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OF THE

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FROM

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MANILA
2013

Prepared
by

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Manila
2013

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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

THIRD DIVISION

[A.M. No. 07-11-592-RTC. March 14, 2008]

IN RE: TRANSFER OF HEARING OF CRIMINAL CASE NOS. 13308 (*PP v. CRISOSTOMO ARMAMENTO*) and 13337 (*PP. v. MARK ANTONY PEREZ*) FROM RTC–BR. 4, BATANGAS CITY TO THE BUREAU OF CORRECTIONS, MUNTINLUPA CITY.

SYLLABUS

REMEDIAL LAW; APPEALS; FACTUAL FINDINGS OF THE TRIAL COURT ARE ACCORDED GREATEST RESPECT BY THE APPELLATE COURT ABSENT ANY ABUSE OF DISCRETION; RATIONALE. — It is settled that findings of fact of the trial court are accorded greatest respect by the appellate court absent any abuse of discretion. In fact, should there be no indication of grave error committed by the trial court, all appellate courts are bound to respect such findings of facts. There is good reason behind this time-honored legal precept. The trial judge has the opportunity to directly observe the witnesses and to determine by their demeanor on the stand the probative value of their testimonies. The Court in *People v. Yadao*, elucidated thus: "x x x The witnesses reveal much when they testify that is not reflected in the transcript, which only records what they say but not how they said it. The meaningful pause, the ready reply, the angry denial, the elusive eyes or the forthright stare, the sudden pallor when a lie is exposed or the flush of face that accentuates a sincere assertion – these and many other

tell-tale marks of honesty or invention are not lost on the trial judge. It is for this reason that his factual findings are generally not disturbed by the appellate court unless they are found to be clearly biased or arbitrary. x x x" Such rationale ceases to exist should it become acceptable to split the burden of work in one case between two or more judges – one to conduct the hearings, and another to write the decision based on the records alone. This should be discouraged. Indeed, it should only be allowed when there is no other viable option.

R E S O L U T I O N

REYES, R.T., *J.*:

AS far as practicable, the judge who hears the case should be the one to decide it, as he had the opportunity to observe firsthand the deportment of witnesses and the presentation of evidence. The practice of allowing one judge to conduct trial and another to render decision *in the same case* based only on records should be avoided.

This administrative matter concerns two criminal cases pending before Branch 4, Regional Trial Court (RTC), Batangas City, to wit:

1.) Criminal Case No. 13308, entitled "*People v. Crisostomo Armamento*" for violation of Section 5, Article II of Republic Act (R.A.) No. 9165;[1] and

2.) Criminal Case No. 13337, entitled "*People v. Mark Antony Perez for Murder*."

The accused in both cases are currently detained and serving sentence in the New Bilibid Prisons, Muntinlupa, Metro Manila. Whenever hearings are conducted, they are brought to the RTC in Batangas City.

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[1] Comprehensive Dangerous Drugs Act of 2002.

On November 6, 2007, the Office of the Court Administrator (OCA) received an undated letter from Judge Albert A. Kalalo of Branch 4 of the RTC in Batangas City. He seeks guidance on the course of action to be taken in the subject cases considering that these are undergoing trial.

Taking into consideration the risks involved and the expenses incurred by the Government whenever the accused are brought to court for hearings, the OCA, in its evaluation and recommendation of November 13, 2007, recommends that the following courses of action be taken:

1. the undated letter of Hon. Albert A. Kalalo, RTC, Branch 4, Batangas City informing this Office that the accused in Criminal Case Nos. 13308 entitled "*People of the Philippines vs. Crisostomo Armamento*" and 13337 entitled "*People of the Philippines vs. Mark Antony Perez*" are detained and already serving sentence at the Bureau of Corrections, New Bilibid Prisons, Muntinlupa City be **NOTED**;

2. the Branch Clerk of Court, RTC, Branch 4, Batangas City be **DIRECTED** to forward the records of Criminal Case Nos. 13308 and 13337 to the executive judge, RTC, Muntinlupa City for raffle of the subject cases among the courts thereat;

3. the judge to whom the cases are assigned be **DIRECTED** to conduct the entire trial of the aforesaid cases within the premises of the Bureau of Corrections, Muntinlupa City. For this purpose, the judge shall be assisted by at least two (2) of his personnel;

4. thereafter, the records of the cases shall be **RETURNED** to RTC, Branch 4, Batangas City for the preparation of the decisions; and

5. after which, the records of the cases shall be **RETURNED** to RTC, Muntinlupa City for the promulgation of the decisions.

We cannot give our nod to the recommendations.

It is settled that findings of fact of the trial court are accorded greatest respect by the appellate court absent any abuse of discretion.[2] In fact, should there be no indication of grave error committed by the trial court, all appellate courts are bound to respect such findings of facts.[3]

There is good reason behind this time-honored legal precept. The trial judge has the opportunity to directly observe the witnesses and to determine by their demeanor on the stand the probative value of their testimonies. The Court in *People v. Yadao*,[4] elucidated thus:

x x x The witnesses reveal much when they testify that is not reflected in the transcript, which only records what they say but not how they said it. The meaningful pause, the ready reply, the angry denial, the elusive eyes or the forthright stare, the sudden pallor when a lie is exposed or the flush of face that accentuates a sincere assertion – these and many other tell-tale marks of honesty or invention are not lost on the trial judge. It is for this reason that his factual findings are generally not disturbed by the appellate court unless they are found to be clearly biased or arbitrary. x x x[5]

Such rationale ceases to exist should it become acceptable to split the burden of work in one case between two or more judges – one to conduct the hearings, and another to write the decision based on the records alone. This should be discouraged. Indeed, it should only be allowed when there is no other viable option.

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[2] *People v. San Gabriel,* 323 Phil. 102, 108 (1996).

[3] *Dy v. Sacay,* G.R. Nos. 78535-36, September 19, 1988, 165 SCRA 473, 484.

[4] G.R. Nos. 72991-92, November 26, 1992, 216 SCRA 1.

[5] *People v. Yadao, id*. at 7.

The doctrine laid down in *U.S. v. Abreu*,[6] that it is **not** necessary that the judge who prepares and signs the decision be the one who heard the case, stems from an entirely different factual milieu. In said case, the judge who had received evidence resigned before deciding the case. It was held by the Court that his successor may decide the case on the evidence already taken; and that where competent and admissible evidence is properly taken by a judge who dies, retires or resigns before a decision is promulgated, his successor must necessarily be able to continue his predecessor's functions without a retrial.

The case at bar does not involve circumstances where the judge who hears the trial is no longer available by reason of death, retirement or resignation to render the decision. Hence, it is to the best interest of justice that the judge who hears the trial be the one to decide the case.

WHEREFORE, Judge Albert A. Kalalo is *ORDERED* to go to Muntinlupa City and conduct the rest of the trial of the subject cases within the premises of the Bureau of Corrections.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Nachura, JJ.,* concur.

[6] 30 Phil. 402 (1915).

EN BANC

[A.M. No. P-05-2004. March 14, 2008]
(Formerly OCA I.P.I. No. 05-2086-P)

OFFICE OF THE COURT ADMINISTRATOR, *complainant, vs.* **LOURDES F. BERMEJO, COURT STENOGRAPHER II, MUNICIPAL TRIAL COURT IN CITIES, PUERTO PRINCESA CITY,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; PRESENTATION OF EVIDENCE; AUTHENTICATION AND PROOF OF DOCUMENTS; PUBLIC DOCUMENTS; THE DULY ACCOMPLISHED FORM OF THE CIVIL SERVICE IS AN OFFICIAL DOCUMENT OF THE COMMISSION, ADMISSIBLE IN EVIDENCE WITHOUT NEED OF FURTHER PROOF. — It is a settled rule in our jurisdiction that the duly accomplished form of the Civil Service is an official document of the Commission, which, by its very nature, is considered in the same category as that of a public document, admissible in evidence without need of further proof. As an official document, the entries thereof made in the course of official duty are *prima facie* evidence of the facts stated therein.

2. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS AND EMPLOYEES; DISHONESTY; DEFINED. — Dishonesty is defined as intentionally making a false statement on any material fact, or practicing or attempting to practice any deception or fraud in securing his examination, appointment or registration. Dishonesty is a serious offense which reflects a person's character and exposes the moral decay which virtually destroys his honor, virtue and integrity. It is a malevolent act that has no place in the judiciary, as no other office in the government service exacts a greater demand for moral righteousness from an employee than a position in the judiciary.

3. ID.; ID.; ID.; ID.; CLASSIFIED AS A GRAVE OFFENSE PUNISHABLE BY DISMISSAL FOR THE FIRST OFFENSE. — Under the *Uniform Rules on Administrative Cases in the Civil Service*, dishonesty is classified as a grave offense punishable by dismissal for the first offense.

D E C I S I O N

***PER CURIAM*:**

Before this Court is an administrative case for Dishonesty against Lourdes F. Bermejo, Court Stenographer II, stationed at the Municipal Trial Court in Cities (MTCC), Puerto Princesa City, Palawan.

On January 20, 2004, then Court Administrator Presbitero J. Velasco, Jr.[1] received a letter from Consolacion C. Santos, Director IV of the Civil Service Commission (CSC) Regional Office No. 3, San Fernando, Pampanga, referring to the Office of the Court Administrator (OCA) an undated letter from a "concerned citizen" accusing Bermejo of using another name in taking her Civil Service Eligibility Examination, while another person took the same exam using Bermejo's name. Attached to the letter is a Memorandum dated August 14, 2003 of Nora S. Castro, Chief Personnel Specialist of the same CSC regional office, reporting that upon verification of the pictures attached to the anonymous letter and that of the Picture Seat Plan used during the exam, the person who purportedly impersonated Bermejo and the picture of the person in the seat plan using the name of Bermejo was the same person. The letter also states that because of this impersonation, Bermejo passed the exam and was able to use said eligibility to obtain a permanent appointment as a stenographer at the Puerto Princesa City MTCC. The real Bermejo allegedly also took the same exam under a different name, but failed.

In an Indorsement dated March 15, 2004, Court Administrator Velasco referred the anonymous letter to Bermejo for comment. In her handwritten Comment, Bermejo denied the allegations and said that she went through the proper process to obtain her civil service eligibility. She alleged that the charges were the handiwork of her husband's mistress who had been threatening to have her removed from the service. As regards

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[1] Now an Associate Justice of this Court.

the photographs attached to the letter, Bermejo said that she had inquired into the identity of the person who allegedly used her name in the exam and found that she was a childhood friend of her husband, but was currently serving sentence for adultery at the Correctional Institute for Women.

Bermejo also explained why she took the test in San Fernando, Pampanga. She allegedly applied to take the exam in Manila since her appointment was set to expire on July 15, 1998. However, she was informed that the next exam was on June 16, 1998. Learning that there was an exam scheduled earlier in San Fernando, she went there to see if she could take the exam there instead. And she did.

Subsequently, on July 16, 2004, Deputy Court Administrator Jose P. Perez directed Bermejo to explain the discrepancy between the picture on her personnel file and the picture of the person who took the examination using her name. According to DCA Perez, records of the OCA and of the CSC showed that Bermejo was not the same person who used Bermejo's name and took the sub-professional examination on May 27, 1998 in San Fernando, Pampanga.

In her reply, Bermejo alleged that she could not explain the discrepancy. She said that she personally took the exam and attached proof of her travel from Palawan to Manila and from Manila to Pampanga, as well as her Application Receipt to take the May 27, 2008 exam in San Fernando, with her name and picture appearing therein.

Bermejo stated that the person she suspected to be behind the case, her husband's mistress, had already passed away. She maintained that she did not know the person in the picture and said she could not find the same person, as the place where the latter allegedly lived had been razed by fire. She said that the only discrepancy she could own up to was that pertaining to her birth date, listed in her Certificate of Eligibility as "May 13, 1965," while her birth certificate indicated "May 13, 1968."

After investigation, the OCA submitted its evaluation and recommendation,[2] stating thus:

EVALUATION: The focal issue here is factual – *i.e.,* whether or not another person actually took the Civil Service Commission Sub-Professional eligibility test at San Fernando, Pampanga on 27 May 1998, using the name Lourdes F. Bermejo. In the affirmative, the corollary legal issue proceeds – *i.e.,* whether or not it constitutes dishonesty as would merit a finding of administrative liability on the part of respondent.

At bar is an anonymous complaint, which respondent suspects is the handiwork of her husband's ["]other woman[."] In evidence is a certified copy of the Seat Plan of the examination concerned. Said document is of public record and indicates that it was duly checked and certified by the room examiner as well as counter-checked by the supervising examiner. The same indubitably bears out a different person appearing to take the exam using the name Lourdes F. Bermejo, whereas the real Lourdes F. Bermejo (whose picture matches the respondent's) is the one seated beside her. Respondent fails to overcome this evidence. Aside from the presumption of regularity in the execution of official documents, respondent in her two letters did not categorically deny the genuineness and due execution of the Seat Plan. Instead, she impliedly admitted the same by her defense that she could not anymore locate the person appearing atop her name.

We note that it took more than five (5) years for the supposed "concerned citizen" to assail the anomaly, and that the alleged motive imputed to complainant probably holds water. However, these, at best, are merely persuasive, circumstantial, and do not suffice to discount an evidence which tend directly to prove the fact in issue.

Coming to the next issue, it is our considered opinion that the circumstances constitute dishonesty, given the following considerations:

1) Respondent's insistent line is that she actually took the exam – which is misleading since she indeed took the same – but she kept mum on that (sic) she let another person use her name in taking the civil service examination;

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[2] *Rollo*, pp. 1-4.

2) Respondent asserts that the person who purportedly took the exam using the name Lourdes F. Bermejo was her husband's childhood peer who is now allegedly serving sentence for adultery and whose locality of origin was razed by fire. How she was able to figure out the details of said person, when she only supposedly met her briefly during [the] exam that took place more than five years ago, at a far place where respondent was a complete stranger, is suspect;

3) It should be stressed that as a matter of procedure, the room examiners assigned to supervise the conduct of a Civil Service examination closely examine the pictures submitted and affixed on the Picture Seat Plan (CSC Resolution No. 95-3964, Obedencio, Jaime A.). The examiners carefully compare the appearance of each of the examinees with the person in the picture submitted and affixed on the Picture Seat Plan. In cases where the examinee does not look like the person in the picture submitted and attached on (sic) the PSP, the examiner will not allow the said person to take the examination (CSC Resolution No. 95-5195, Taguinay, Ma. Theresa).

Hence, it is clear that somebody else took the CSC exam for respondent Lourdes F. Bermejo. For her to deny it and actually reap the benefits of passing the same, when in fact somebody else took it for her, constitutes dishonesty.

In similar cases, the Honorable Court is consistent in imposing the stern penalty of dismissal, pursuant to Section 23, Rule XIV of the Omnibus Rules Implementing Book V of Executive Order No. 292. [Pls. see: *CSC vs. Zenaida T. Sta. Ana,* A.M. No. P-03-1696 (April 20, 2003); *Cruz and Paitim vs. CSC,* G.R. No. 144464 (Nov. 27, 2001); *Floria vs. Sunga,* A.M. No. CA-01-10-PI (Nov. 14, 2001)].

RECOMMENDATION: Respectfully submitted for consideration of the Honorable Court is our recommendation that:

1. the instant complaint be docketed as a regular administrative matter; and

2. respondent Lourdes F. Bermejo, (sic) be found guilty of dishonesty and accordingly ***DISMISSED*** as Court Stenographer II, MTCC, Puerto Princesa City, with forfeiture of all her retirement benefits, except accrued leave credits, and with prejudice to reemployment in any branch or instrumentality of the government, including government-owned or controlled corporations.

The OCA's recommendation is well-taken.

This Court has had occasion to rule on similar cases in the past. In *Civil Service Commission v. Sta. Ana,*[3] the Court found, thus:

After a thorough review of the matter, the Court finds that respondent is indeed guilty of dishonesty. An examination of respondent's Personal Data Sheet reveals that her signature and picture on it are different from those in her CAT Application and Picture Seat Plan. Respondent attributes such discrepancy to "unknown persons who may have been committing such anomaly and irregularity in the examination procedure of the CSC." However, this Court agrees with the observation of the executive judge that the irregularity should not be attributed to the CSC which had no motive in tampering with such documents. Even if such irregularity was attributable to error or oversight, respondent did not present any proof that it occurred during the examination and, thus, the CSC officials who supervised the exam enjoyed the presumption of regularity in the performance of their official duty. Besides, for the CSC to commit such a mistake – mixing up the pictures and signatures of examinees – was unlikely due to the strict procedures it follows during civil service examinations. In a similar case, this Court approved the findings of the CSC regarding procedures during examinations:

It should be stressed that as a matter of procedure, the room examiners assigned to supervise the conduct of a Civil Service examination closely examine the pictures submitted and affixed on the Picture Seat Plan (CSC Resolution No. 95-3694, Obedencio, Jaime A.). The examiners carefully compare the appearance of each of the examinees with the person in the picture submitted and affixed on the PSP. In cases where the examinee does not look like the person in the picture submitted and attached on the PSP, the examiner will not allow the said person to take the examination (CSC Resolution No. 95-5195, Taguinay, Ma. Theresa).

Thus, the irregularity in respondent's Personal Data Sheet, CAT Application and Picture Seat Plan cannot be attributed to error on the CSC's part. It is clear that somebody else took the CSC exam for respondent Sta. Ana.

For respondent to claim that she herself took the CSC exam when in fact somebody else took it for her constitutes dishonesty.

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[3] 450 Phil. 59, 67-68 (2003).

On the other hand, in *Donato v. Civil Service Commission Regional Office No. 1*,[4] Alejandro Donato, Jr. was charged with dishonesty and falsification of public documents for representing himself as Gil Arce and taking the civil service exam under that name. The CSC and the Court of Appeals both found that the picture of Donato appeared on the Picture Seat Plan on top of the name Gil Arce. On the other hand, Arce admitted that he might have mistakenly submitted Donato's picture during the exam. The Court rejected Donato's claim that the case was merely the handiwork of his former principal who allegedly had an axe to grind against him in the face of positive evidence against him and Arce. Accordingly, the Court upheld the dismissal of both Arce and Donato.

In the case at bar, respondent Bermejo attributes the anonymous complaint to her husband's mistress and alleges that the woman whose picture appears with her name on the Seat Plan is her husband's childhood friend. However, she fails to explain how the two, who apparently also live in Palawan, were able to manipulate and influence the CSC personnel in San Fernando, Pampanga in order to come up with the charges against her, or how they were able to coax another person – allegedly her husband's childhood friend – into impersonating her to take the exam. Besides, it seems to us a little too convenient for respondent to pin the blame on persons who are no longer around to defend themselves.

Respondent also fails to refute the documentary evidence against her. It is a settled rule in our jurisdiction that the duly accomplished form of the Civil Service is an official document of the Commission, which, by its very nature, is considered in the same category as that of a public document, admissible in evidence without need of further proof. As an official document, the entries thereof made in the course of official duty are *prima facie* evidence of the facts stated therein.[5]

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[4] G.R. No. 165788, February 7, 2007, 515 SCRA 48.

[5] *Id*. at 61-62, citing *Maradial v. CSC,* CA-G.R. SP No. 40764, September 27, 1996.

Instead, respondent tries to support her arguments with documents of her own. Unfortunately, the evidence she adduces does not negate the veracity of the CSC's Picture Seat Plan. Worse, these documents even strengthen the case against her. The picture in her passport is that of the person whose name in the Seat Plan is indicated as Julieta M. Padrones, who happens to be seated beside the person purportedly named Lourdes F. Bermejo.

It is difficult to believe that respondent could not have noticed that her picture was put on top of a different name and that her name was accompanied by the picture of another person. There was a space provided for the signature of the examinee. Thus, respondent could not have missed that she was signing – if indeed she was signing her own name – the box with a different picture. She proffers no sufficient explanation for this discrepancy.

In *Donato*, this Court quoted with approval the CSC's findings, to wit:

> In the offense of impersonation, there are always two persons involved. The offense cannot prosper without the active participation of both persons (CSC Resolution No. 94-6582). Further, by engaging or colluding with another person to take the test in his behalf and thereafter by claiming the resultant passing rate as his, clinches the case against him. In cases of impersonation, the Commission has consistently rejected claims of good faith, for "*it is contrary to human nature that a person will do (impersonation) without the consent of the person being impersonated*." (CSC resolution No. 94-0826)[6]

Finally, respondent's allegations fail to controvert the presumption of regularity in the performance of official duties of the CSC personnel. The Court has noted in previous cases the procedure followed during the conduct of the Civil Service Exams, as quoted by the OCA in its evaluation.[7] Respondent does not even allege that the CSC Regional Office No. 3 personnel who administered

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[6] *Id*. at 61. See also *Bartolata v. Julaton,* A.M. No. P-02-1638, July 6, 2006, 494 SCRA 433; *Cruz v. Civil Service Commission*, 422 Phil. 236 (2001).

[7] *Supra* note 1.

the exam departed from this established procedure or that any irregularity attended the conduct of the exam.

Dishonesty is defined as intentionally making a false statement on any material fact, or practicing or attempting to practice any deception or fraud in securing his examination, appointment or registration.[8] Dishonesty is a serious offense which reflects a person's character and exposes the moral decay which virtually destroys his honor, virtue and integrity. It is a malevolent act that has no place in the judiciary, as no other office in the government service exacts a greater demand for moral righteousness from an employee than a position in the judiciary.[9]

We conclude that there is substantial evidence to hold that respondent committed the act of dishonesty imputed to her. Under the *Uniform Rules on Administrative Cases in the Civil Service*,[10] dishonesty is classified as a grave offense punishable by dismissal for the first offense.

WHEREFORE, the foregoing premises considered, respondent **LOURDES F. BERMEJO** is found *GUILTY* of dishonesty and *DISMISSED* from the service, with forfeiture of all retirement benefits, except accrued leave credits, and with prejudice to reemployment in any branch or instrumentality of the government, including government-owned or controlled corporations.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio Morales, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Nachura, Reyes, and *Leonardo-de Castro, JJ.,* concur.

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[8] *Concerned Citizen v. Gabral*, A.M. No. P-05-2098, December 15, 2005, 478 SCRA 13, citing *Sevilla v. Gocon*, 467 Phil. 512 (2004).

[9] *Re: Spurious Certificate of Eligibility of Tessie G. Quires, Regional Trial Court, Office of the Clerk of Court, Quezon City*, A.M. No. 05-5-268-RTC, May 4, 2006, 489 SCRA 349, 351.

[10] CSC Memorandum Circular No. 19-99.

THIRD DIVISION

[A.M. No. P-07-2307. March 14, 2008]
(Formerly OCA I.P.I. No. 03-1740-P)

NECENIO GILLANA, *complainant, vs.* **BALBINO B. GERMINAL, Sheriff IV, Regional Trial Court, Branch 60, Cadiz City, Negros Occidental,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS AND EMPLOYEES; SHERIFFS; MUST EXERCISE DUE CARE AND REASONABLE SKILL IN THE PERFORMANCE OF THEIR DUTIES. — While there is no question that sheriffs must act with considerable dispatch in executing judgments, it is equally true, however, that in the enforcement of judgments and writs, sheriffs must know what is inherently right and wrong and must act with prudence and caution. They are called to exercise due care and reasonable skill in the performance of their duties. They cannot just demolish any house within the property of the victorious plaintiff, even if the writ of demolition contains the phrase "and any and all persons claiming rights under them" following the names of the defendants to a case. Evidence must be presented to establish that persons whose properties are to be demolished but whose names do not appear in the complaint derived their rights from defendants impleaded therein. If there is objection to the demolition of structures being claimed by persons not parties to the case, the appropriate course of action for the sheriff is to inform the judge of the situation by way of a partial sheriff's return and wait for instructions on the proper procedure to be observed.

2. ID.; ID.; ID.; ID.; FAILURE TO MAKE A RETURN UPON SATISFACTION OF THE JUDGMENT IN PART OR IN FULL CONSTITUTES SIMPLE NEGLECT OF DUTY; CASE AT BAR. — Respondent admitted that he received the writ of demolition on July 9, 2001. Yet he filed a Sheriff's Partial Return of Service only on September 30, 2002. Respondent is required to make a return and submit it to the court immediately upon satisfaction of the judgment in part or in full; and if the judgment could not be satisfied in full, to make a report to the court within 30

days after his receipt of the writ and to state why full satisfaction could not be made. As sheriff, it was respondent's duty to continue making a report every 30 days on the proceedings being taken thereon until the judgment was fully satisfied. The reason for this was to update the court on the status of the execution and to give it an idea as to why the judgment was not satisfied, with the ultimate purpose of ensuring the speedy execution of decisions. For failing to observe the requirements set forth in Section 14, Rule 39 of the Rules of Court, the Court finds respondent guilty of simple neglect of duty. As complainant failed to show that respondent was motivated by bad faith or malice in failing to comply with this Rule, a mere reprimand is proper.

3. ID.; ID.; ID.; ID.; SHERIFF'S ACT OF RECEIVING MONEY FROM A PARTY TO IMPLEMENT A COURT PROCESS WITHOUT OBSERVING THE PROPER PROCEDURE LAID DOWN BY THE RULES CONSTITUTES SIMPLE MISCONDUCT; PENALTY; CASE AT BAR. — [A] sheriff is required to secure the court's prior approval of the estimated expenses and fees needed to implement a court process. The requesting party shall then deposit the amount with the Clerk of Court, and the expenses shall be disbursed to the executing sheriff subject to his liquidation within the same period for rendering a return on the process or writ. Any unspent amount shall be refunded to the party who made the deposit. x x x For respondent's act of receiving money from complainant without observing the proper procedure laid down by the rules, the Court finds him liable for simple misconduct. Simple misconduct is a less grave offense, which carries a penalty of suspension of one (1) month and one (1) day to six (6) months for the first offense. Considering however that this is respondent's first offense of this nature which serves to mitigate his liability, the Court finds that a penalty of fine in the sum of ₱5,000.00, with a stern warning that a repetition of the same offense shall be dealt with more severely, is reasonable and just.

APPEARANCES OF COUNSEL

Alexander J. Cawit for complainant.
Wayne T. Morada for respondent.

R E S O L U T I O N

AUSTRIA-MARTINEZ, *J.*:

Necenio Gillana (complainant) charges Sheriff Balbino B. Germinal (respondent) of the Regional Trial Court (RTC), Branch 60 of Cadiz City, Negros Occidental with failure to implement a writ of demolition and failure to liquidate the money for its implementation.[1]

In the complaint dated June 28, 2003, complainant as the Judicial Administrator of the Intestate Estate of Spouses Gervacio Jimenez, avers: The Municipal Trial Court in Cities (MTCC) of Sagay City issued on May 30, 2001 a 2nd *Alias* Writ of Demolition in Civil Case No. 949[2] and a Writ of Demolition dated June 7, 2002 in Civil Case No. 1295[3] which it forwarded to respondent for implementation since the MTCC did not have a sheriff of its own and was under the jurisdiction of RTC Branch 60. Respondent asked for money for the demolition of the structures of the defendants in the two cases. As complainant could not give the amount initially asked for by respondent, it was agreed that respondent would just demolish five of the ten structures stated in the writs for ₱10,000.00. The structures they agreed to demolish were those of Danilo Panonce, Lucia Fernandez, Cesar Francisco and Andres Casipong defendants in Civil Case No. 949; and of Ladislao Fernandez Diongson, defendant in Civil Case No. 1295. In spite of having received the amount however, as evidenced by a receipt dated August 13, 2002, respondent was only able to implement the writ in Civil Case No. 1295 and failed to demolish the four other structures he was supposed to demolish. Respondent also failed,

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[1] *Rollo*, pp. 1-3.

[2] Entitled *"Intestate Estate of the late Spouses Gervacio Jimenez and Lucia Abello, represented by Necenio Gillana, Judicial Administrator v. Danilo Panonce, et al."*

[3] Entitled *"Intestate Estate of the late Spouses Gervacio Jimenez and Lucia Abello, represented by Necenio Gillana, Judicial Administrator v. SPO4 Ladislao Fernandez Diongson, Jr. alias 'Boy Diongson', et al."*

up to the time of the filing of the complaint, to liquidate the amount of ₱10,000.00 which he received from complainant.[4]

In his Comment dated October 22, 2003, respondent explains: he failed to implement the writ because the occupancy and possession of the structures to be demolished were uncertain. There were about 150 structures in the area, and he could not rely on complainant's representative in determining which structures were those of defendants, since said representative was not a resident of the place. The structures supposed to be demolished were occupied by persons not defendants in the case and who claimed to be the owners thereof by showing Declarations of Real Property Value. Respondent filed a Sheriff's Partial Return of Service, in order to place in the court and the parties the responsibility of clarifying the issue of possession of the defendants and did not proceed to implement the writ without clarifying first said issue, especially since the decision was rendered way back in 1994. He was very willing to demolish the properties subject of the writs, despite the danger to his life, as he in fact demolished the house of Diongson, there being no dispute regarding his occupancy.[5]

Respondent further contends that: he did not ask for the amount of ₱10,000.00; it was unexpectedly given him by complainant; respondent instructed complainant's lawyer to deposit the money with the clerk of court but said counsel insisted that respondent sign the receipt and accept the amount, threatening that if respondent would not accept it directly, they would look for another sheriff and report the matter to this Court; he believed in good faith that he was not obliged to liquidate the amount of ₱10,000.00, as said amount was for the food and transportation of the police and the demolition team and not for the sheriff's expenses; neither did the counsel nor complainant's representative ask for the liquidation of the amount either verbally or in writing; and in any event, attached to the Comment was the liquidation of the expenses incurred, showing that no amount accrued to respondent's personal benefit.[6]

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[4] *Supra* note 1.

[5] *Rollo*, pp. 36-39.

[6] *Id*. at 41-42.

Complainant filed a Reply refuting respondent's allegations.[7]

The Court in its Resolution dated June 14, 2004 referred the case to the Executive Judge of the RTC, Branch 60 of Cadiz City, for investigation, report and recommendation.[8]

In his Report dated June 22, 2007,[9] Judge Reynaldo M. Alon found respondent guilty of failing to implement the writ of demolition against four defendants in Civil Case No. 949 and recommended that he be fined in the amount of ₱5,000.00.[10]

The Court does not agree.

While there is no question that sheriffs must act with considerable dispatch in executing judgments,[11] it is equally true, however, that in the enforcement of judgments and writs, sheriffs must know what is inherently right and wrong and must act with prudence and caution. They are called to exercise due care and reasonable skill in the performance of their duties.[12] They cannot just demolish any house within the property of the victorious plaintiff, even if the writ of demolition contains the phrase "and any and all persons claiming rights under them" following the names of the defendants to a case. Evidence must be presented to establish that persons whose properties are to be demolished but whose names do not appear in the complaint derived their rights from defendants impleaded therein.[13] If there is objection to the demolition of structures

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[7] *Id*. at 75-87.

[8] *Id*. at 91.

[9] Judge Alon submitted a Manifestation dated October 23, 2006 saying that there has been a delay in the investigation due to the parties' request for resettings and that he will exert all efforts to terminate the case the soonest possible time; *id*. at 212.

[10] *Id*. at 318-319.

[11] *Bautista v. Orque, Jr.*, A.M. No. P-05-2099, October 31, 2006, 506 SCRA 309, 315; *Casaje v. Gatbalite*, 387 Phil. 530, 537 (2000).

[12] *Collado v. Sevidal*, A.M. No. P-05-2073, August 29, 2006, 500 SCRA 1, 6.

[13] *Amor v. Leyva*, A.M. No. P-02-1536, January 27, 2006, 480 SCRA 236, 241.

being claimed by persons not parties to the case, the appropriate course of action for the sheriff is to inform the judge of the situation by way of a partial sheriff's return and wait for instructions on the proper procedure to be observed.[14]

In this case respondent filed a Sheriff's Partial Return of Service dated September 30, 2002, explaining that he was not able to implement the writ of demolition because when he, together with two policemen and four members of the demolition team, went to the subject area on September 26, 2002, the scheduled date of demolition, he found out that Panonce had no house or improvements on the lot; and Cesar Francisco's house was being claimed by Jonathan Francisco, Lucia Fernandez's house by Ruel Carton and Andrea Casipong's house by Lydia Adena, all supported by Declarations of Real Property.[15]

Considering that the decision was rendered by the MTCC way back in 1994 and respondent went to the area to implement the writ only in 2002, as the writ of demolition was indorsed to him only in 2001, respondent acted prudently when he did not push through with the demolition and instead brought to the court's attention, by way of partial return, the question of what particular structures were to be demolished in order for the court and the parties to clarify the same and for the court to give further instructions for respondent to carry out.

Under the premises, the Court finds that respondent cannot be faulted for failing to implement the writ.

The Court notes, however, that respondent failed to observe Section 14 of Rule 39 of the Rules of Court, to wit:

> Sec. 14. *Return of writ of execution*. — The writ of execution shall be returnable to the court issuing it immediately after the judgment has been satisfied in part or in full. If the judgment cannot be satisfied in full within thirty (30) days after his receipt of the writ, the officer shall report to the court and state the reason therefor. Such writ shall continue in effect during the period within which the judgment

[14] *Collado v. Sevidal*, *supra* note 12, at 7.

[15] *Rollo*, p. 14.

may be enforced by motion. The officer shall make a report to the court every thirty (30) days on the proceedings taken thereon until the judgment is satisfied in full, or its effectivity expires. The returns or periodic reports shall set forth the whole of the proceedings taken, and shall be filed with the court and copies thereof promptly furnished the parties.

for which he should be disciplined.

Respondent admitted that he received the writ of demolition on July 9, 2001. Yet he filed a Sheriff's Partial Return of Service only on September 30, 2002.[16]

Respondent is required to make a return and submit it to the court immediately upon satisfaction of the judgment in part or in full; and if the judgment could not be satisfied in full, to make a report to the court within 30 days after his receipt of the writ and to state why full satisfaction could not be made. As sheriff, it was respondent's duty to continue making a report every 30 days on the proceedings being taken thereon until the judgment was fully satisfied. The reason for this was to update the court on the status of the execution and to give it an idea as to why the judgment was not satisfied, with the ultimate purpose of ensuring the speedy execution of decisions.[17]

For failing to observe the requirements set forth in Section 14, Rule 39 of the Rules of Court, the Court finds respondent guilty of simple neglect of duty. As complainant failed to show that respondent was motivated by bad faith or malice in failing to comply with this Rule, a mere reprimand is proper.[18]

Respondent also failed to comply with Section 9, Rule 141 of the Rules of Court which was in effect when respondent received money from the complainant. Although Rule 141 was amended by A.M. No. 04-2-04-SC in 2004, the old provision

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[16] *Rollo*, p. 14.

[17] *Bernabe v. Eguia*, 458 Phil. 97, 107 (2003); see also *Mangubat v. Camino*, A.M. No. P-06-2115, February 23, 2006, 483 SCRA 163, 171.

[18] *Punzalan v. Macalisang*, A.M. No. P-06-2268, November 27, 2006, 508 SCRA 157, 164.

applies to this case, as the offense took place prior to the amendment. It reads:

> Sec. 9. *Sheriffs and other persons serving processes.* —
>
> xxx xxx xxx
>
> In addition to the fees herein above fixed, the party requesting the process of any court, preliminary, incidental, or final, shall pay the sheriff's expenses in serving or executing the process, or safeguarding the property levied upon, attached or seized, including kilometrage for each kilometer of travel, guards' fees, warehousing and similar charges, in an amount estimated by the sheriff, subject to the approval of the court. Upon approval of said estimated expenses, the interested party shall deposit such amount with the clerk of court and *ex officio* sheriff, who shall disburse the same to the deputy sheriff assigned to effect the process, subject to liquidation within the same period for rendering a return on the process. Any unspent amount shall be refunded to the party making the deposit. A full report shall be submitted by the deputy sheriff assigned with his return, and the sheriff's expenses shall be taxed as costs against the judgment debtor.

From this provision it is clear that a sheriff is required to secure the court's prior approval of the estimated expenses and fees needed to implement a court process. The requesting party shall then deposit the amount with the Clerk of Court, and the expenses shall be disbursed to the executing sheriff subject to his liquidation within the same period for rendering a return on the process or writ. Any unspent amount shall be refunded to the party who made the deposit.[19]

Respondent's claim that the amount of ₱10,000.00 was unexpectedly given him by complainant and that he was forced to accept it cannot excuse him from liability. Respondent should know that as sheriff, he is not allowed to receive any voluntary payments from the parties in the course of the performance of their duties, for to do so would be inimical to the best interest of the service. Even assuming *arguendo* that such payments were indeed given and received in good faith, this fact alone

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[19] *Tana v. Paredes,* A.M. No. P-04-1789, July 22, 2005, 464 SCRA 47, 54-55.

would not dispel the suspicion that these were made for less than noble purposes.[20] Good faith on the part of respondent, or lack of it, in proceeding to properly execute his mandate would be of no moment, for he is chargeable with the knowledge that being the officer of the court tasked therefor, it behooves him to make due compliances.[21]

His claim that he did not liquidate his expenses because the complainant never demanded it from him also betrays his ignorance of the aforestated Rule. No demand on the part of the requesting party is needed, as the rule itself mandates that the sheriff should liquidate the expenses incurred by him within the same period for rendering a return on the process. Whether or not he personally benefited from the amount he received is immaterial.[22]

For respondent's act of receiving money from complainant without observing the proper procedure laid down by the rules, the Court finds him liable for simple misconduct.[23] Simple misconduct is a less grave offense, which carries a penalty of suspension of one (1) month and one (1) day to six (6) months for the first offense.[24] Considering however that this is respondent's first offense of this nature which serves to mitigate his liability,[25] the Court finds that a penalty of fine in the sum of ₱5,000.00, with a stern warning that a repetition of the same offense shall be dealt with more severely, is reasonable and just.[26]

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[20] *Id*. at 55.

[21] *Villaluz v. Bautista*, 387 Phil. 544, 554 (2000).

[22] See *Guevarra v. Sicat, Jr.*, 446 Phil. 872 (2003).

[23] *Id*. at 879.

[24] Rule IV, Section 52 B (2) Uniform Rules on Administrative Cases in the Civil Service, Civil Service Commission Memorandum Circular No. 19, s. 1999.

[25] *Flores v. Falcotelo,* A.M. No. P-05-2038, January 25, 2006, 480 SCRA 16; *Adoma v. Gatcheco*, A.M. No. P-05-1942, January 17, 2005, 448 SCRA 299.

[26] See *Grayda v. Primo*, A.M. No. P-04-1897, November 11, 2004, 442 SCRA 60.

WHEREFORE, the Court finds respondent Balbino B. Germinal, Sheriff IV of the Regional Trial Court, Branch 60 of Cadiz City, Negros Occidental *GUILTY* of SIMPLE NEGLECT OF DUTY, for which he is *REPRIMANDED*; and SIMPLE MISCONDUCT, for which he is *FINED* in the sum of ₱5,000.00, with a STERN WARNING that repetition of the same or similar offenses shall be dealt with more severely.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Nachura, and *Reyes, JJ.,* concur.

THIRD DIVISION

[A.M. No. P-08-2432. March 14, 2008]
(Formerly OCA IPI No. 04-2018-P)

JENNYLEN LEE, *complainant, vs.* **JUANITA A. MANGALINDAN, Junior Process Server, Municipal Trial Court, Branch 1, Guagua, Pampanga,** *respondent.*

SYLLABUS

POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS AND EMPLOYEES; MISCONDUCT; ISSUANCE OF A BOUNCING CHECK CONSTITUTES MISCONDUCT WHICH IS A GROUND FOR DISCIPLINARY ACTION; CASE AT BAR. — Respondent's issuance of a bouncing check constitutes misconduct which is a ground for disciplinary action. The conduct of every personnel connected with the courts should at all times be circumspect to preserve the integrity and dignity of the courts of justice. Thus, even if respondent paid the value of the subject check and the substantial interest thereon, respondent still stands liable. However, except for the present case, the fact that respondent has had an otherwise unblemished service in the judiciary for 22 years, and that she

has paid her obligation to the full satisfaction of the complainant, mitigate such liability. A fine of ₱2,000.00 is in order.

APPEARANCES OF COUNSEL

Renato T. Nuguid Law Offices for complainant.
Jose M. Castro for respondent.

R E S O L U T I O N

AUSTRIA-MARTINEZ, *J.*:

Before the Court is a letter-complaint dated September 3, 2004 of Ms. Jennylen Lee charging respondent Juanita A. Mangalindan, Junior Process Server, Municipal Trial Court (MTC), Branch 1, Guagua, Pampanga with Grave Misconduct for issuing to her PCI Bank Check Number 0147186 dated June 30, 2000, which when presented for payment on its maturity date was dishonored by the drawee bank on the ground that the account was closed.

In the investigation, it was established that:

1. respondent issued and delivered PCI Bank Check No. 0147186 dated June 30, 2000 in the amount of ₱30,000.00, and that it bounced when presented for payment for the reason "Account Closed"; and

2. respondent already paid the value of the subject check and interest thereon.

In the Report and Recommendation dated June 13, 2007, Investigating Judge Pamela Ann A. Maxino found respondent guilty of misconduct and recommended that respondent be fined ₱3,000.00.

Upon evaluation thereof, the Office of the Court Administrator recommends the dismissal of the case on the ground that respondent not only paid the value of the check for ₱30,000.00 but also paid substantial interest in the amount of ₱20,000.00, to the satisfaction of the complainant, and that this is respondent's first administrative case after more than 22 years in the judiciary.

The Court upholds the findings and recommendation of the Investigating Judge, except as to the penalty.

Respondent's issuance of a bouncing check constitutes misconduct which is a ground for disciplinary action.[1] The conduct of every personnel connected with the courts should at all times be circumspect to preserve the integrity and dignity of the courts of justice.[2] Thus, even if respondent paid the value of the subject check and the substantial interest thereon, respondent still stands liable.

However, except for the present case, the fact that respondent has had an otherwise unblemished service in the judiciary for 22 years, and that she has paid her obligation to the full satisfaction of the complainant, mitigate such liability. A fine of ₱2,000.00 is in order.

WHEREFORE, the Court finds Juanita A. Mangalindan, Junior Process Server, MTC, Branch 1, Guagua, Pampanga, guilty of Misconduct and *FINES* her ₱2,000.00, payable within 60 days from receipt of herein Resolution with a *STERN WARNING* that a repetition of the same or similar act will be dealt with more severely.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Nachura, and Reyes, JJ., concur.

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[1] *Mamaclay v. Francisco,* 447 Phil. 356, 360 (2003).

[2] *Id*.

THIRD DIVISION

[A.M. No. RTJ-06-1973. March 14, 2008]
(Formerly OCA IPI No. 05-2329-RTJ)

ASUNCION REYES, *complainant, vs.* **JUDGE RUSTICO D. PADERANGA, Regional Trial Court, Branch 28, Mambajao, Camiguin,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; BURDEN OF PROOF; IN ADMINISTRATIVE PROCEEDINGS, THE COMPLAINANT BEARS THE ONUS OF ESTABLISHING, BY SUBSTANTIAL EVIDENCE, THE AVERMENTS OF HIS COMPLAINT. — [I]n administrative proceedings, the complainant bears the *onus* of establishing, by substantial evidence, the averments of her complaint. Substantial evidence is such evidence which a reasonable mind will accept as sufficient to support a conclusion. If complainant fails to discharge said burden, respondent cannot be held liable for the charge.

2. ID.; RULES OF COURT; DISQUALIFICATION OF JUDGES; WHEN A CASE DOES NOT FALL UNDER THE INSTANCES COVERED BY THE RULE ON MANDATORY DISQUALIFICATION OF JUDGES, INHIBITION IS DISCRETIONARY AND PRIMARILY A MATTER OF CONSCIENCE AND SOUND DISCRETION ON THE PART OF THE JUDGE. — [W]hen a case does not fall under the instances covered by the rule on mandatory disqualification of judges as expressly enumerated in Section 1, Rule 137 of the Rules of Court, which provides: "Section 1. *Disqualification of judges*. No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, or **to counsel within the fourth degree**, computed according to the rules of the civil law, or in which he has been executor, administrator, guardian, trustee or counsel, or in which he has presided in any inferior court when his ruling or decision is the subject of review, without the written consent of all parties in interest,

signed by them and entered upon the record. A judge may, in the exercise of his sound discretion, disqualify himself from sitting in a case, for just or valid reasons other than those mentioned above." inhibition is discretionary and primarily a matter of conscience and sound discretion on the part of the judge. This discretion is an acknowledgment of the fact that judges are in a better position to determine the issue of inhibition, as they are the ones who directly deal with the litigants in their courtrooms.

3. ID.; ACTIONS; JURISDICTION; THE ACTIVE PARTICIPATION OF A PARTY IN A CASE PENDING AGAINST HIM BEFORE A COURT IS TANTAMOUNT TO RECOGNITION OF THAT COURT'S JURISDICTION. — It is basic that the active participation of a party in a case pending against him before a court is tantamount to recognition of that court's jurisdiction and a willingness to abide by the resolution of the case which will bar said party from later on impugning the court's jurisdiction. While it is true that failure to comply with a condition precedent can be a basis for dismissing an action, the defendant must raise such matter in a motion to dismiss and not file an answer and actively participate in the trial of the case; otherwise, he shall be deemed to have waived said defense.

4. ID.; RULES OF COURT; DISCIPLINE OF JUDGES; GROSS IGNORANCE OF THE LAW; A JUDGE'S LACK OF CONVERSANCE WITH BASIC LEGAL PRINCIPLES CONSTITUTES GROSS IGNORANCE OF THE LAW. — While a judge may not be held liable for gross ignorance of the law for every erroneous order that he renders, it is also axiomatic that when the legal principle involved is sufficiently basic, lack of conversance with it constitutes gross ignorance of the law. Indeed, even though a judge may not always be subjected to disciplinary action for every erroneous order or decision he renders, that relative immunity is not a license to be negligent or abusive and arbitrary in performing his adjudicatory prerogatives. It does not mean that a judge need not observe propriety, discreetness and due care in the performance of his official functions. This is because if judges wantonly misuse the powers vested in them by the law, there will be not only confusion in the administration of justice but also oppressive disregard of the basic requirements of due process.

5. ID.; ID.; ID.; ID.; PENALTY. — Gross ignorance of the law or procedure is classified as a serious charge under Section 8, Rule 140, as amended by A.M. No. 01-8-10-SC, which took effect on October 1, 2001. For this infraction, any of the following sanctions may be imposed: (1) dismissal from the service, forfeiture of all or part of the benefits as the Court may determine, and disqualification from reinstatement or appointment to any public office, including government-owned or controlled corporations, provided that the forfeiture of benefits shall in no case include accrued leave credits; (2) suspension from office without salary and other benefits for more than three but not exceeding six months; or (3) a fine of more than ₱20,000.00 but not exceeding ₱40,000.00.

6. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIAL DEPARTMENT; ALL LOWER COURTS MUST DECIDE CASES BROUGHT BEFORE THEM THREE MONTHS FROM THE TIME THE CASE IS SUBMITTED FOR DECISION; EXTENSION OF TIME TO DECIDE CASES, WHEN ALLOWED. — The Constitution provides that all lower courts must decide or resolve cases or matters brought before them three months from the time a case or matter is submitted for decision. Canon 6, Sec. 5 of the New Code of Judicial Conduct for the Philippine Judiciary, which became effective on June 1, 2004, also provides that judges shall perform all duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness. If a judge is unable to comply with the 90-day reglementary period for deciding cases or matters, he can, for good reasons, ask for an extension, which request is generally granted. Indeed, the Court usually allows reasonable extensions of time to decide cases in recognition of the heavy caseload of the trial courts. x x x The need to impress upon judges the importance of deciding cases promptly and expeditiously cannot be stressed enough, for delay in the disposition of cases and matters undermines the people's faith and confidence in the judiciary. As oft stated, justice delayed is justice denied.

7. REMEDIAL LAW; RULES OF COURT; DISCIPLINE OF JUDGES; UNDUE DELAY IN RENDERING A DECISION OR ORDER; PENALTY. — Undue delay in rendering a decision or order, under Rule 140 as amended by A.M. No. 01-8-10-SC, is a less serious charge punishable with either suspension from office without salary and benefits for not less than one or more than

three months, or a fine of more than ₱10,000.00 but not exceeding ₱20,000.00. In many cases, the Court has imposed a fine upon judges who failed to decide cases within the prescribed period.

APPEARANCES OF COUNSEL

Lagamon Law Office for complainant.
Francisco T. Del Castillo for respondent.

R E S O L U T I O N

AUSTRIA-MARTINEZ, *J.*:

Before the Court is an Administrative Complaint filed by Asuncion Reyes (complainant) dated July 14, 2005 charging Judge Rustico D. Paderanga (respondent), Presiding Judge of the Regional Trial Court (RTC), Branch 28, Mambajao, Camiguin, with bias, ignorance of the law and procedure, antedating orders, failure to resolve cases within the reglementary period and refusal to inhibit in several cases pending before his court.[1]

The charges emanate from five civil cases, as follows:

(1) In Civil Case No. 676, entitled "*Spouses Jose and Dorothy Reyes v. Asuncion Reyes and Adrianne Ebcas,"* appeal for Ejectment and Damages.

Complainant avers that respondent was guilty of gross ignorance of the law particularly of Section 9, Rule 39 of the Rules of Court[2] when he ordered the garnishment of complainant's Dollar Deposit Account with the Philippine National Bank (PNB) in the amount of US$10,000.00 when the judgment debt was only ₱100,000.00; and undue delay in resolving a motion, as it took him 105 days to resolve complainant's motion to withdraw deposit in excess of ₱100,000.00. Complainant asserts that such

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[1] *Rollo*, p. 1.

[2] Section 9. *Execution of judgments for money, how enforced*. –

x x x x x x x x x

(c) *Garnishment of debts and credits*.— x x x The garnishment shall cover only such amount as will satisfy the judgment and all lawful fees.

delay was aggravated by the fact that she told respondent that the reason she filed the motion was to be able to buy medicines for her 98-year old ailing mother. She claims that initially, respondent refused to act on the motion to withdraw, saying that he would not allow the withdrawal of any amount as long as the other party would object. When complainant filed a Motion to Inhibit on December 13, 2004, citing Section 9, Rule 39 of the Rules of Court, however, respondent was prompted to grant complainant's motion to withdraw, which he dated as December 6, 2004 but mailed on December 17, 2004, to make it appear that said order was not a reaction to the Motion to Inhibit. Complainant further asserts that respondent rendered his decision in this case only on May 18, 2005 or 1 year and 14 days after the case was submitted for decision. Finally, complainant states that respondent was biased and prejudiced, and that he acted with vengeance on account of complainant's Motion to Inhibit.[3]

(2) In Civil Case No. 517, entitled "*Julio Vivares, as Executor of the Estate of Torcuato Reyes and Mila Reyes-Ignalig, as heir v. Engr. Jose J. Reyes,"* for Partition.

Complainant claims: It was only when respondent judge handled the case, *i.e*., seven years from the filing of the complaint, that defendant's counsel, who is respondent's relative within the fifth civil degree, filed a motion for preliminary hearing of defendant's affirmative defenses. Respondent refused to inhibit himself despite obvious bias and prejudice, and dismissed the case, through a Resolution dated December 9, 2004, in spite of vehement opposition from complainant and the pendency of a petition before the Supreme Court regarding the matter of receivership, manifesting respondent's gross ignorance of the law. Respondent antedated the December 9, 2004 Resolution as shown by the fact that it was mailed only on December 21, 2004. And he delayed resolving the motion to dismiss, as he rendered the same only 2 years and 49 days after it was submitted for resolution.[4]

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[3] *Rollo*, pp. 2-7, 18-21.

[4] *Rollo*, pp. 7, 10-12, 18-21.

(3) In Civil Case No. 683, entitled *"Asuncion Reyes v. Spouses Jose and Dorothy Reyes,"* for Reconveyance, Declaration of Nullity of OCT No. P-10146 and Damages.

Complainant alleges that respondent took 105 days to resolve a motion to dismiss, and that he was guilty of bias, hostility and ignorance of the law,[5] without elaborating, however, on the reasons therefor. In a letter to then Chief Justice Hilario Davide, Jr., dated January 14, 2005, complainant also claimed that respondent antedated the Orders dated December 6, 7, and 9, 2004, as shown by the fact that they were mailed days after their issuance.[6]

(4) In Civil Case No. 681, entitled *"Arturo Jacot v. Delia Nacasabog and Pacita Mabilanga,"* for Appeal for Forcible Entry with Damages.

Complainant narrates that respondent initially disqualified himself from trying the case because the opposing counsel, Atty. Avelino P. Orseno, Jr., is respondent's nephew;[7] respondent, however, recalled his inhibition when Atty. Orseno withdrew his appearance, with his appointment as Attorney III in the Department of Agrarian Reform (DAR); complainant moved for reconsideration seeking respondent's inhibition from the case, as well as the disqualification of appellee's new counsel, Atty. Charlito Sabuga-a, on the ground that Atty. Sabuga-a was also a DAR lawyer and he could not be disassociated from Atty. Orseno; respondent, however, denied the said motions.[8]

(5) In Civil Case No. 687, entitled *"Delia Jacot-Mabilanga and Pacita Jacot v. Arturo, Ronnie and Ricky, all surnamed Jacot,"* for Quieting of Title of Real Property with Damages.

Complainant claims that respondent displayed manifest bias when, without any request for extension, respondent *motu proprio* issued an Order on January 17, 2005 giving defendants' counsel additional

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[5] *Id*. at 12-13.

[6] *Id*. at 96-97.

[7] Son of respondent's sister.

[8] *Rollo*, pp. 13-16.

15 days within which to submit their memorandum. The original lawyer of the defendants was Atty. Orseno, respondent's nephew. Complainant asserts that respondent's refusal to inhibit himself constituted a violation of Section 1, Rule 137 of the Rules of Court, notwithstanding the withdrawal of Atty. Orseno in the appeal.[9]

Respondent submitted his Comment refuting the charges against him.[10] Complainant thereafter filed a Reply reiterating her claims.[11]

The Court assigned Associate Justice Teresita Dy-Liacco Flores of the Court of Appeals (CA) Cagayan de Oro City to investigate and submit her report and recommendation.[12]

On September 12, 2007, the Court received Justice Dy-Liacco Flores's report finding that, of the many charges hurled against respondent, only two were duly proven: gross ignorance of the law and procedure for dismissing Civil Case No. 517; and delay in resolving a motion in Civil Case No. 676, for which the imposition of fines in the amounts of ₱20,000.00 and ₱15,000.00, respectively, is recommended.[13]

The Court's Ruling

The Court agrees with the findings and recommendation of the Investigating Justice with certain modifications.

Preliminarily, let it be stressed that in administrative proceedings, the complainant bears the *onus* of establishing, by substantial evidence, the averments of her complaint. Substantial evidence is such evidence which a reasonable mind will accept as sufficient to support a conclusion.[14] If complainant

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[9] *Id*. at 16-18.

[10] *Id*. at 116-125.

[11] *Id*. at 361-364.

[12] *Id*. at 213.

[13] *Id*. at 475, 485, 566.

[14] *Español v. Mupas,* A.M. No. MTJ-01-1348, November 11, 2004, 442 SCRA 13, 37.

fails to discharge said burden, respondent cannot be held liable for the charge.[15]

On the charge of bias

Complainant charges respondent with bias in all the civil cases subject of the present administrative complaint. Apart from the averments in her complaint, however, she was not able to present any clear and convincing proof that would show that respondent was intentionally acting against her. Mere suspicion of partiality is not enough. There must be sufficient evidence to prove the same, as well as a manifest showing of bias and partiality stemming from an extrajudicial source or some other basis. A judge's conduct must be clearly indicative of arbitrariness and prejudice before it can be stigmatized as biased and partial.[16] As there is no substantial evidence to hold respondent liable on this point, the Investigating Justice correctly recommended the dismissal of this charge against him.

On the charge of refusal to inhibit

Closely related to the charge of bias is the charge of refusal to inhibit. Again, the Investigating Justice correctly recommended the dismissal of this charge against respondent, because when a case does not fall under the instances covered by the rule on mandatory disqualification of judges as expressly enumerated in Section 1, Rule 137 of the Rules of Court, which provides:

> Section 1. *Disqualification of judges*. No judge or judicial officer shall sit in any case in which he, or his wife or child, is pecuniarily interested as heir, legatee, creditor or otherwise, or in which he is related to either party within the sixth degree of consanguinity or affinity, or **to counsel within the fourth degree**, computed according to the rules of the civil law, or in which he has been executor, administrator, guardian, trustee or counsel, or in which he has presided in any inferior court when his ruling or decision is the subject of review, without the written consent of all parties in interest, signed by them and entered upon the record.

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[15] *Tan v. Estoconing*, A.M. No. MTJ-04-1554, June 29, 2005, 462 SCRA 10, 24; *Español v. Mupas, supra* note 14.

[16] *Id*. at 25.

A judge may, in the exercise of his sound discretion, disqualify himself from sitting in a case, for just or valid reasons other than those mentioned above. (Emphasis supplied)

inhibition is discretionary and primarily a matter of conscience and sound discretion on the part of the judge.[17] This discretion is an acknowledgment of the fact that judges are in a better position to determine the issue of inhibition, as they are the ones who directly deal with the litigants in their courtrooms.[18]

As aptly explained by respondent in his Comment, the grounds mentioned by complainant in her motions to inhibit are not mandatory grounds for disqualification. He is related to Atty. Hermosisima, counsel in Civil Case No. 517 only by the fifth degree of affinity, which relationship is not included in Rule 137. Complainant failed to cite any specific act that would indicate bias, prejudice or vengeance warranting his inhibition from the cases.[19]

On the charge of antedating orders

On this point, the Investigating Justice correctly observed that a gap of few days from the date of the order and the date of mailing is a weak circumstance from which a conclusion of antedating may be drawn.[20] Respondent's explanation in his Comment that the mailing of orders was not promptly done during the period of December 6 to 21, 2004 because his court at the time was undermanned and overburdened with work[21] is very plausible. In the face of a weak accusation, such explanation must be considered sufficient to dismiss the charge.

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[17] *Santos v. Lacurom*, A.M. No. RTJ-04-1823, August 28, 2006, 499 SCRA 639, 650.

[18] *Abrajano v. Heirs of Augusto Salas, Jr.*, G.R. No. 158895, February 16, 2006, 482 SCRA 476, 487.

[19] *Rollo*, pp. 10, 121.

[20] *Rollo*, p. 516.

[21] *Id*. at 117-119.

On the charges of gross ignorance of the law

Of the several charges of gross ignorance of the law, Investigating Justice Dy-Liacco Flores found basis to hold respondent administratively liable therefor anent his issuance of the December 9, 2004 Resolution in Civil Case No. 517.

Civil Case No. 517 for Partition and Recovery of Share of Real Estate was filed by Julio Vivares (Julio) as Executor of the Estate of Torcuato Reyes and Mila Reyes-Ignalig (Mila), heir of Torcuato, against Jose Reyes (Jose) on August 17, 1995 seeking the partition of the Estate of Spouses Severino Reyes, parents of Torcuato and Jose.[22] Jose filed an Answer with Affirmative Defenses and Counterclaim on September 22, 1995 invoking prematurity, among others.[23] Julio and Mila filed a Reply,[24] and several incidents took place thereafter — pre-trial,[25] partial judgment based on the partial settlement between Jose and Mila,[26] constitution of a commission of three to identify the properties already adjudicated to Torcuato and Jose,[27] appointment of a receiver,[28] and filing of a petition with the CA and thereafter with the Supreme Court on the issue of receivership.[29]

Seven years after the filing of the case, respondent assumed office as Presiding Judge of RTC Branch 28 where the case was pending.[30] On July 30, 2002, Jose, for the first time, filed a Motion to Hear Affirmative Defenses.[31] On November 6,

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[22] Records, folder 1, pp. 1-4.

[23] *Id*. at 9-12.

[24] *Id*. at 14-17.

[25] See records, folder 1, pp. 18-24.

[26] *Id*. at 50-52.

[27] *Id*. at 187-189.

[28] *Id*. at 324-325.

[29] See *rollo*, p. 283.

[30] See records, folder 1, p. 384.

[31] *Id*. at 385-390.

2002, respondent issued an order suspending the proceedings in the case "as a gesture of respect to the Supreme Court," where a petition on the issue of receivership was pending.[32] A year and a half later, or on July 16, 2004, Julio and Mila filed a Motion to Set the Case for Hearing and to Resolve all Pending Issues, claiming that Jose continued to appropriate and enjoy the fruits of the common properties, to their prejudice.[33] Jose filed a Comment asserting that his Motion to Hear Affirmative Defenses should first be passed upon, as it raised the question of the prematurity of filing the case.[34] On October 5, 2004, respondent issued a Joint Order in Civil Case Nos. 517, 676 and 683, as it involved the same parties and practically the same subject matter, calling them to a conference for the purpose of seeking an amicable settlement.[35] Failing to reach an agreement in the joint hearing on November 19, 2004, respondent set another hearing for January 10, 2005.[36]

Before January 10, 2005, however, that is, on December 9, 2004, respondent issued a "Resolution (On the Motion to Hear Affirmative Defenses)" dismissing Civil Case No. 517. In the said resolution respondent sustained Jose that the case should be dismissed, since a condition precedent had not been complied with , *i.e*. no determination of the debts, if any, of the estate of the Spouses Severino Reyes, whose properties were sought to be partitioned, had yet been made, which under Rule 90 of the Rules of Court, should first be complied with; and the failure of the complaint to allege that the estate of Spouses Severino Reyes left no debts made it vulnerable to dismissal for failure to state a cause of action.[37]

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[32] *Id*. at 431.

[33] *Id*. at 443-444.

[34] *Id*. at 447-450.

[35] *Id*. at 454-455.

[36] Records, folder 4, pp. 63-64.

[37] Records, folder 1, pp. 458-467.

The Court agrees with the Investigating Justice in finding respondent guilty of ignorance of the law. Jose actively participated in pre-trial which thereafter led to a partial settlement of the properties; and since he benefited in the partial judgment rendered by the court, Jose can no longer move for the dismissal of the action. Respondent is aware of the pendency of the action before the Supreme Court regarding the issue of receivership, as he in fact earlier issued an order suspending the proceedings of the case only to reverse himself thereafter by dismissing the main case, effectively mooting the case before the Supreme Court. The resolution caught the parties by surprise, as there was still a scheduled hearing for January 10, 2005.[38]

It is basic that the active participation of a party in a case pending against him before a court is tantamount to recognition of that court's jurisdiction and a willingness to abide by the resolution of the case which will bar said party from later on impugning the court's jurisdiction. While it is true that failure to comply with a condition precedent can be a basis for dismissing an action, the defendant must raise such matter in a motion to dismiss and not file an answer and actively participate in the trial of the case; otherwise, he shall be deemed to have waived said defense.[39]

In Civil Case No. 517, defendant Jose's active participation in the case was manifested by the following incidents: the order of then Presiding Judge Sinforoso V. Tabamo, Jr. on October 17, 1996 stated that "by agreement, defendant Jose is directed to release to plaintiff Julio A. Vivares the sum of ₱3,000.00 with which to finance the procurement of the documents needed."[40] Records also show that Jose entered into a partial settlement with Mila, his mother and siblings on January 17, 1997 concerning certain parcels of land,[41] which settlement

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[38] *Rollo*, pp. 522-526.

[39] *Santos v. Lumbao*, G.R. No. 169129, March 28, 2007, 519 SCRA 408, 423; *Tribiana v. Tribiana*, G.R. No. 137359, September 13, 2004, 438 SCRA 216, 220.

[40] Records, folder 1, pp. 39-40.

[41] *Id*. at 46-49.

they filed with the court and which became the basis of a Partial Judgment rendered by Judge Tabamo on January 29, 1997.[42] On November 25, 1997, Judge Tabamo also issued an order stating that Jose submitted the name of Luis Nery to be part of the "Commission of Three," which was tasked to identify the properties already adjudicated to Jose and Torcuato, in order to be able to liquidate the properties of the estate of Spouses Severino Reyes.[43]

Respondent should have realized that with these incidents showing Jose's active participation in the case, defendant Jose could no longer move for the dismissal of the same.

The Investigating Justice also correctly pointed out that respondent's December 9, 2004 Resolution placed doubt on the validity of the trial court's Partial Judgment dated January 29, 1997. It effectively mooted the petition for review pending before the Supreme Court, and it caught the parties by surprise, as there was still a scheduled hearing for January 10, 2005.

While a judge may not be held liable for gross ignorance of the law for every erroneous order that he renders, it is also axiomatic that when the legal principle involved is sufficiently basic, lack of conversance with it constitutes gross ignorance of the law.[44] Indeed, even though a judge may not always be subjected to disciplinary action for every erroneous order or decision he renders, that relative immunity is not a license to be negligent or abusive and arbitrary in performing his adjudicatory prerogatives.[45] It does not mean that a judge need not observe propriety, discreetness and due care in the performance of his official functions.[46] This is because if judges wantonly misuse the powers vested in them by the law, there will be not only confusion in the administration of justice

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[42] Records, Folder 1, pp. 50-52.

[43] *Id*. at 72.

[44] *Enriquez v. Caminade*, A.M. No. RTJ-05-1966, March 21, 2006, 485 SCRA 98, 102; *Planas v. Reyes*, A.M. No. RTJ-05-1905, February 23, 2005, 452 SCRA 146, 160.

[45] *Rico v. Rufon*, A.M. No. RTJ-04-1822, June 25, 2007, 525 SCRA 477, 486; *Sanchez v. Vestil*, 358 Phil. 477, 496 (1998).

[46] *Dayawon v. Garfin*, 437 Phil. 139, 149 (2002).

but also oppressive disregard of the basic requirements of due process.[47]

Respondent, in the performance of his duties, failed to observe due care, diligence, prudence and circumspection, which the law requires in the rendition of any public service.[48] When an error is so gross and patent, such error produces an inference of bad faith, making the judge liable for gross ignorance of the law.[49]

The Investigating Justice also correctly opined that while it is a basic principle that an administrative case should not be resorted to when a judicial remedy is available, in this case judicial remedies have already been exhausted, *i.e.*, a motion for reconsideration, an appeal and a petition for *certiorari* were already filed which all ended in dismissal; thus, an inquiry into a judge's administrative liability arising from his judicial acts is already proper.[50]

Gross ignorance of the law or procedure is classified as a serious charge under Section 8, Rule 140, as amended by A.M. No. 01-8-10-SC, which took effect on October 1, 2001. For this infraction, any of the following sanctions may be imposed: (1) dismissal from the service, forfeiture of all or part of the benefits as the Court may determine, and disqualification from reinstatement or appointment to any public office, including government-owned or controlled corporations, provided that the forfeiture of benefits shall in no case include accrued leave credits; (2) suspension from office without salary and other benefits for more than three but not exceeding six months; or (3) a fine of more than ₱20,000.00 but not exceeding ₱40,000.00.

Considering that this is respondent's first administrative infraction, the Court finds the recommended penalty of ₱20,000.00 to be proper.[51]

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[47] *Sanchez v. Vestil*, *supra* note 45.

[48] *Id*.

[49] *Ora v. Almajar*, A.M. No. MTJ-05-1599, October 14, 2005, 473 SCRA 17, 23.

[50] *Rollo*, pp. 527-528.

[51] *Balayon, Jr. v. Dinopol*, A.M. No. RTJ-06-1969, June 15, 2006, 490 SCRA 547, 558; *Varcas v. Orola, Jr.,* A.M. No. MTJ-05-1615, February 22, 2006, 483 SCRA 1, 9.

As to the other charges of gross ignorance of the law, the Investigating Justice correctly dismissed the same for lack of basis.

Complainant's claim that respondent ordered the garnishment of her entire US$10,000.00 deposit account is belied by the records. There is nothing in respondent's Order dated April 23, 2004, which ordered the issuance of a writ of execution, stating that the entire dollar account was to be garnished; neither was there anything in the Writ of Execution dated May 21, 2004, stating anything to that effect.[52] The Notice of Garnishment issued by the sheriff even states that the garnishment shall be made only upon the personal properties of complainant, sufficient to cover the amount mentioned in the writ.[53]

As to the charge of gross ignorance of the law in Civil Case No. 683, complainant merely mentioned said charge under the said civil case without even offering any explanation why respondent should be held liable therefor.[54] As there is no basis for the other charges of gross ignorance of the law, the same should be dismissed.

On the charges of undue delay

Of the several charges of undue delay, the Investigating Justice found respondent guilty thereof only in the Resolution dated December 6, 2004 in Civil Case No. 676, granting complainant's motion to withdraw deposits.

Respondent's only defense on this point is that, from the time complainant filed her motion on August 23, 2004 until he issued his Resolution on December 6, 2004, the interval is only a little over three months; and that, in between, the parties filed several pleadings setting forth their respective arguments, which respondent had to consider before resolving the motion.[55]

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[52] Records, folder 3, pp. 221-222, 248-249.

[53] *Id*. at 285.

[54] *Rollo*, p. 13.

[55] *Id*. at 116.

Indeed, records show that after complainant filed a Motion to Withdraw Deposits, the opposing party, upon order of respondent, filed a Comment on September 1, 2004; thereafter, complainant filed a Reply on October 4, 2004, to which another Comment was filed on October 25, 2004.[56]

The Investigating Justice found, however, that the motion to withdraw was simple and non-litigable, since Jose, the opposing party, had no right to object to the release of complainant's deposit in excess of the award in his favor. And granting that respondent just wanted to be cautious before granting complainant's motion, the last pleading that respondent should have considered was Jose's comment on the motion which was filed on September 1, 2004. Respondent's delay was aggravated by the fact that complainant manifested to respondent the need to withdraw the excess amount from her bank account, because she needed to buy medicines and food supplements for her ailing mother. Reckoned from the time Jose filed his Comment, respondent took 97 days to resolving the motion to withdraw.[57]

The Court agrees that the Motion to Withdraw Deposits is non-litigable; thus, it should have been resolved right away. While all written motions should be heard, excepted from this rule are non-litigious motions or those motions which may be acted upon by the court without prejudice to the rights of the adverse party.[58] The garnishment covers only the amount mentioned in the writ of execution. There should be no dispute, therefore, as to the right of complainant over the deposit in excess of the said amount.

The Investigating Justice also found that respondent incurred a delay of 19 days in deciding the appeal in Civil Case No. 676. Considering, however, that respondent issued other resolutions

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[56] Records, folder 3, pp. 295, 322-326, 351-356.

[57] *Rollo*, pp. 538-540.

[58] *Bagano v. Hontanosas*, A.M. No. RTJ-05-1915, May 6, 2005, 458 SCRA 59, 64.

regarding the case; that he had so many cases for trial and decision at the time he assumed office; and that an arithmetical computation of the period may not always be a good measure to determine whether there is delay, the Investigating Justice recommended that respondent should not be held liable for said offense.[59]

On this matter, the Court disagrees.

The Constitution provides that all lower courts must decide or resolve cases or matters brought before them three months from the time a case or matter is submitted for decision.[60] Canon 6, Sec. 5 of the New Code of Judicial Conduct for the Philippine Judiciary, which became effective on June 1, 2004, also provides that judges shall perform all duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness.

If a judge is unable to comply with the 90-day reglementary period for deciding cases or matters, he can, for good reasons, ask for an extension, which request is generally granted.[61] Indeed, the Court usually allows reasonable extensions of time to decide cases in recognition of the heavy caseload of the trial courts.[62] As respondent failed to ask for an extension in this case, he is deemed to have incurred delay.

The need to impress upon judges the importance of deciding cases promptly and expeditiously cannot be stressed enough, for delay in the disposition of cases and matters undermines the people's faith and confidence in the judiciary. As oft stated, justice delayed is justice denied.[63]

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[59] *Rollo*, pp. 543-544.

[60] *Tan v. Estoconing*, *supra* note 15, at 18; *Office of the Court Administrator v. Madronio, Sr.,* A.M. No. MTJ-04-1571, February 14, 2005, 451 SCRA 206, 210-211.

[61] *Tan v. Estoconing*, *supra* note 15, at 18; *Office of the Court Administrator v. Madronio, Sr.*, *supra* note 60, at 211.

[62] *Tan v. Estoconing*, *supra* note 15, at 18; *Aslarona v. Echavez*, 459 Phil. 167, 171 (2003).

[63] *Office of the Court Administrator v. Madronio, Sr.*, *supra* note 60, at 211.

Undue delay in rendering a decision or order, under Rule 140 as amended by A.M. No. 01-8-10-SC, is a less serious charge punishable with either suspension from office without salary and benefits for not less than one or more than three months, or a fine of more than ₱10,000.00 but not exceeding ₱20,000.00. In many cases, the Court has imposed a fine upon judges who failed to decide cases within the prescribed period.[64]

For the delay incurred by respondent in the above-mentioned cases, the Court finds the recommended fine of ₱15,000.00 to be proper.[65]

Again, as to the other charges of undue delay, particularly the motion to hear the affirmative defenses in Civil Case No. 517 and the decision in Civil Case No. 683, the 90-day period within which to resolve the same was interrupted by the Order dated October 25, 2004 calling the parties to a conference for an amicable settlement.[66] For this reason, the Court finds that respondent cannot be disciplined therefor.

WHEREFORE, respondent Judge Rustico D. Paderanga is hereby found *GUILTY* of gross ignorance of the law for, which he is fined ₱20,000.00; and undue delay in resolving a motion and in deciding an appeal, for which he is fined ₱15,000.00 with a *STERN WARNING* that a more severe penalty will be meted out for the commission of similar offense in the future.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Nachura, and *Reyes, JJ.,* concur.

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[64] See *Aslarona v. Echavez*, *supra* note 62; *Office of the Court Administrator v. Madronio*, *supra* note 60.

[65] *Balsamo v. Suan*, 458 Phil. 11, 25 (2003).

[66] *Rollo*, pp. 507-508, 555-556, records folder 1, p. 455.

THIRD DIVISION

[A.M. No. RTJ-07-2050. March 14, 2008]
(Formerly OCA I.P.I No. 07-2563-RTJ)

SPOUSES ARLEEN AND LORNA OLIVEROS, *complainants, vs.* **HONORABLE DIONISIO C. SISON, Acting Presiding Judge, Regional Trial Court, Branch 74, Antipolo City,** *respondent.*

SYLLABUS

REMEDIAL LAW; CIVIL PROCEDURE; REQUIREMENT ON CERTIFICATION AGAINST FORUM SHOPPING; NOT COMPLIED WITH IN CASE AT BAR. — Complainants themselves admitted that they failed to inform this Court of the petition they filed before the CA within five days after they "learn[ed] that the same or similar action or claim has been filed or is pending," as provided by the Rules, or in this case, after they themselves filed the latter case. They, however, argue that they were not aware of such requirement. While that may have been true, their argument becomes untenable when seen in the light of their subsequent actions. The Verification/Certification of the Petition for *Certiorari* before the CA clearly shows that both complainants signed the same. Thus, they are presumed to have read its contents, or since they are supposedly assisted by counsel, that the latter explained the contents thereof. This should have already made them aware of the requirement to inform the Court of the filing of the case before the CA considering that in the latter case, they are praying for the nullification of the very same Order for which they were seeking administrative sanctions against respondent Judge before this Court. Yet even in the Petition for Review itself, they failed to disclose that they had already filed an administrative case against Judge Sison before this Court arising from the same order they were questioning therein. Thus, there appears a real possibility that the pernicious effect sought to be prevented by the rules requiring the Certification against Forum Shopping would arise. Accordingly, the complainants could be held liable for contempt of this Court.

APPEARANCES OF COUNSEL

Archimedes G. Buencamino for complainants.

R E S O L U T I O N

NACHURA, *J.*:

Before this Court is a Motion for Partial Reconsideration filed by Judge Dionisio C. Sison seeking the reversal of our Decision[1] dated June 27, 2007 finding him guilty of gross ignorance of the law and for which he was fined ₱10,000.00. We held therein that Judge Sison failed to abide by the requirements under the Revised Rules on Civil Procedure in citing herein complainants, spouses Arleen and Lorna Oliveros, for indirect contempt, thus:

> As to the order citing complainants for indirect contempt, while we are disposed to accept Judge Sison's good faith in issuing the same, we have already held in the past, that good faith in situations of fallible discretion inheres only within the parameters of tolerable misjudgment and does not apply where the issues are so simple and the applicable legal principle evident and basic as to be beyond permissible margins of error. When the law is so elementary, not to know it constitutes gross ignorance of the law.
>
> Rule 71 of the Revised Rules on Civil Procedure explicitly sets out the requirements for instituting a complaint for indirect contempt. Section 4 thereof states:
>
> > SEC. 4. *How proceedings commenced*. – Proceedings for indirect contempt may be initiated *motu proprio* by the court against which the contempt was committed by an order or any formal charge requiring the respondent to show cause why he should not be punished for contempt.
> >
> > **In all other cases, charges for indirect contempt shall be commenced by a verified petition with supporting particulars and certified true copies of documents or**

[1] *Rollo,* pp. 45-53.

> **papers involved therein, and upon full compliance with the requirements for filing initiatory pleadings for civil actions in the court concerned. If the contempt charges arose out of or are related to a principal action pending in court, the petition for contempt shall allege that fact but said petition shall be docketed, heard and decided separately, unless the court in its discretion orders the consolidation of the contempt charge and the principal action for joint hearing and decision.** (emphasis supplied)

This provision is couched in plain and simple language. The procedure prescribed therein is clear and unmistakable. The defendants' motion obviously does not conform with this Rule; accordingly, it should not have been entertained and the warrant of arrest should never have been issued. The argument that filing the contempt charge as a separate and independent petition would "favor multiplicity of suits" is too lame an excuse for violating the Rules.

Moreover, complainants should have been given the opportunity to be heard and to defend themselves against the contempt charge, involving as it does such a dire consequence as imprisonment for six months. The Court notes that the motion to cite complainants in indirect contempt was set for hearing on November 13, 2006, that complainants did not appear (because they allegedly never received a copy of the motion nor any notice of hearing), that the matter was deemed submitted for resolution, and that on the same day an Order granting the motion and directing the issuance of a warrant for the arrest of the complainants was issued. The undue haste in disposing of this procedurally infirm motion deprived complainants of one of man's most fundamental rights, the right to be heard.

These circumstances amply overcome the presumption of good faith that Judge Sison enjoys in his favor.

Under the Rules of Court, gross ignorance of the law or procedure constitutes a serious charge. However, we find the OCA's recommendation of a ₱10,000 fine appropriate.

WHEREFORE, in view of the foregoing, we find respondent Judge Dionisio C. Sison **GUILTY** of gross ignorance of the law and impose on him a **FINE** of ₱10,000.00. (citations omitted)[2]

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[2] *Id*. at 51-52.

In Judge Sison's Motion for Partial Reconsideration,[3] he maintains that it is his honest opinion and belief that the contempt order he issued substantially complied with the first paragraph of Section 4, Rule 71 of the Rules of Court.[4] He also insists that he issued the order in good faith and with no ill motive. He treated the Motion to Cite for Contempt as the proper notice or information to the court for it to act on the alleged act of disregard or disrespect for a lawful court order. He did not issue a show-cause order because the Motion to Cite for Contempt already contained a notice of hearing. The complainants, Judge Sison insists, were informed of the hearing but failed to appear. He said that complainants' counsel was personally served a copy of the Motion – as evidenced by the stamp "Received (Buencamino Law Office)" – on the last page of said Motion.

He also explains that since Rule 71 states that contempt charges may be brought by the court *motu proprio*, his understanding was that the second paragraph of Section 4, Rule 71[5] need not be resorted to anymore.

Judge Sison also alleges that complainants failed to inform this Court of a Petition for *Certiorari* filed by the latter with the CA, docketed as CA- G.R. SP No. 97892,[6] wherein they

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[3] *Id*. at 54-57.

[4] Proceedings for indirect contempt may be initiated *motu proprio* by the court against which the contempt was committed by an order or any other formal charge requiring the respondent to show cause why he should not be punished for contempt.

[5] In all other cases, charges for indirect contempt shall be commenced by a verified petition with supporting particulars and certified true copies of documents or papers involved therein, and upon full compliance with the requirements for filing initiatory pleadings for civil actions in the court concerned. If the contempt charges arose out of or are related to a principal action pending in court, the petition for contempt shall allege that fact but said petition shall be docketed, heard and decided separately, unless the court in its discretion orders the consolidation of the contempt charge and the principal action for joint hearing and decision.

[6] Annex "1", Comment on the Motion for Partial Reconsideration, *rollo,* pp. 108-129.

questioned the contempt order he issued. The CA issued a Resolution dated February 26, 2007 dismissing the petition since the proper mode of reviewing a contempt charge is appeal and not a petition for *certiorari*. Complainants then filed a Motion for Reconsideration of said Resolution.

Judge Sison also takes exception to the Court's finding of "undue haste" in issuing the subject contempt order and warrant of arrest. He argues that he issued the order promptly because defendant spouses Mallett informed the court that they were being threatened by Arleen Oliveros, allegedly a convicted killer under parole. He also alleges that he issued the order because John Mallett is an American citizen and cases affecting foreigners are to be given preference and resolved with dispatch.

Meanwhile, this Court noted in its September 24, 2007 Resolution[7] that Judge Sison had paid the ₱10,000.00[8] fine.

On the other hand, complainants, in their Comment,[9] allege that they filed the administrative case with this Court on November 15, 2006, or before they filed the Petition for *Certiorari* (CA-G.R. SP. No. 97892) with the CA on February 13, 2007. They further allege that the Petition is the product of Judge Sison's continuous insensitivity resulting in the issuance of the contempt order, the denial of their motion to reconsider the same, and his issuance of a warrant against other persons claiming rights under complainants. The Petition for *Certiorari* seeks the nullification of the Order citing complainants in indirect contempt, the Order denying their motion for reconsideration, and the warrant for their arrest.

Complainants also allege that they were not aware that they had to inform the Court of the subsequent filing of the Petition for *Certiorari*. They claim that they did not know that Judge Sison had filed an Answer in the administrative case because

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[7] *Rollo,* p. 81.

[8] O.R. No. 7067451 dated August 21, 2007, *id*. at 80.

[9] *Rollo,* pp. 99-107.

they never received any of the pleadings the latter filed with this Court, including the Motion for Partial Reconsideration.

On February 26, 2007, the CA issued a Resolution[10] dismissing complainants' petition since the proper mode of reviewing a contempt charge is appeal and not a petition for *certiorari*. Complainants filed a Motion for Reconsideration of the Resolution, which the CA granted in a Resolution[11] dated August 6, 2007. Thus, the CA set aside its February 26, 2007 Resolution and ordered the respondents to Comment on the Petition for *Certiorari*.

Likewise, the spouses Oliveros informed the Court that complainant Arleen Oliveros had fully served the sentence (six-month imprisonment) imposed for the indirect contempt charge.[12]

In his Reply, Judge Sison points out that the complainants' Comment is a mere rehash of the arguments raised in the complaint. He maintains that complainants were given an opportunity to be heard on the motion to cite them in contempt but that they failed to appear on the hearing date. He also reiterates that he issued the Order citing complainants in contempt in good faith and the latter have failed to show otherwise.

After reviewing the motion filed by Judge Sison, we find the same devoid of merit. The issues raised have already been passed upon and judiciously resolved by this Court in its June 27, 2007 Decision. Judge Sison does not raise any substantial argument that would merit the modification of our decision.

However, we cannot as yet write *finis* to this case.

Complainants themselves admitted that they failed to inform this Court of the petition they filed before the CA within five days after they "learn[ed] that the same or similar action or

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[10] Annex "C", Motion for Partial Reconsideration, *id*. at 63-64.

[11] Annex "2", Comment on the Motion for Partial Reconsideration, *id*. at 153-155.

[12] Certificate of Discharge (Annex "3"), Comment on the Motion for Partial Reconsideration, *id*. at 156-157.

claim has been filed or is pending," as provided by the Rules,[13] or in this case, after they themselves filed the latter case. They, however, argue that they were not aware of such requirement. While that may have been true, their argument becomes untenable when seen in the light of their subsequent actions. The Verification/Certification of the Petition for *Certiorari* before the CA clearly shows that both complainants signed the same. Thus, they are presumed to have read its contents, or since they are supposedly assisted by counsel, that the latter explained the contents thereof. This should have already made them aware of the requirement to inform the Court of the filing of the case before the CA considering that in the latter case, they are praying for the nullification of the very same Order for which they were seeking administrative sanctions against respondent Judge before this Court. Yet even in the Petition for Review itself, they failed to disclose that they had already filed an administrative case against Judge Sison before this Court arising from the

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[13] SEC. 5. *Certification against forum shopping.* —The plaintiff or principal party shall certify under oath in the complaint or other initiatory pleading asserting a claim for relief r in a sworn certification annexed thereto and simultaneously filed therewith: (a) that he has not theretofore commenced any action or filed any claim involving the same issues in any court, tribunal or quasi-judicial agency and, to the best of his knowledge, no such other action or claim is pending therein; (b) if there is such other pending action or claim, a complete statement of the present status thereof; and (c) **if he should thereafter learn that the same or similar action or claim has been filed or is pending, he shall report that fact within five (5) days therefrom to the court wherein his aforesaid complaint or initiatory pleading has been filed**.

Failure to comply with the foregoing requirements shall not be curable by mere amendment of the complaint or other initiatory pleading but shall be cause for the dismissal of the case without prejudice, unless otherwise provided, upon motion and after hearing. The submission, of a false certification or **non-compliance with any of the undertakings therein shall constitute indirect contempt of court**, without prejudice to the corresponding administrative and criminal actions. If the acts of the party or his counsel clearly constitute willful and deliberate forum shopping, the same shall be ground for summary dismissal with prejudice and shall constitute direct contempt, as well as a cause for administrative sanctions. (emphasis supplied)

same order they were questioning therein.[14] Thus, there appears a real possibility that the pernicious effect sought to be prevented by the rules requiring the Certification against Forum Shopping would arise. Accordingly, the complainants could be held liable for contempt of this Court.

WHEREFORE, the foregoing premises considered, the **MOTION FOR PARTIAL RECONSIDERATION** is *DENIED* for lack of merit. On the other hand, complainant-spouses **ARLEEN and LORNA OLIVEROS** are hereby directed to *SHOW CAUSE*, within **TEN (10) DAYS** from receipt of this Resolution, why they should not be cited for contempt for violation of Section 5, Rule 7 of the Revised Rules on Civil Procedure.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 136409. March 14, 2008]

SUBHASH C. PASRICHA and JOSEPHINE A. PASRICHA, *petitioners, vs.* **DON LUIS DISON REALTY, INC.,** *respondent.*

SYLLABUS

1. MERCANTILE LAW; CORPORATION LAW; CORPORATION CODE; PRIVATE CORPORATIONS; REQUIREMENT OF PRIOR AUTHORITY TO ACT IN THE NAME OF THE CORPORATION; SUBSEQUENT AND SUBSTANTIAL COMPLIANCE THEREOF, ALLOWED. — A corporation has

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[14] *Rollo*, p. 129.

no powers except those expressly conferred on it by the Corporation Code and those that are implied from or are incidental to its existence. In turn, a corporation exercises said powers through its board of directors and/or its duly authorized officers and agents. Physical acts, like the signing of documents, can be performed only by natural persons duly authorized for the purpose by corporate by-laws or by a specific act of the board of directors. Thus, any person suing on behalf of the corporation should present proof of such authority. Although Ms. Bautista initially failed to show that she had the capacity to sign the verification and institute the ejectment case on behalf of the company, when confronted with such question, she immediately presented the Secretary's Certificate confirming her authority to represent the company. There is ample jurisprudence holding that subsequent and substantial compliance may call for the relaxation of the rules of procedure in the interest of justice. In *Novelty Phils., Inc. v. Court of Appeals,* the Court faulted the appellate court for dismissing a petition solely on petitioner's failure to timely submit proof of authority to sue on behalf of the corporation. In *Pfizer, Inc. v. Galan*, we upheld the sufficiency of a petition verified by an employment specialist despite the total absence of a board resolution authorizing her to act for and on behalf of the corporation. Lastly, in *China Banking Corporation v. Mondragon International Philippines, Inc,* we relaxed the rules of procedure because the corporation ratified the manager's status as an authorized signatory. In all of the above cases, we brushed aside technicalities in the interest of justice. This is not to say that we disregard the requirement of prior authority to act in the name of a corporation. The relaxation of the rules applies only to highly meritorious cases, and when there is substantial compliance. While it is true that rules of procedure are intended to promote rather than frustrate the ends of justice, and while the swift unclogging of court dockets is a laudable objective, we should not insist on strict adherence to the rules at the expense of substantial justice. Technical and procedural rules are intended to help secure, not suppress, the cause of justice; and a deviation from the rigid enforcement of the rules may be allowed to attain that prime objective, for, after all, the dispensation of justice is the core reason for the existence of courts.

2. REMEDIAL LAW; CIVIL PROCEDURE; MOTION TO INHIBIT; SHALL BE DENIED IF FILED AFTER A MEMBER OF THE COURT HAD ALREADY GIVEN AN OPINION ON THE MERITS OF THE CASE. — It is settled that a motion to inhibit shall be denied if filed after a member of the court had already given an opinion on the merits of the case, the rationale being that "a litigant cannot be permitted to speculate on the action of the court x x x (only to) raise an objection of this sort after the decision has been rendered."

3. ID.; ID.; ID.; THE SUSPICION THAT A JUDGE IS PARTIAL TO ONE OF THE PARTIES SHOULD BE SUBSTANTIATED BY EVIDENCE. — [I]t is settled that mere suspicion that a judge is partial to one of the parties is not enough; there should be evidence to substantiate the suspicion. Bias and prejudice cannot be presumed, especially when weighed against a judge's sacred pledge under his oath of office to administer justice without regard for any person and to do right equally to the poor and the rich. There must be a showing of bias and prejudice stemming from an extrajudicial source, resulting in an opinion on the merits based on something other than what the judge learned from his participation in the case. We would like to reiterate, at this point, the policy of the Court not to tolerate acts of litigants who, for just about any conceivable reason, seek to disqualify a judge (or justice) for their own purpose, under a plea of bias, hostility, prejudice or prejudgment.

4. ID.; ID.; SPECIAL CIVIL ACTIONS; UNLAWFUL DETAINER; ELEMENTS. — Unlawful detainer cases are summary in nature. In such cases, the elements to be proved and resolved are the fact of lease and the expiration or violation of its terms. Specifically, the essential requisites of unlawful detainer are: 1) the fact of lease by virtue of a contract, express or implied; 2) the expiration or termination of the possessor's right to hold possession; 3) withholding by the lessee of possession of the land or building after the expiration or termination of the right to possess; 4) letter of demand upon lessee to pay the rental or comply with the terms of the lease and vacate the premises; and 5) the filing of the action within one year from the date of the last demand received by the defendant

5. ID.; APPEALS; CONCLUSIONS OF FACT OF THE TRIAL COURT, ESPECIALLY WHEN AFFIRMED BY THE COURT

OF APPEALS, ARE FINAL AND CONCLUSIVE, AND CANNOT BE REVIEWED ON APPEAL BY THE SUPREME COURT. — It is settled doctrine that in a civil case, the conclusions of fact of the trial court, especially when affirmed by the Court of Appeals, are final and conclusive, and cannot be reviewed on appeal by the Supreme Court. Albeit the rule admits of exceptions, not one of them obtains in this case.

6. CIVIL LAW; OBLIGATIONS AND CONTRACTS; EXTINGUISHMENT OF OBLIGATIONS; TENDER OF PAYMENT AND CONSIGNATION; EXPLAINED. — Article 1256 of the Civil Code provides: "Article 1256. If the creditor to whom tender of payment has been made refuses without just cause to accept it, the debtor shall be released from responsibility by the consignation of the thing or sum due. Consignation alone shall produce the same effect in the following cases: x x x (4) When two or more persons claim the same right to collect; x x x." Consignation shall be made by depositing the things due at the disposal of a judicial authority, before whom the tender of payment shall be proved in a proper case, and the announcement of the consignation in other cases. x x x The rationale for consignation is to avoid the performance of an obligation becoming more onerous to the debtor by reason of causes not imputable to him. x x x. Well-settled is the rule that tender of payment must be accompanied by consignation in order that the effects of payment may be produced.

7. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; INTERPLEADER; WHEN PROPER. — Section 1, Rule 62 of the Rules of Court provides: "Section 1. *When interpleader proper*. – Whenever conflicting claims upon the same subject matter are or may be made against a person who claims no interest whatever in the subject matter, or an interest which in whole or in part is not disputed by the claimants, he may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves." Otherwise stated, an action for interpleader is proper when the lessee does not know to whom payment of rentals should be made due to conflicting claims on the property (or on the right to collect). The remedy is afforded not to protect a person against double liability but to protect him against double vexation in respect of one liability.

Notably, instead of availing of the above remedies, petitioners opted to refrain from making payments.

8. CIVIL LAW; SPECIAL CONTRACTS; LEASE; THE LESSOR HAS THE RIGHT TO JUDICIALLY EJECT THE LESSEE IN CASE OF NON-PAYMENT OF THE MONTHLY RENTALS. — Article 1673 of the Civil Code gives the lessor the right to judicially eject the lessees in case of non-payment of the monthly rentals. A contract of lease is a consensual, bilateral, onerous and commutative contract by which the owner temporarily grants the use of his property to another, who undertakes to pay the rent therefor.

APPEARANCES OF COUNSEL

Albert M. Rasalan for petitioners.
Feria Feria La'O Tantoco for Don Luis Dison Realty, Inc.

D E C I S I O N

NACHURA, *J.*:

This is a petition for review on *certiorari* under Rule 45 of the Rules of Court seeking the reversal of the Decision[1] of the Court of Appeals (CA) dated May 26, 1998 and its Resolution[2] dated December 10, 1998 in CA-G.R. SP No. 37739 dismissing the petition filed by petitioners Josephine and Subhash Pasricha.

The facts of the case, as culled from the records, are as follows:

Respondent Don Luis Dison Realty, Inc. and petitioners executed two Contracts of Lease[3] whereby the former, as lessor, agreed to lease to the latter Units 22, 24, 32, 33, 34, 35, 36, 37 and 38 of the San Luis Building, located at 1006 M.Y. Orosa

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[1] Penned by Associate Justice Ruben T. Reyes, with Associate Justices Quirino D. Abad Santos, Jr. and Eloy R. Bello, Jr., concurring; *rollo*, pp. 44-62.

[2] *Rollo*, pp. 63-72.

[3] The first Contract of Lease covers Rooms 32 and 35, *id*. at 1034-1042; the second Contract of Lease covers Rooms 22, 24, 33, 34, 36, 37 and 38, *id*. at 1043-1050.

cor. T.M. Kalaw Streets, Ermita, Manila. Petitioners, in turn, agreed to pay monthly rentals, as follows:

For Rooms 32/35:
From March 1, 1991 to August 31, 1991 – ₱5,000.00/₱10,000.00
From September 1, 1991 to February 29, 1992 – ₱5,500.00/₱11,000.00
From March 1, 1992 to February 28, 1993 – ₱6,050.00/₱12,100.00
From March 1, 1993 to February 28, 1994 – ₱6,655.00/₱13,310.00
From March 1, 1994 to February 28, 1995 – ₱7,320.50/₱14,641.00
From March 1, 1995 to February 28, 1996 – ₱8,052.55/₱16,105.10
From March 1, 1996 to February 29, 1997 – ₱8,857.81/₱17,715.61
From March 1, 1997 to February 28, 1998 – ₱9,743.59/₱19,487.17
From March 1, 1998 to February 28, 1999 – ₱10,717.95/₱21,435.89
From March 1, 1999 to February 28, 2000 – ₱11,789.75/₱23,579.48[4]

For Rooms 22 and 24:
Effective July 1, 1992 – ₱10,000.00 with an increment of 10% every two years.[5]

For Rooms 33 and 34:
Effective April 1, 1992 – ₱5,000.00 with an increment of 10% every two years.[6]

For Rooms 36, 37 and 38:
Effective when tenants vacate said premises – ₱10,000.00 with an increment of 10% every two years.[7]

Petitioners were, likewise, required to pay for the cost of electric consumption, water bills and the use of telephone cables.[8]

The lease of Rooms 36, 37 and 38 did not materialize leaving only Rooms 22, 24, 32, 33, 34 and 35 as subjects of the lease contracts.[9] While the contracts were in effect, petitioners dealt with Francis Pacheco (Pacheco), then General Manager of private respondent. Thereafter, Pacheco was replaced by

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[4] *Rollo*, pp. 1034-1036.

[5] *Id*. at 1043-1044.

[6] *Id*.

[7] *Id*.

[8] *Id*. at 1037 and 1045.

[9] Records, p. 8.

Roswinda Bautista (Ms. Bautista).[10] Petitioners religiously paid the monthly rentals until May 1992.[11] After that, however, despite repeated demands, petitioners continuously refused to pay the stipulated rent. Consequently, respondent was constrained to refer the matter to its lawyer who, in turn, made a final demand on petitioners for the payment of the accrued rentals amounting to ₱916,585.58.[12] Because petitioners still refused to comply, a complaint for ejectment was filed by private respondent through its representative, Ms. Bautista, before the Metropolitan Trial Court (MeTC) of Manila.[13] The case was raffled to Branch XIX and was docketed as Civil Case No. 143058-CV.

Petitioners admitted their failure to pay the stipulated rent for the leased premises starting July until November 1992, but claimed that such refusal was justified because of the internal squabble in respondent company as to the person authorized to receive payment.[14] To further justify their non-payment of rent, petitioners alleged that they were prevented from using the units (rooms) subject matter of the lease contract, except Room 35. Petitioners eventually paid their monthly rent for December 1992 in the amount of ₱30,000.00, and claimed that respondent waived its right to collect the rents for the months of July to November 1992 since petitioners were prevented from using Rooms 22, 24, 32, 33, and 34.[15] However, they again withheld payment of rents starting January 1993 because of respondent's refusal to turn over Rooms 36, 37 and 38.[16] To show good faith and willingness to pay the rents, petitioners alleged that they prepared the check vouchers for their monthly rentals from

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[10] *Rollo*, p. 901.

[11] Records, p. 3.

[12] Demand letter dated November 2, 1993, through private respondent's counsel Feria, Feria, Lugtu and Lao; records, p. 36.

[13] Records, pp. 2-5.

[14] *Id*. at 10.

[15] *Id*. at 11.

[16] *Id*. at 14.

January 1993 to January 1994.[17] Petitioners further averred in their Amended Answer[18] that the complaint for ejectment was prematurely filed, as the controversy was not referred to the *barangay* for conciliation.

For failure of the parties to reach an amicable settlement, the pre-trial conference was terminated. Thereafter, they submitted their respective position papers.

On November 24, 1994, the MeTC rendered a Decision dismissing the complaint for ejectment.[19] It considered petitioners' non-payment of rentals as unjustified. The court held that mere willingness to pay the rent did not amount to payment of the obligation; petitioners should have deposited their payment in the name of respondent company. On the matter of possession of the subject premises, the court did not give credence to petitioners' claim that private respondent failed to turn over possession of the premises. The court, however, dismissed the complaint because of Ms. Bautista's alleged lack of authority to sue on behalf of the corporation.

Deciding the case on appeal, the Regional Trial Court (RTC) of Manila, Branch 1, in Civil Case No. 94-72515, reversed and set aside the MeTC Decision in this wise:

> WHEREFORE, the appealed decision is hereby reversed and set aside and another one is rendered ordering defendants-appellees and all persons claiming rights under them, as follows:
>
> (1) to vacate the leased premised (sic) and restore possession thereof to plaintiff-appellant;
>
> (2) to pay plaintiff-appellant the sum of ₱967,915.80 representing the accrued rents in arrears as of November 1993, and the rents on the leased premises for the succeeding months in the amounts stated in paragraph 5 of the complaint until fully paid; and

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[17] *Id*. at 13.

[18] *Id*. at 110-117.

[19] Penned by Judge Ernesto A. Reyes; records, pp. 261-266.

(3) to pay an additional sum equivalent to 25% of the rent accounts as and for attorney's fees plus the costs of this suit.

SO ORDERED.[20]

The court adopted the MeTC's finding on petitioners' unjustified refusal to pay the rent, which is a valid ground for ejectment. It, however, faulted the MeTC in dismissing the case on the ground of lack of capacity to sue. Instead, it upheld Ms. Bautista's authority to represent respondent notwithstanding the absence of a board resolution to that effect, since her authority was implied from her power as a general manager/treasurer of the company.[21]

Aggrieved, petitioners elevated the matter to the Court of Appeals in a petition for review on *certiorari*.[22] On March 18, 1998, petitioners filed an Omnibus Motion[23] to cite Ms. Bautista for contempt; to strike down the MeTC and RTC Decisions as legal nullities; and to conduct hearings and ocular inspections or delegate the reception of evidence. Without resolving the aforesaid motion, on May 26, 1998, the CA affirmed[24] the RTC Decision but deleted the award of attorney's fees.[25]

Petitioners moved for the reconsideration of the aforesaid decision.[26] Thereafter, they filed several motions asking the

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[20] *Rollo*, pp. 302-303.

[21] Record, p. 367.

[22] The petitioners adopted a wrong mode of appeal. Notwithstanding the procedural defect, the CA still took cognizance of the case and decided the same on the merits; CA *rollo*, pp. 1-42.

[23] *Rollo*, pp. 346-376.

[24] The *fallo* reads:

WHEREFORE, the **appealed decision** is hereby **AFFIRMED** with the **modification** that the **award of attorney's fees** is **deleted**.

SO ORDERED (*Rollo,* pp. 61-62*)*.

[25] *Supra* note 1.

[26] *Rollo*, pp. 73-116

Honorable Justice Ruben T. Reyes to inhibit from further proceeding with the case allegedly because of his close association with Ms. Bautista's uncle-in-law.[27]

In a Resolution[28] dated December 10, 1998, the CA denied the motions for lack of merit. The appellate court considered said motions as repetitive of their previous arguments, irrelevant and obviously dilatory.[29] As to the motion for inhibition of the Honorable Justice Reyes, the same was denied, as the appellate court justice stressed that the decision and the resolution were not affected by extraneous matters.[30] Lastly, the appellate court granted respondent's motion for execution and directed the RTC to issue a new writ of execution of its decision, with the exception of the award of attorney's fees which the CA deleted.[31]

Petitioners now come before this Court in this petition for review on *certiorari* raising the following issues:

I.

Whether this ejectment suit should be dismissed and whether petitioners are entitled to damages for the unauthorized and malicious filing by Rosario (sic) Bautista of this ejectment case, it being clear that [Roswinda] – whether as general manager or by virtue of her subsequent designation by the Board of Directors as the corporation's attorney-in-fact – had **no legal capacity to institute the ejectment suit**, independently

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[27] *Id*. at 377-386.

[28] *Id*. at 63-72. The *fallo* reads:

ACCORDINGLY, petitioners' motion for reconsideration, omnibus motions, motion to inhibit, motion for contempt and related motions are hereby DENIED for utter lack of merit.

Private respondents' motion for execution is GRANTED. In the interest of justice, the Regional Trial Court, Branch I, Manila is directed to issue a new writ of execution of its judgment which we affirmed, except as to attorney's fees which we deleted. For this purpose, the original records elevated to Us are ordered remanded to the RTC.

SO ORDERED.

[29] *Rollo*, p. 71.

[30] *Id*. at 70-71.

[31] *Id*. at 72.

of whether Director Pacana's Order setting aside the SEC revocation Order is a mere scrap of paper.

II.

Whether the RTC's and the Honorable Court of Appeals' failure and refusal to resolve the most fundamental factual issues in the instant ejectment case render said decisions **void on their face by reason of the complete abdication** by the RTC and the Honorable Justice Ruben Reyes of their **constitutional duty not only to** clearly and distinctly state the facts and the law on which a decision is based **but also to** resolve the decisive factual issues in any given case.

III.

Whether the (1) failure and refusal of Honorable Justice Ruben Reyes to inhibit himself, despite his admission – by reason of his silence – of petitioners' accusation that the said Justice enjoyed a $7,000.00 scholarship grant courtesy of the uncle-in-law of respondent "corporation's" purported general manager and (2) worse, his act of ruling against the petitioners and in favor of the respondent "corporation" constitute an unconstitutional deprivation of petitioners' property without due process of law.[32]

In addition to Ms. Bautista's lack of capacity to sue, petitioners insist that respondent company has no standing to sue as a juridical person in view of the suspension and eventual revocation of its certificate of registration.[33] They likewise question the factual findings of the court on the bases of their ejectment from the subject premises. Specifically, they fault the appellate court for not finding that: 1) their non-payment of rentals was justified; 2) they were deprived of possession of all the units subject of the lease contract except Room 35; and 3) respondent violated the terms of the contract by its continued refusal to turn over possession of Rooms 36, 37 and 38. Petitioners further prayed that a Temporary Restraining Order (TRO) be issued enjoining the CA from enforcing its Resolution directing the issuance of a Writ of Execution. Thus, in a Resolution[34] dated

[32] *Id*. at 19-20.

[33] *Id*. at 978.

[34] *Id*. at 520-521.

January 18, 1999, this Court directed the parties to maintain the *status quo* effective immediately until further orders.

The petition lacks merit.

We uphold the capacity of respondent company to institute the ejectment case. Although the Securities and Exchange Commission (SEC) suspended and eventually revoked respondent's certificate of registration on February 16, 1995, records show that it instituted the action for ejectment on December 15, 1993. Accordingly, when the case was commenced, its registration was not yet revoked.[35] Besides, as correctly held by the appellate court, the SEC later set aside its earlier orders of suspension and revocation of respondent's certificate, rendering the issue moot and academic.[36]

We likewise affirm Ms. Bautista's capacity to sue on behalf of the company despite lack of proof of authority to so represent it. A corporation has no powers except those expressly conferred on it by the Corporation Code and those that are implied from or are incidental to its existence. In turn, a corporation exercises said powers through its board of directors and/or its duly authorized officers and agents. Physical acts, like the signing of documents, can be performed only by natural persons duly authorized for the purpose by corporate by-laws or by a specific act of the board of directors.[37] Thus, any person suing on behalf of the corporation should present proof of such authority. Although Ms. Bautista initially failed to show that she had the capacity to sign the verification and institute the ejectment case on behalf of the company, when confronted with such question, she immediately presented the Secretary's Certificate[38] confirming her authority to represent the company.

There is ample jurisprudence holding that subsequent and substantial compliance may call for the relaxation of the rules

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[35] *Id*. at 1358.

[36] *Id*. at 69.

[37] *BA Savings Bank v. Sia*, 391 Phil. 370, 377 (2000).

[38] Records, p. 100.

of procedure in the interest of justice.[39] In *Novelty Phils., Inc. v. Court of Appeals,*[40] the Court faulted the appellate court for dismissing a petition solely on petitioner's failure to timely submit proof of authority to sue on behalf of the corporation. In *Pfizer, Inc. v. Galan*,[41] we upheld the sufficiency of a petition verified by an employment specialist despite the total absence of a board resolution authorizing her to act for and on behalf of the corporation. Lastly, in *China Banking Corporation v. Mondragon International Philippines, Inc,*[42] we relaxed the rules of procedure because the corporation ratified the manager's status as an authorized signatory. In all of the above cases, we brushed aside technicalities in the interest of justice. This is not to say that we disregard the requirement of prior authority to act in the name of a corporation. The relaxation of the rules applies only to highly meritorious cases, and when there is substantial compliance. While it is true that rules of procedure are intended to promote rather than frustrate the ends of justice, and while the swift unclogging of court dockets is a laudable objective, we should not insist on strict adherence to the rules at the expense of substantial justice.[43] Technical and procedural rules are intended to help secure, not suppress, the cause of justice; and a deviation from the rigid enforcement of the rules may be allowed to attain that prime objective, for, after all, the dispensation of justice is the core reason for the existence of courts.[44]

As to the denial of the motion to inhibit Justice Reyes, we find the same to be in order. *First,* the motion to inhibit came

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[39] *Wack Wack Golf and Country Club v. National Labor Relations Commission*, G.R. No. 149793, April 15, 2005, 456 SCRA 280, 294.

[40] 458 Phil. 36 (2003).

[41] 410 Phil. 483 (2001).

[42] G.R. No. 164798, November 17, 2005, 475 SCRA 332.

[43] *Wack Wack Golf and Country Club v. National Labor Relations Commission*, *supra* note 39, at 294.

[44] *General Milling Corp. v. National Labor Relations Commission*, 442 Phil. 425, 428 (2002).

after the appellate court rendered the assailed decision, that is, after Justice Reyes had already rendered his opinion on the merits of the case. It is settled that a motion to inhibit shall be denied if filed after a member of the court had already given an opinion on the merits of the case, the rationale being that "a litigant cannot be permitted to speculate on the action of the court x x x (only to) raise an objection of this sort after the decision has been rendered."[45] *Second,* it is settled that mere suspicion that a judge is partial to one of the parties is not enough; there should be evidence to substantiate the suspicion. Bias and prejudice cannot be presumed, especially when weighed against a judge's sacred pledge under his oath of office to administer justice without regard for any person and to do right equally to the poor and the rich. There must be a showing of bias and prejudice stemming from an extrajudicial source, resulting in an opinion on the merits based on something other than what the judge learned from his participation in the case.[46] We would like to reiterate, at this point, the policy of the Court not to tolerate acts of litigants who, for just about any conceivable reason, seek to disqualify a judge (or justice) for their own purpose, under a plea of bias, hostility, prejudice or prejudgment.[47]

We now come to the more substantive issue of whether or not the petitioners may be validly ejected from the leased premises.

Unlawful detainer cases are summary in nature. In such cases, the elements to be proved and resolved are the fact of lease and the expiration or violation of its terms.[48] Specifically, the essential requisites of unlawful detainer are: 1) the fact of lease by virtue

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[45] *Chavez v. Public Estates Authority*, 451 Phil. 1, 41 (2003); *Limpin, Jr. v. Intermediate Appellate Court*, G.R. No. 70987, May 5, 1988, 161 SCRA 83, 97-98.

[46] *Soriano v. Judge Angeles,* 393 Phil. 769, 779 (2000); *People v. Court of Appeals*, 369 Phil. 150, 157 (1999).

[47] *People v. Serrano*, G.R. No. 44712, October 28, 1991, 203 SCRA 171, 186.

[48] *Ocampo v. Tirona*, G.R. No. 147812, April 6, 2005, 455 SCRA 62, 72; *Manuel v. Court of Appeals*, G.R. No. 95469, July 25, 1991, 199 SCRA 603, 608.

of a contract, express or implied; 2) the expiration or termination of the possessor's right to hold possession; 3) withholding by the lessee of possession of the land or building after the expiration or termination of the right to possess; 4) letter of demand upon lessee to pay the rental or comply with the terms of the lease and vacate the premises; and 5) the filing of the action within one year from the date of the last demand received by the defendant.[49]

It is undisputed that petitioners and respondent entered into two separate contracts of lease involving nine (9) rooms of the San Luis Building. Records, likewise, show that respondent repeatedly demanded that petitioners vacate the premises, but the latter refused to heed the demand; thus, they remained in possession of the premises. The only contentious issue is whether there was indeed a violation of the terms of the contract: on the part of petitioners, whether they failed to pay the stipulated rent without justifiable cause; while on the part of respondent, whether it prevented petitioners from occupying the leased premises except Room 35.

This issue involves questions of fact, the resolution of which requires the evaluation of the evidence presented. The MeTC, the RTC and the CA all found that petitioners failed to perform their obligation to pay the stipulated rent. It is settled doctrine that in a civil case, the conclusions of fact of the trial court, especially when affirmed by the Court of Appeals, are final and conclusive, and cannot be reviewed on appeal by the Supreme Court.[50] Albeit the rule admits of exceptions, not one of them obtains in this case.[51]

To settle this issue once and for all, we deem it proper to assess the array of factual findings supporting the court's conclusion.

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[49] *Dela Cruz v. Court of Appeals*, G.R. No. 139442, December 6, 2006, 510 SCRA 103, 115-116.

[50] *Vda. de Gualberto v. Go*, G.R. No. 139843, July 21, 2005, 463 SCRA 671, 682; *Ocampo v. Ocampo*, G.R. No. 150707, April 14, 2004, 427 SCRA 545, 563; *Alvarez v. Court of Appeals*, 455 Phil. 864, 875 (2003).

[51] *Vda. De Gualberto v. Go*, *supra*, at 682.

The evidence of petitioners' non-payment of the stipulated rent is overwhelming. Petitioners, however, claim that such non-payment is justified by the following: 1) the refusal of respondent to allow petitioners to use the leased properties, except room 35; 2) respondent's refusal to turn over Rooms 36, 37 and 38; and 3) respondent's refusal to accept payment tendered by petitioners.

Petitioners' justifications are belied by the evidence on record. As correctly held by the CA, petitioners' communications to respondent prior to the filing of the complaint never mentioned their alleged inability to use the rooms.[52] What they pointed out in their letters is that they did not know to whom payment should be made, whether to Ms. Bautista or to Pacheco.[53] In their July 26 and October 30, 1993 letters, petitioners only questioned the method of computing their electric billings without, however, raising a complaint about their failure to use the rooms.[54] Although petitioners stated in their December 30, 1993 letter that respondent failed to fulfill its part of the contract,[55] nowhere did they specifically refer to their inability to use the leased rooms. Besides, at that time, they were already in default on their rentals for more than a year.

If it were true that they were allowed to use only one of the nine (9) rooms subject of the contract of lease, and considering that the rooms were intended for a business purpose, we cannot understand why they did not specifically assert their right. If we believe petitioners' contention that they had been prevented from using the rooms for more than a year before the complaint for ejectment was filed, they should have demanded specific performance from the lessor and commenced an action in court. With the execution of the contract, petitioners were already in

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[52] *Rollo*, p. 54.

[53] *Id.* at 1051.

[54] *Id.* at 1053-1056.

[55] *Id.* at 1058.

a position to exercise their right to the use and enjoyment of the property according to the terms of the lease contract.[56] As borne out by the records, the fact is that respondent turned over to petitioners the keys to the leased premises and petitioners, in fact, renovated the rooms. Thus, they were placed in possession of the premises and they had the right to the use and enjoyment of the same. They, likewise, had the right to resist any act of intrusion into their peaceful possession of the property, even as against the lessor itself. Yet, they did not lift a finger to protect their right if, indeed, there was a violation of the contract by the lessor.

What was, instead, clearly established by the evidence was petitioners' non-payment of rentals because ostensibly they did not know to whom payment should be made. However, this did not justify their failure to pay, because if such were the case, they were not without any remedy. They should have availed of the provisions of the Civil Code of the Philippines on the consignation of payment and of the Rules of Court on interpleader.

Article 1256 of the Civil Code provides:

> Article 1256. If the creditor to whom tender of payment has been made refuses without just cause to accept it, the debtor shall be released from responsibility by the consignation of the thing or sum due.
>
> Consignation alone shall produce the same effect in the following cases:
>
> x x x x x x x x x
>
> (4) When two or more persons claim the same right to collect;
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> x x x x x x x x x.

Consignation shall be made by depositing the things due at the disposal of a judicial authority, before whom the tender of payment

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[56] *Aguilar v. Court of Appeals*, 390 Phil. 621, 641 (2000).

shall be proved in a proper case, and the announcement of the consignation in other cases.[57]

In the instant case, consignation alone would have produced the effect of payment of the rentals. The rationale for consignation is to avoid the performance of an obligation becoming more onerous to the debtor by reason of causes not imputable to him.[58] Petitioners claim that they made a written tender of payment and actually prepared vouchers for their monthly rentals. But that was insufficient to constitute a valid tender of payment. Even assuming that it was valid tender, still, it would not constitute payment for want of consignation of the amount. Well-settled is the rule that tender of payment must be accompanied by consignation in order that the effects of payment may be produced.[59]

Moreover, Section 1, Rule 62 of the Rules of Court provides:

> Section 1. *When interpleader proper*. – Whenever conflicting claims upon the same subject matter are or may be made against a person who claims no interest whatever in the subject matter, or an interest which in whole or in part is not disputed by the claimants, he may bring an action against the conflicting claimants to compel them to interplead and litigate their several claims among themselves.

Otherwise stated, an action for interpleader is proper when the lessee does not know to whom payment of rentals should be made due to conflicting claims on the property (or on the right to collect).[60] The remedy is afforded not to protect a person against double liability but to protect him against double vexation in respect of one liability.[61]

Notably, instead of availing of the above remedies, petitioners opted to refrain from making payments.

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[57] Civil Code, Art. 1258.

[58] *Eternal Gardens Memorial Park Corp. v. Court of Appeals*, 347 Phil. 232, 264 (1997).

[59] *State Investment House, Inc. v. Court of Appeals*, G.R. No. 90676, June 19, 1991, 198 SCRA 390, 399.

[60] *Ocampo v. Tirona*, *supra* note 48, at 76.

[61] *Id*.

Neither can petitioners validly invoke the non-delivery of Rooms 36, 37 and 38 as a justification for non-payment of rentals. Although the two contracts embraced the lease of nine (9) rooms, the terms of the contracts – with their particular reference to specific rooms and the monthly rental for each – easily raise the inference that the parties intended the lease of each room separate from that of the others. There is nothing in the contract which would lead to the conclusion that the lease of one or more rooms was to be made dependent upon the lease of all the nine (9) rooms. Accordingly, the use of each room by the lessee gave rise to the corresponding obligation to pay the monthly rental for the same. Notably, respondent demanded payment of rentals only for the rooms actually delivered to, and used by, petitioners.

It may also be mentioned that the contract specifically provides that the lease of Rooms 36, 37 and 38 was to take effect only when the tenants thereof would vacate the premises. Absent a clear showing that the previous tenants had vacated the premises, respondent had no obligation to deliver possession of the subject rooms to petitioners. Thus, petitioners cannot use the non-delivery of Rooms 36, 37 and 38 as an excuse for their failure to pay the rentals due on the other rooms they occupied.

In light of the foregoing disquisition, respondent has every right to exercise his right to eject the erring lessees. The parties' contracts of lease contain identical provisions, to wit:

> In case of default by the LESSEE in the payment of rental on the fifth (5th) day of each month, the amount owing shall as penalty bear interest at the rate of FOUR percent (4%) per month, to be paid, without prejudice to the right of the LESSOR to terminate his contract, enter the premises, and/or eject the LESSEE as hereinafter set forth;[62]

Moreover, Article 1673[63] of the Civil Code gives the lessor the right to judicially eject the lessees in case of non-payment

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[62] *Rollo*, pp. 1036 and 1044.

[63] The lessor may judicially eject the lessee for any of the following causes:

(1) When the period agreed upon, or that which is fixed for the duration of leases under Articles 1682 and 1687, has expired;

of the monthly rentals. A contract of lease is a consensual, bilateral, onerous and commutative contract by which the owner temporarily grants the use of his property to another, who undertakes to pay the rent therefor.[64] For failure to pay the rent, petitioners have no right to remain in the leased premises.

WHEREFORE, premises considered, the petition is *DENIED* and the *Status Quo* Order dated January 18, 1999 is hereby *LIFTED*. The Decision of the Court of Appeals dated May 26, 1998 and its Resolution dated December 10, 1998 in CA-G.R. SP No. 37739 are *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Quisumbing, Austria-Martinez,* and *Chico-Nazario, JJ.,* concur.

EN BANC

[G.R. No. 145184. March 14, 2008]

PRESIDENTIAL *AD HOC* FACT-FINDING COMMITTEE ON BEHEST LOANS, represented by PRESIDENTIAL COMMISSION ON GOOD GOVERNMENT through ATTY. ORLANDO L. SALVADOR, *petitioner, vs.* **HON. ANIANO A.**

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(2) Lack of payment of the price stipulated;

(3) Violation of any of the conditions agreed upon in the contract;

(4) When the lessee devotes the thing leased to any use or service not stipulated which causes the deterioration thereof; or if he does not observe the requirement in No. 2 of Article 1657, as regards the use thereof.

The ejectment of tenants of agricultural lands is governed by special laws.

[64] *Aguilar v. Court of Appeals*, *supra* note 56, at 640.

* Additional member in lieu of Justice Reyes, who took no part.

DESIERTO, in his capacity as OMBUDSMAN; DEVELOPMENT BANK OF THE PHILIPPINES' MEMBERS OF THE BOARD OF GOVERNORS AND OFFICERS AT THE TIME — Rafael Sison, Joseph Tengco, Alice Reyes, Vicente Paterno, Joseph Edralin, Roberto Ongpin, Verden Dangilan, Rodolfo Manalo; BOARD OF DIRECTORS AND OFFICERS INTEGRATED CIRCUITS PHILIPPINES, INC. Querube Makalintal, * Ambrosio Makalintal, Vicente Jayme, Antonio Santiago, Edgar Quinto, Horacio Makalintal, Alfredo de los Angeles, Jose Rey D. Rueda, Ramoncito Modesto, Gerardo Limjuco, *respondents.*

SYLLABUS

1. REMEDIAL LAW; CRIMINAL PROCEDURE; PARTIES THAT WERE NOT MADE AS RESPONDENTS IN THE PROCEEDINGS BEFORE THE OMBUDSMAN CANNOT BE MADE AS RESPONDENTS FOR THE FIRST TIME BEFORE THE PRESENT PETITION. — Before tackling the issues raised by the petitioner, this Court takes notice of a serious procedural flaw. Joseph Edralin, Roberto Ongpin, Verden Dangilan and Rodolfo Manalo were impleaded as respondents in this petition. However, they were not made respondents in the proceedings before the Ombudsman. Neither was there any allegation in the sworn-complaint and supplementary complaint executed by Atty. Salvador before the Ombudsman that Edralin, Ongpin, Dangilan and Manalo had any participation in, or were responsible for, the approval of the questioned loan. As such, they cannot be made respondents for the first time in this petition. Accordingly, we dismiss the petition as against them.

2. POLITICAL LAW; BILL OF RIGHTS; PROSCRIPTION AGAINST *EX-POST FACTO* LAW; NOT BEING PENAL LAWS, ADMINISTRATIVE ORDER NO. 13 AND MEMORANDUM ORDER NO. 61 CANNOT BE CHARACTERIZED AS *EX POST FACTO* LAWS. — An *ex post facto* law has been defined as

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* Died during the pendency of the case. Hence, in its November 19, 2002 Resolution, this Court dismissed the casae against him.

one — (a) which makes an action done before the passing of the law and which was innocent when done criminal, and punishes such action; or (b) which aggravates a crime or makes it greater than it was when committed; or (c) which changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed; or (d) which alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the defendant; or (e) which assumes to regulate civil rights and remedies only, but in effect imposes a penalty or deprivation of a right which when exercised was lawful; or (f) which deprives a person accused of a crime of some lawful protection to which he has become entitled, such as the protection of a former conviction or acquittal, or a proclamation of amnesty. The constitutional proscription of *ex post facto* laws is aimed against the retrospectivity of penal laws. Penal laws are acts of the legislature which prohibit certain acts and establish penalties for their violations; or those that define crimes, treat of their nature, and provide for their punishment. Administrative Order No. 13 does not mete out a penalty for the act of granting behest loans. It merely creates the Presidential *Ad Hoc* Fact-Finding Committee on Behest Loans and provides for its composition and functions. Memorandum Order No. 61, on the other hand, simply provides the frame of reference in determining the existence of behest loans. Not being penal laws, Administrative Order No. 13 and Memorandum Order No. 61 cannot be characterized as *ex post facto* laws. Furthermore, in *Estarija v. Ranada*, in which petitioner raised the issue of constitutionality of R.A. No. 6770 in his motion for reconsideration of the Ombudsman's decision, we had occasion to state that the Ombudsman had no jurisdiction to entertain questions on the constitutionality of a law. The Ombudsman, therefore, acted in excess of its jurisdiction in delving into the constitutionality of the subject administrative and memorandum orders.

3. ID.; ACCOUNTABILITY OF PUBLIC OFFICERS; OFFICE OF THE OMBUDSMAN; ITS PRIMARY FUNCTION IS TO DETERMINE THE PRESENCE OR ABSENCE OF PROBABLE CAUSE AGAINST THOSE IN PUBLIC OFFICE DURING A PRELIMINARY INVESTIGATION. — Case law has it that the determination of probable cause against those in public office

during a preliminary investigation is a function that belongs to the Office of the Ombudsman. The Ombudsman is empowered to determine, in the exercise of his discretion, whether probable cause exists, and to charge the person believed to have committed the crime as defined by law. As a rule, courts should not interfere with the Ombudsman's investigatory power, exercised through the Ombudsman Prosecutors, and the authority to determine the presence or absence of probable cause, except when the finding is tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.

4. CRIMINAL LAW; EXTINCTION OF CRIMINAL LIABILITY; PRESCRIPTION OF THE CRIME; THE CRIMINAL OFFENSES ALLEGED BY PRIVATE RESPONDENTS HAD NOT YET PRESCRIBED WHEN THE CRIME WAS FILED ON FEBRUARY 17, 1995, LESS THAN THREE (3) YEARS FROM THE PRESUMPTIVE DATE OF DISCOVERY. — The computation of the prescriptive period for offenses involving the acquisition of behest loans had already been laid to rest in *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*, thus: [I]t was well-nigh impossible for the State, the aggrieved party, to have known the violations of R.A. No. 3019 at the time the questioned transactions were made because, as alleged, the public officials concerned connived or conspired with the "beneficiaries of the loans." Thus, we agree with the COMMITTEE that the prescriptive period for the offenses with which the respondents in OMB-0-96-0968 were charged should be computed from the discovery of the commission thereof and not from the day of such commission. The ruling was reiterated in *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Ombudsman Desierto*, wherein the Court explained: In cases involving violations of R.A. No. 3019 committed prior to the February 1986 EDSA Revolution that ousted President Ferdinand E. Marcos, we ruled that the government as the aggrieved party could not have known of the violations at the time the questioned transactions were made. Moreover, no person would have dared to question the legality of those transactions. Thus, the counting of the prescriptive period commenced from the date of discovery of the offense in 1992 after an exhaustive investigation by the Presidential Ad Hoc Committee on Behest Loans. The Sworn Statement filed by Atty. Salvador did not specify the exact dates when the alleged

offenses were discovered. However, the records show that it was the Committee that discovered the same. As such, the discovery could not have been made earlier than October 8, 1992, the date when the Committee was created. The complaint was filed on February 17, 1995, less than three (3) years from the presumptive date of discovery. Thus, the criminal offenses allegedly committed by the private respondents had not yet prescribed when the complaint was filed.

5. ID.; ANTI-GRAFT AND CORRUPT PRACTICES ACT (R.A. NO. 3019); CORRUPT PRACTICES OF PUBLIC OFFICERS; ELEMENTS THAT MUST BE ESTABLISHED TO BE HELD LIABLE UNDER SECTION 3 (e) AND SECTION 3 (g) OF R.A. NO. 3019. — For one to have violated Section 3(e) of R.A. No. 3019, the following elements must be established: 1) the accused must be a public officer discharging administrative, judicial or official functions; 2) he must have acted with manifest partiality, evident bad faith or inexcusable negligence; and 3) he must have caused undue injury to any party, including the government, or given any private party unwarranted benefits, advantage or preference, in the discharge of his functions. Evidently, mere bad faith or partiality and negligence *per se* are not enough for one to be held liable under the law. It is required that the act constitutive of bad faith or partiality must, in the first place, be evident or manifest, while the negligent deed should be both gross and inexcusable. Further, it is necessary to show that any or all of these modalities resulted in undue injury to a specified party. On the other hand, to be liable under Section 3(g), there must be a showing that private respondents entered into a grossly disadvantageous contract on behalf of the government.

6. ID.; ID.; ID.; ALLEGED CORRUPT PRACTICES NOT ESTABLISHED; NO CONVINCING PROOF WAS OFFERED TO DEMONSTRATE THAT THE CONTRACTS WERE GROSSLY DISADVANTAGEOUS TO THE GOVERNMENT OR THAT THEY WERE ENTERED INTO TO GIVE RESPONDENT COMPANY UNWARRANTED BENEFITS AND ADVANTAGES. — Petitioner did not satisfy either criterion. It is clear from the records that the DBP officers studied and evaluated ICPI's request for an interim loan and an industrial loan, and they were convinced that ICPI was deserving of the grant, considering the viability and economic desirability of

its project. Petitioners failed to demonstrate that DBP did not exercise sound business judgment when it approved the loan. Neither was there any proof that the conditions imposed for the loan were specially designed in order to favor ICPI. The Chapter on Human Relations of the Civil Code directs every person, *inter alia*, to observe good faith, which springs from the fountain of good conscience. Well-settled is the rule that good faith is presumed. Specifically, a public officer is presumed to have acted in good faith in the performance of his duties. Mistakes committed by a public officer are not actionable, absent a clear showing that he was motivated by malice or gross negligence amounting to bad faith. "Bad faith" does not simply connote bad moral judgment or negligence. There must be some dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of a sworn duty through some motive or intent, or ill will. It partakes of the nature of fraud. It contemplates a state of mind affirmatively operating with furtive design or some motive of self-interest or ill will for ulterior purposes. Petitioners utterly failed to show that private respondents' actions fit such description. Neither was there any convincing proof offered to demonstrate that the contracts were grossly disadvantageous to the Government, or that they were entered into to give ICPI unwarranted benefits and advantages.

7. ID.; ID.; ID.; NO SOLID BASIS FOR PETITIONERS TO CLAIM THAT RESPONDENT COMPANY DID NOT DESERVE THE CONCESSION GIVEN BY THE DEVELOPMENT BANK OF THE PHILIPPINES. — Petitioner asserts that ICPI was undeserving of the accommodation given by DBP. To support this allegation, petitioners quoted a portion of the credit evaluation report, which reads: Investigations conducted by DBP's Credit Department revealed adverse findings on ICPI and Mr. Gene Vicente Tamesis, who until recently, has been the principal stockholder and executive officer of subject Corporation. x x x Mr. Tamesis, however, has since transferred all of his shareholdings to Mr. Ambrosio G. Makalintal. Aware of Mr. Tamesis' unfavorable credit standing, ICPI's management has, further, caused him to yield his position as Chairman of the Board in favor of Mr. Querube C. Makalintal, former Justice of the Supreme Court and presently Speaker of the Interim Batasang Pambansa. But we note that the said credit

investigation report goes further, and states: With the responsible management of the Makalintals and the conversion of substantial liabilities of ICPI into equity (subject-firm's major creditors, namely, Philippine Underwriters Finance Corporation and Atrium Capital Corporation have both agreed, in principle, to convert their claims into equity), the corporation can now operate on a clean credit slate and stands a good chance of meeting its credit obligations. There is, thus, no solid basis for petitioners to claim that ICPI did not deserve the concession given by DBP.

8. ID.; ID.; ID.; SUBJECT CONTRACTS WERE NOT BEHEST LOANS AS PROVEN BY THE FACT THAT RESPONDENT COMPANY WAS NOT UNDER CAPITALIZED AND THE LOAN WAS NOT UNDER-COLLATERALIZED AT THE TIME OF ITS APPROVAL. — Contrary to what petitioner wants to portray, the contracts between ICPI and DBP were not behest loans. ICPI was not under-capitalized and the loan was not under-collateralized at the time of its approval. Likewise, the approval can hardly be depicted as one done with undue haste. The records show that in 1979, Atrium Capital Corporation and Philippine Underwriter's Corporation agreed on the conversion of their ₱8,500,000.00 worth of creditor's equity into capital stocks. Then, in 1980, the individual stockholders paid their respective subscriptions amounting to ₱3,000,000.00, thereby increasing ICPI's paid up capital to ₱11,500,000.00 as of April 23, 1980. This belies petitioners' claim that, at that time, ICPI was under-capitalized. Similarly, the industrial loan was sufficiently collateralized at the time of its approval. It was granted on the condition that the assets intended for acquisition by ICPI would serve as collateral. The Philippine Export and Foreign Loan Guarantee Corporation (PEFLGC) also guaranteed 70% of the loan extended. ICPI was further required to assign to DBP not less than 67% of its total subscribed and outstanding voting shares, which should be maintained at all times and should subsist during the existence of the loan. As additional security, ICPI's majority stockholders, namely, Integrated Circuits Philippine, Inc. (ICP) of Philippine Underwriters Finance Corporation, Atrium Corporation (AC), Ambrosio G. Makalintal and Querube Makalintal were also made jointly and severally liable to DBP. DBP was also given the right to designate its comptroller in ICP. Petitioner's insistence that DBP excluded

the joint and several liabilities of the majority stockholders of ICP and AC and of Querube Makalintal has to be rejected. It is true that DBP's Industrial Project Department recommended the amendment of this condition. However, no proof was offered to prove that the DBP Board of Directors approved such recommendation. Petitioner also points to the alleged non-implementation of the guarantee by PEFLGC to demonstrate that the loan was under-collateralized at the time of its approval. But the evidence presented shows that the PEFLGC approved the guarantee, although the approval lapsed in 1985. Thus, it cannot be gainsaid that, at the time of the approval of the loan, there was a guarantee by PEFLGC. Besides, even if we exclude as security the guarantee of PEFLGC, the loan still had sufficient collaterals at the time of its approval. The contention that the loan was hastily granted also fails to persuade. The supplemental complaint alleged that the interim loan was granted on April 6, 1980. However, there was no allegation, much less proof, as to when ICPI applied for this interim loan. In the absence of such proof, we cannot conclude that the same was hastily granted. Neither does the industrial loan appear to have been hastily granted. Admittedly, the interim loan granted on April 6, 1980 formed part of ICPI's application for industrial or foreign currency loan in the amount of US$1,352,400.00. Logically then, we can assume that ICPI's application was filed earlier than April 6, 1980, the date of the approval of the interim loan. DBP, however, approved the industrial loan only on August 6, 1980. The processing period of more than four months is inconsistent with the claim that the loan was hastily granted. In sum, petitioner does not persuade us that the contract between ICPI and DBP was a behest loan.

9. ID.; ID.; ID.; NO CIRCUMSTANCES WERE SHOWN TO INDICATE A COMMON CRIMINAL DESIGN OF EITHER THE OFFICERS OF THE DEVELOPMENT BANK OF THE PHILIPPINES OR RESPONDENT COMPANY NOR THAT THEY COLLUDED TO CAUSE UNDUE INJURY TO THE GOVERNMENT BY GIVING UNWARRANTED BENEFITS.— We note that petitioner did not specify the precise role played by, or the participation of, each of the private respondents in the alleged violation of R.A. No. 3019. No concrete or overt acts of the ICP's directors and officers, particularly of Mr. Querube Makalintal, were specifically alleged or mentioned in

the complaint and its supplement, and no proof was adduced to show that they unduly influenced the directors and concerned officials of DBP. Neither were circumstances shown to indicate a common criminal design of either the officers of DPB or ICPI, nor that they colluded to cause undue injury to the government by giving unwarranted benefits to ICPI. The Ombudsman can hardly be faulted for not wanting to proceed with the prosecution of the offense, convinced that he does not possess the necessary evidence to secure a conviction.

APPEARANCES OF COUNSEL

Office of the Special Legal Counsel (PCGG) for petitioner.
Trio & Regalado for A.Ll. Reyes and R. Manalo.
Santiago & Santiago Law Office for R. Sison.
Estelito P. Mendoza and *Orlando A. Santiago* for R.V. Ongpin.
Gerodias Suchiangco Estrella for J. L.I. Edralin.
Cruz Durian Alday & Cruz-Matters for J. Tengco, Jr.

D E C I S I O N

NACHURA, *J.*:

The Presidential *Ad Hoc* Fact-Finding Committee on Behest Loans, (the Committee), representing the Presidential Commission on Good Government (PCGG), through Atty. Orlando L. Salvador (Atty. Salvador) filed this Petition for *Certiorari* seeking to nullify the September 3, 1999 Resolution[1] of the Office of the Ombudsman in OMB-0-95-0443, dismissing the criminal complaint filed against private respondents, and the June 6, 2000 Order[2] denying its reconsideration.

On October 8, 1992, President Fidel V. Ramos issued Administrative Order No. 13 creating the Presidential *Ad Hoc* Fact-Finding Committee on Behest Loans (Committee), which reads:

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[1] Annex "A", *rollo*, pp. 26-30.
[2] Annex "B", *id.* at 31-33.

WHEREAS, Sec. 28, Article II of the 1987 Constitution provides that "Subject to reasonable conditions prescribed by law, the State adopts and implements a policy of full public disclosure of all transactions involving public interest";

WHEREAS, Sec. 15, Article XI of the 1987 Constitution provides that "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";

WHEREAS, there have been allegations of loans, guarantees, or other forms of financial accommodation granted, directly or indirectly, by government owned and controlled bank or financial institutions, at the behest, command or urging by previous government officials to the disadvantage and detriment of the Philippine government and the Filipino people;

ACCORDINGLY, an "*Ad-Hoc* FACT FINDING COMMITTEE ON BEHEST LOANS" is hereby created to be composed of the following:

Chairman of the Presidential Commission on Good Government	- Chairman
The Solicitor General	- Vice-Chairman
Representative from the Office of the Executive Secretary	- Member
Representative from the Department of Finance	- Member
Representative from the Department of Justice	- Member
Representative from the Development Bank of the Philippines	- Member
Representative from the Philippine National Bank	- Member
Representative from the Asset Privatization Trust	- Member
Government Corporate Counsel	- Member

Representative from the
Philippine Export and Foreign
Loan Guarantee Corporation - Member

The *Ad Hoc* Committee shall perform the following functions:

1. Inventory all behest loans; identify the lenders and borrowers, including the principal officers and stockholders of the borrowing firms, as well as the persons responsible for granting the loans or who influenced the grant thereof;

2. Identify the borrowers who were granted "friendly waivers", as well as the government officials who granted these waivers; determine the validity of these waivers;

3. Determine the courses of action that the government should take to recover those loans, and to recommend appropriate actions to the Office of the President within sixty (60) days from the date hereof.

The Committee is hereby empowered to call upon any department, bureau, office, agency, instrumentality or corporation of the government, or any officer or employee thereof, for such assistance as it may need in the discharge of its function.

By Memorandum Order No. 61 dated November 9, 1992, the functions of the Committee were subsequently expanded by including in its investigation, inventory and study all non-performing loans, whether behest or non-behest. It likewise provided for the following criteria which might be utilized as frame of reference in determining a behest loan, to wit:

1. It is under-collateralized;

2. The borrower corporation is undercapitalized;

3. Direct or indirect endorsement by high government officials like presence of marginal notes;

4. Stockholders, officers or agents of the borrower corporation are identified as cronies;

5. Deviation of use of loan proceeds from the purpose intended;

6. Use of corporate layering;

7. Non-feasibility of the project for which financing is being sought; and

8. Extraordinary speed in which the loan release was made.

Moreover, a behest loan may be distinguished from a non-behest loan in that while both may involve civil liability for non-payment or non-recovery, the former may likewise entail criminal liability.

Several loan accounts were referred to the Committee for its investigation, including the loan transactions between Comptronics Philippines, Inc. (CPI), now Integrated Circuits Philippines (ICPI), and the Development Bank of the Philippines (DBP).

After examining and studying the loan transactions, the Committee determined that they bore the characteristics of a behest loan as defined under Memorandum Order No. 61. Consequently, Atty. Orlando L. Salvador, Consultant of the Committee, and representing the PCGG, filed with the Office of the Ombudsman a sworn complaint[3] for violation of Section 3(e)(g) of Republic Act (R.A.) No. 3019, or the *Anti-Graft and Corrupt Practices Act,* against the Concerned Members of the DBP Board of Governors, and Concerned Directors and Officers of ICPI, namely, Querube Makalintal, Ambrosio C. Makalintal, Vicente R. Jayme, Antonio A. Santiago, Edgar L. Quinto, Horacio G. Makalintal, Alfredo F. delos Angeles, Josery D. Ruede, Manuel Tupaz, Alberto T. Perez and Gerardo A. Limjuco (private respondents).

Atty. Salvador alleged that ICPI applied for an industrial loan (foreign currency loan) of US$1,352,400.00, or ₱10,143,000.00, from DBP. The loan application was approved on August 6, 1980 under DBP Board Resolution No. 2924. Atty. Salvador claimed that there was undue haste in the approval of the loan. He also alleged that prior to its approval, ICPI was granted an interim loan of ₱1,786,000.00 to cover the project's initial financing requirement. He added that the ICPI's industrial loan was under-collateralized and ICPI was

[3] *Id*. at 47-50.

undercapitalized at the time the loan was granted. ICPI's paid up capital by then was only ₱3,000,000.00, while the appraised value of the machinery and equipment offered as collaterals was only ₱5,943,610.00. Atty. Salvador concluded that ICPI was undeserving of the concession given to it, and the approval of the loan constitutes a violation of Section 3(e)(g) of R.A. No. 3019.

On March 13, 1996, Atty. Salvador filed a Supplementary Complaint Affidavit,[4] to include in his complaint ICPI's interim loan of ₱1,786,000.00, which he claimed was granted with undue haste and without collateral, except a promissory note and comfort letter signed by DBP Chairman Rafael Sison. He added that the stockholders, officers and agents are identified cronies, since the Chairman of the Board – Querube Makalintal – was, at the same time, the then Speaker of the Interim Batasang Pambansa. He named Rafael A. Sison, Jose Tengco, Alice Ll. Reyes, and Casimiro Tanedo as the ones responsible for the approval of the loan who should, thus, be charged, along with the officers and directors of ICPI, for violation of R.A. No. 3019.

After evaluating the evidence submitted by the Committee, the Ombudsman issued the assailed Memorandum, finding that:

> After going over the record, we find no probable cause to warrant the filing of the instant case in court.
>
> To start with, the cause of action has prescribed.
>
> The loan in [question] was entered into between ICPI and DBP sometime in August 1980, while the complaint was filed on February 17, 1995 only, or after the lapse of almost fifteen years. Under Section 11, RA 3019, offenses committed before March 16, 1982, prescribed in ten (10) years.
>
> The transaction was duly documented and the instruments drawn in support thereof were duly registered and open to public scrutiny, the prescriptive period of any legal action in connection with the said transaction commenced to run from the date the same was registered sometime in 1980.

[4] *Id*. at 60-63.

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Complainant's allegation that the questioned loans were not covered by sufficient collaterals is negated by the evidence on record. It appears from the Executive Summary attached to the complaint that ICPI loans were secured by the following, to wit: (a) Machinery and Equipment to be acquired valued at ₱5,943,610.00; (b) The Philippine Export and Foreign Loan Guarantee Corporation guarantee up to 70% of the proposed DBP loan or ₱7,100,000.00; (c) By the Joint and several signatures with ICPI, Philippine Underwriter Finance Corporation; Atrium Capital Corporation, Mr. Ambrocio and Querube Macalintal. The value of the machineries and equipment and the amount guaranteed by Philippine Export and Foreign Loan Guarantee Corporation have a total amount ₱13,043,610.00. ICPI's paid up capital in the amount of ₱3,000,000.00 was also considered as additional security. The aggregate value of ICPI's securities was therefore ₱16,043,610.00, while the total amount of loans granted was only ₱10,143,000.00. Clearly, therefore, the loans granted to ICPI were not undercollaterized (sic).

Moreover, ICPI had an authorized capital stock of ₱10 Million of which ₱3 Million had been paid up or more than 25% of the authorized capital. It cannot be said that the corporation is undercapitalized.

In fine, the questioned loans were not considered behest loans within the purview of Memorandum Order No. 61, dated November 9, 1992 (Broadening the Scope of the *Ad-Hoc* Fact-Finding Committee on Behest Loans Created Pursuant to Administrative Order No. 13, dated October 8, 1992).

Finally, the aforesaid Administrative and Memorandum Orders both issued by the President in 1992, may not be retroactively applied to the questioned transactions which took place in 1980 because to do so would be tantamount to an *ex post facto* law which is proscribed by the Constitution.[5]

Thus, the Ombudsman disposed:

WHEREFORE, premises considered, let the instant complaint be, as the same is hereby, DISMISSED.

SO RESOLVED.[6]

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[5] *Id*. at 28-30.

[6] *Id*. at 30.

A motion for reconsideration was filed, but the Ombudsman denied the same on June 6, 2000.[7]

Hence, this petition for *certiorari*.

Before tackling the issues raised by the petitioner, this Court takes notice of a serious procedural flaw. Joseph Edralin, Roberto Ongpin, Verden Dangilan and Rodolfo Manalo were impleaded as respondents in this petition. However, they were not made respondents in the proceedings before the Ombudsman. Neither was there any allegation in the sworn-complaint and supplementary complaint executed by Atty. Salvador before the Ombudsman that Edralin, Ongpin, Dangilan and Manalo had any participation in, or were responsible for, the approval of the questioned loan. As such, they cannot be made respondents for the first time in this petition. Accordingly, we dismiss the petition as against them.

With the procedural issue resolved, this Court now comes to the issues raised by the petitioner.

Petitioner alleges that the Ombudsman committed grave abuse of discretion amounting to lack or excess of jurisdiction in ruling that (i) the offenses subject of its criminal complaint had prescribed; (ii) Administrative Order No. 13 and Memorandum Order No. 61 are *ex post facto* laws; and (iii) there is no probable cause to indict private respondents for violation under Section 3(e)(g) of R.A. No. 3019.

The computation of the prescriptive period for offenses involving the acquisition of behest loans had already been laid to rest in *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Desierto*,[8] thus:

> [I]t was well-nigh impossible for the State, the aggrieved party, to have known the violations of R.A. No. 3019 at the time the questioned transactions were made because, as alleged, the public officials concerned connived or conspired with the "beneficiaries of the loans." Thus, we agree with the COMMITTEE that the prescriptive

[7] *Id*. at 31-33.

[8] 375 Phil. 697 (1999).

period for the offenses with which the respondents in OMB-0-96-0968 were charged should be computed from the discovery of the commission thereof and not from the day of such commission.[9]

The ruling was reiterated in *Presidential Ad Hoc Fact-Finding Committee on Behest Loans v. Ombudsman Desierto*,[10] wherein the Court explained:

> In cases involving violations of R.A. No. 3019 committed prior to the February 1986 EDSA Revolution that ousted President Ferdinand E. Marcos, we ruled that the government as the aggrieved party could not have known of the violations at the time the questioned transactions were made. Moreover, no person would have dared to question the legality of those transactions. Thus, the counting of the prescriptive period commenced from the date of discovery of the offense in 1992 after an exhaustive investigation by the Presidential Ad Hoc Committee on Behest Loans.[11]

The Sworn Statement filed by Atty. Salvador did not specify the exact dates when the alleged offenses were discovered. However, the records show that it was the Committee that discovered the same. As such, the discovery could not have been made earlier than October 8, 1992, the date when the Committee was created. The complaint was filed on February 17, 1995, less than three (3) years from the presumptive date of discovery. Thus, the criminal offenses allegedly committed by the private respondents had not yet prescribed when the complaint was filed.

Likewise, we do not agree with the Ombudsman's declaration that Administrative Order No. 13 and Memorandum Order No. 61 cannot be applied retroactively to the questioned transactions because to do so would violate the constitutional prohibition against *ex post facto* laws.

An *ex post facto* law has been defined as one — (a) which makes an action done before the passing of the law and which

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[9] *Id*. at 724.

[10] 415 Phil. 723 (2001).

[11] *Id*. at 729-730.

was innocent when done criminal, and punishes such action; or (b) which aggravates a crime or makes it greater than it was when committed; or (c) which changes the punishment and inflicts a greater punishment than the law annexed to the crime when it was committed; or (d) which alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the defendant;[12] or (e) which assumes to regulate civil rights and remedies only, but in effect imposes a penalty or deprivation of a right which when exercised was lawful; or (f) which deprives a person accused of a crime of some lawful protection to which he has become entitled, such as the protection of a former conviction or acquittal, or a proclamation of amnesty.[13]

The constitutional proscription of *ex post facto* laws is aimed against the retrospectivity of penal laws. Penal laws are acts of the legislature which prohibit certain acts and establish penalties for their violations; or those that define crimes, treat of their nature, and provide for their punishment.[14]

Administrative Order No. 13 does not mete out a penalty for the act of granting behest loans. It merely creates the Presidential *Ad Hoc* Fact-Finding Committee on Behest Loans and provides for its composition and functions. Memorandum Order No. 61, on the other hand, simply provides the frame of reference in determining the existence of behest loans. Not being penal laws, Administrative Order No. 13 and Memorandum Order No. 61 cannot be characterized as *ex-post facto* laws.

Furthermore, in *Estarija v. Ranada*,[15] in which petitioner raised the issue of constitutionality of R.A. No. 6770 in his

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[12] *Chavez v. Romulo*, G.R. No. 157036, June 9, 2004, 431 SCRA 534, 565.

[13] *Lacson v. Executive Secretary*, 361 Phil. 251, 275 (1999).

[14] *Orlando L. Salvador v. Placido L. Mapa, et al.*, G.R. No. 135080, November 28, 2007.

[15] G.R. No. 159314, June 26, 2006, 492 SCRA 652, 665.

motion for reconsideration of the Ombudsman's decision, we had occasion to state that the Ombudsman had no jurisdiction to entertain questions on the constitutionality of a law. The Ombudsman, therefore, acted in excess of its jurisdiction in delving into the constitutionality of the subject administrative and memorandum orders.

Now, on the merits of the case.

Private respondents were charged with violation of Section 3(e)(g) of R.A. No. 3019. The pertinent provisions read:

> Sec. 3. *Corrupt practices of public officers*. — In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:
>
> xxx xxx xxx
>
> (e) Causing any undue injury to any party, including the Government, or giving any private party any unwarranted benefits, advantage or preference in the discharge of his official, administrative or judicial functions through manifest partiality, evident bad faith or gross inexcusable negligence. This provision shall apply to officers and employees of officers or government corporations charged with the grant of licenses or permits or other concessions.
>
> xxx xxx xxx
>
> (g) Entering, on behalf of the Government, into any contract or transaction manifestly and grossly disadvantageous to the same, whether or not the public officer profited or will profit thereby.

Petitioner asserts that the loan transaction between DBP and ICPI bore the characteristics of a behest loan. It claims that the loan was under-collateralized and ICPI was under-capitalized when the questioned loan was hastily granted. Petitioner believes that there exists probable cause to indict the private respondents for violation of Section 3(e)(g) of R.A. No. 3019.

Case law has it that the determination of probable cause against those in public office during a preliminary investigation

is a function that belongs to the Office of the Ombudsman.[16] The Ombudsman is empowered to determine, in the exercise of his discretion, whether probable cause exists, and to charge the person believed to have committed the crime as defined by law. As a rule, courts should not interfere with the Ombudsman's investigatory power, exercised through the Ombudsman Prosecutors, and the authority to determine the presence or absence of probable cause, except when the finding is tainted with grave abuse of discretion amounting to lack or excess of jurisdiction.[17]

For one to have violated Section 3(e) of R.A. No. 3019, the following elements must be established: 1) the accused must be a public officer discharging administrative, judicial or official functions; 2) he must have acted with manifest partiality, evident bad faith or inexcusable negligence; and 3) he must have caused undue injury to any party, including the government, or given any private party unwarranted benefits, advantage or preference, in the discharge of his functions.[18] Evidently, mere bad faith or partiality and negligence *per se* are not enough for one to be held liable under the law. It is required that the act constitutive of bad faith or partiality must, in the first place, be evident or manifest, while the negligent deed should be both gross and inexcusable. Further, it is necessary to show that any or all of these modalities resulted in undue injury to a specified party.[19]

On the other hand, to be liable under Section 3(g), there must be a showing that private respondents entered into a grossly disadvantageous contract on behalf of the government.

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[16] *Ramiscal, Jr. v. Sandiganbayan*, G.R. Nos. 169727-28, August 18, 2006, 499 SCRA 375, 394.

[17] *Collantes v. Marcelo*, G.R. Nos. 167006-07, August 14, 2007, 530 SCRA 142, 150-151.

[18] *Uriarte v. People,* G.R. No. 169251, December 20, 2006, 511 SCRA 471, 486; *Santos v. People*, G.R. No. 161877, March 23, 2006, 485 SCRA 185, 194; *Cabrera v. Sandiganbayan*, G.R. Nos. 162314-17, October 25, 2004, 441 SCRA 377, 386.

[19] *Collantes v. Marcelo*, *supra* note 17, at 153.

Petitioner did not satisfy either criterion.

It is clear from the records that the DBP officers studied and evaluated ICPI's request for an interim loan and an industrial loan, and they were convinced that ICPI was deserving of the grant, considering the viability and economic desirability of its project. Petitioners failed to demonstrate that DBP did not exercise sound business judgment when it approved the loan. Neither was there any proof that the conditions imposed for the loan were specially designed in order to favor ICPI.

The Chapter on Human Relations of the Civil Code directs every person, *inter alia*, to observe good faith, which springs from the fountain of good conscience.[20] Well-settled is the rule that good faith is presumed. Specifically, a public officer is presumed to have acted in good faith in the performance of his duties.

Mistakes committed by a public officer are not actionable, absent a clear showing that he was motivated by malice or gross negligence amounting to bad faith.[21] "Bad faith" does not simply connote bad moral judgment or negligence. There must be some dishonest purpose or some moral obliquity and conscious doing of a wrong, a breach of a sworn duty through some motive or intent, or ill will. It partakes of the nature of fraud. It contemplates a state of mind affirmatively operating with furtive design or some motive of self-interest or ill will for ulterior purposes.[22] Petitioners utterly failed to show that private respondents' actions fit such description.

Neither was there any convincing proof offered to demonstrate that the contracts were grossly disadvantageous to the Government, or that they were entered into to give ICPI unwarranted benefits and advantages.

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[20] *Venus v. Desierto*, 358 Phil. 675, 697 (1998).

[21] *Saber v. Court of Appeals*, G.R. No. 132981, August 31, 2004, 437 SCRA 259, 278.

[22] *Mendoza-Arce v. Office of the Ombudsman (Visayas)*, 430 Phil 101, 115 (2002); *Baylon v. Office of the Ombudsman*, 423 Phil. 705, 724 (2001); *Llorente, Jr. v. Sandiganbayan,* 350 Phil. 820, 843 (1998).

Petitioner asserts that ICPI was undeserving of the accommodation given by DBP. To support this allegation, petitioners quoted a portion of the credit evaluation report, which reads:

> Investigations conducted by DBP's Credit Department revealed adverse findings on ICPI and Mr. Gene Vicente Tamesis, who until recently, has been the principal stockholder and executive officer of subject Corporation. x x x Mr. Tamesis, however, has since transferred all of his shareholdings to Mr. Ambrosio G. Makalintal. Aware of Mr. Tamesis' unfavorable credit standing, ICPI's management has, further, caused him to yield his position as Chairman of the Board in favor of Mr. Querube C. Makalintal, former Justice of the Supreme Court and presently Speaker of the Interim Batasang Pambansa.[23]

But we note that the said credit investigation report goes further, and states:

> With the responsible management of the Makalintals and the conversion of substantial liabilities of ICPI into equity (subject-firm's major creditors, namely, Philippine Underwriters Finance Corporation and Atrium Capital Corporation have both agreed, in principle, to convert their claims into equity), the corporation can now operate on a clean credit slate and stands a good chance of meeting its credit obligations.[24]

There is, thus, no solid basis for petitioners to claim that ICPI did not deserve the concession given by DBP.

Contrary to what petitioner wants to portray, the contracts between ICPI and DBP were not behest loans. ICPI was not under-capitalized and the loan was not under-collateralized at the time of its approval. Likewise, the approval can hardly be depicted as one done with undue haste.

The records show that in 1979, Atrium Capital Corporation and Philippine Underwriter's Corporation agreed on the conversion of their ₱8,500,000.00 worth of creditor's equity

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[23] *Rollo* (Vol. 1), pp. 98-99.

[24] *Id*. at 99.

into capital stocks.[25] Then, in 1980, the individual stockholders paid their respective subscriptions amounting to ₱3,000,000.00, thereby increasing ICPI's paid up capital to ₱11,500,000.00 as of April 23, 1980.[26] This belies petitioners' claim that, at that time, ICPI was under-capitalized.

Similarly, the industrial loan was sufficiently collateralized at the time of its approval. It was granted on the condition that the assets intended for acquisition by ICPI would serve as collateral. The Philippine Export and Foreign Loan Guarantee Corporation (PEFLGC) also guaranteed 70% of the loan extended. ICPI was further required to assign to DBP not less than 67% of its total subscribed and outstanding voting shares, which should be maintained at all times and should subsist during the existence of the loan. As additional security, ICPI's majority stockholders, namely, Integrated Circuits Philippine, Inc. (ICP) of Philippine Underwriters Finance Corporation, Atrium Corporation (AC), Ambrosio G. Makalintal and Querube Makalintal were also made jointly and severally liable to DBP. DBP was also given the right to designate its comptroller in ICP.[27]

Petitioner's insistence that DBP excluded the joint and several liabilities of the majority stockholders of ICP and AC and of Querube Makalintal has to be rejected. It is true that DBP's Industrial Project Department recommended the amendment of this condition. However, no proof was offered to prove that the DBP Board of Directors approved such recommendation.

Petitioner also points to the alleged non-implementation of the guarantee by PEFLGC to demonstrate that the loan was under-collateralized at the time of its approval. But the evidence[28] presented shows that the PEFLGC approved the guarantee, although the approval lapsed in 1985. Thus, it cannot be gainsaid

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[25] *Id*. at 92.

[26] *Id*. at 67.

[27] Minutes No. 31, August 6, 1980, *id*. at 42.

[28] Annex "J", *id*. at 206-208.

that, at the time of the approval of the loan, there was a guarantee by PEFLGC. Besides, even if we exclude as security the guarantee of PEFLGC, the loan still had sufficient collaterals at the time of its approval.

The contention that the loan was hastily granted also fails to persuade. The supplemental complaint alleged that the interim loan was granted on April 6, 1980. However, there was no allegation, much less proof, as to when ICPI applied for this interim loan. In the absence of such proof, we cannot conclude that the same was hastily granted.

Neither does the industrial loan appear to have been hastily granted. Admittedly, the interim loan granted on April 6, 1980 formed part of ICPI's application for industrial or foreign currency loan in the amount of US$1,352,400.00. Logically then, we can assume that ICPI's application was filed earlier than April 6, 1980, the date of the approval of the interim loan. DBP, however, approved the industrial loan only on August 6, 1980. The processing period of more than four months is inconsistent with the claim that the loan was hastily granted.[29]

In sum, petitioner does not persuade us that the contract between ICPI and DBP was a behest loan.

Finally, we note that petitioner did not specify the precise role played by, or the participation of, each of the private respondents in the alleged violation of R.A. No. 3019. No concrete or overt acts of the ICP's directors and officers, particularly of Mr. Querube Makalintal, were specifically alleged or mentioned in the complaint and its supplement, and no proof was adduced to show that they unduly influenced the directors and concerned officials of DBP. Neither were circumstances shown to indicate a common criminal design of either the officers of DPB or ICPI, nor that they colluded to cause undue injury to the government by giving unwarranted benefits to ICPI.

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[29] See *Presidential Commission on Good Government v. Hon. Aniano Desierto, et al.,* G.R. No. 139296, November 23, 2007.

The Ombudsman can hardly be faulted for not wanting to proceed with the prosecution of the offense, convinced that he does not possess the necessary evidence to secure a conviction.

WHEREFORE, the petition is *DENIED*. The assailed Memorandum and Order of the Ombudsman in OMB-0-95-0443, are *AFFIRMED*.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio Morales, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Reyes, and *Leonardo-de Castro, JJ.,* concur.

THIRD DIVISION

[G.R. No. 145402. March 14, 2008]

MERALCO INDUSTRIAL ENGINEERING SERVICES CORPORATION, *petitioner, vs.* **NATIONAL LABOR RELATIONS COMMISSION, OFELIA P. LANDRITO GENERAL SERVICES and/or OFELIA P. LANDRITO,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; JUDGMENTS; LAW OF THE CASE PRINCIPLE; THE NATIONAL LABOR RELATIONS COMMISSION'S RESOLUTION WHICH HAS SINCE BECOME FINAL AND EXECUTORY CAN NO LONGER BE DISTURBED FOR IT NOW TO CONSTITUTE THE LAW OF THE CASE. — When private respondents questioned the said NLRC Resolution in a Petition for *Certiorari* with this Court, docketed as G.R. No. 111506, this Court found that the NLRC did not commit grave abuse of discretion in the issuance thereof and accordingly dismissed private respondents' Petition. Said NLRC Resolution, therefore, has since become final and

executory and can no longer be disturbed for it now constitutes the law of the case. Assuming for the sake of argument that the Court of Appeals can still take cognizance of the issue of petitioner's liability for complainants' separation pay, petitioner asserts that the appellate court seriously erred in concluding that it is jointly and solidarily liable with private respondents for the payment thereof. The payment of separation pay should be the sole responsibility of the private respondents because there was no employer-employee relationship between the petitioner and the complainants, and the payment of separation pay is not a labor standards benefit. *Law of the case* has been defined as the opinion delivered on a former appeal. It is a term applied to an established rule that when an appellate court passes on a question and remands the case to the lower court for further proceedings, the **question there settled becomes the law of the case upon subsequent appeal**. It means that whatever is once irrevocably established as the controlling legal rule or decision between the same parties in the same case continues to be the law of the case, *whether correct on general principles or not*, so long as the facts on which such decision was predicated continue to be the facts of the case before the court. Indeed, courts must adhere thereto, whether the legal principles laid down were "correct on general principles or not" or "whether the question is right or wrong" because public policy, judicial orderliness and economy require such stability in the final judgments of courts or tribunals of competent jurisdiction.

2. ID.; ID.; ID.; APPLICATION OF THE LAW OF THE CASE PRINCIPLE IN CASE AT BAR IS MISPLACED; ISSUE REGARDING PETITIONER'S LIABILITY FOR PAYMENT OF SEPARATION PAY WAS YET TO BE RESOLVED AND THE LABOR ARBITER WILL STILL MAKE A DETERMINATION ON WHO SHOULD FINALLY SHOULDER THE MONETARY AWARDS GRANTED TO COMPLAINANTS. — Petitioner's application of the *law of the case* principle to the case at bar as regards its liability for payment of separation pay is misplaced. The only matters settled in the 23 May 1994 Resolution of this Court in G.R. No. 111506, which can be regarded as the *law of the case*, were (1) both the petitioner and the private respondents were jointly and solidarily liable for the judgment awards due the complainants; and (2) the said judgment awards shall be enforced against the surety bond

posted by the private respondents. However, the issue as regards the liability of the petitioner for payment of separation pay was yet to be resolved because precisely, the NLRC, in its Order dated 30 July 1993, still directed the Labor Arbiter to make a determination on who should finally shoulder the monetary awards granted to the complainants. And it was only after G.R. No. 111506 was dismissed by this Court that the Labor Arbiter promulgated his Decision dated 5 October 1994, wherein he clarified the respective liabilities of the petitioner and the private respondents for the judgment awards. In his 5 October 1994 Decision, the Labor Arbiter explained that the solidary liability of the petitioner was limited to the monetary awards for wage underpayment and non-payment of overtime pay due the complainants, and it did not, in any way, extend to the payment of separation pay as the same was the sole liability of the private respondents.

3. LABOR AND SOCIAL LEGISLATION; LABOR STANDARDS; PAYMENT OF WAGES; SOLIDARY LIABILITY; WHILE IT IS TRUE THAT PETITIONER WAS THE INDIRECT EMPLOYER OF THE COMPLAINANTS, IT CANNOT BE HELD LIABLE IN THE SAME WAY AS THE EMPLOYER IN EVERY RESPECT; PETITIONER MAY BE CONSIDERED AN INDIRECT EMPLOYER ONLY FOR PURPOSES OF UNPAID WAGES AND NOT FOR PAYMENT OF UNPAID SEPARATION PAY. — The Court of Appeals indeed erred when it ruled that the petitioner was jointly and solidarily liable with the private respondents as regards the payment of separation pay. The appellate court used as basis Article 109 of the Labor Code, as amended, in holding the petitioner solidarily liable with the private respondents for the payment of separation pay: ART. 109. Solidary Liability.— The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor **for any violation of any provision of this Code**. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers. However, the afore-quoted provision must be read in conjunction with Articles 106 and 107 of the Labor Code, as amended. Article 107 of the Labor Code, as amended, defines an indirect employer as "any person, partnership, association or corporation which, not being an employer, contracts with an independent contractor for the

performance of any work, task, job or project." To ensure that the contractor's employees are paid their appropriate wages, Article 106 of the Labor Code, as amended, provides: ART. 106. *CONTRACTOR OR SUBCONTRACTOR*. – x x x. In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him. Taken together, an indirect employer (as defined by Article 107) can only be held solidarily liable with the independent contractor or subcontractor (as provided under Article 109) in the event that the latter fails to pay the wages of its employees (as described in Article 106). Hence, while it is true that the petitioner was the indirect employer of the complainants, it cannot be held liable in the same way as the employer in every respect. The petitioner may be considered an indirect employer **only for purposes of unpaid wages**.

4. ID.; ID.; ID.; ID.; PETITIONER CANNOT BE HELD LIABLE FOR UNPAID SEPARATION PAY AND BACKWAGES SINCE THERE IS NO ALLEGATION, MUCH LESS PROOF PRESENTED, THAT IT CONSPIRED WITH PRIVATE RESPONDENTS IN THE ILLEGAL DISMISSAL OF THE LATTER'S EMPLOYEES. — There is no question that private respondents are operating as an independent contractor and that the complainants were their employees. There was no employer-employee relationship that existed between the petitioner and the complainants and, thus, the former could not have dismissed the latter from employment. Only private respondents, as the complainants' employer, can terminate their services, and should it be done illegally, be held liable therefor. The only instance when the principal can also be held liable with the independent contractor or subcontractor for the backwages and separation pay of the latter's employees is when there is proof that the principal conspired with the independent contractor or subcontractor in the illegal dismissal of the employees, thus: The liability arising from an illegal dismissal is unlike an order to pay the statutory minimum wage, because the workers' right to such wage is derived from law. The proposition that payment of back wages and separation pay

should be covered by Article 109, which holds an indirect employer solidarily responsible with his contractor or subcontractor for "any violation of any provision of this Code," would have been tenable if there were proof — there was none in this case — that the principal/employer had conspired with the contractor in the acts giving rise to the illegal dismissal. It is the established fact of conspiracy that will tie the principal or indirect employer to the illegal dismissal of the contractor or subcontractor's employees. In the present case, there is no allegation, much less proof presented, that the petitioner conspired with private respondents in the illegal dismissal of the latter's employees; hence, it cannot be held liable for the same.

5. ID.; ID.; ID.; ID.; LIABILITY FOR PAYMENT OF SEPARATION PAY OF COMPLAINANTS CANNOT BE EXTENDED TO PETITIONER BASED ON CONTRACT; THE CONTRACT DOES NOT PROVIDE FOR SUCH A LIABILITY AND THE COURT CANNOT JUST READ THE SAME INTO THE CONTRACT WITHOUT POSSIBLY VIOLATING THE INTENTION OF THE PARTIES. — Neither can the liability for the separation pay of the complainants be extended to the petitioner based on contract. Contract Order No. 166-84 executed between the petitioner and the private respondents contains no provision for separation pay in the event that the petitioner terminates the same. It is basic that a contract is the law between the parties and the stipulations therein, provided that they are not contrary to law, morals, good customs, public order or public policy, shall be binding as between the parties. Hence, if the contract does not provide for such a liability, this Court cannot just read the same into the contract without possibly violating the intention of the parties.

6. ID.; ID.; ID.; ID.; PRIVATE RESPONDENT'S SOLE LIABILITY FOR THE SEPARATION PAY OF THEIR EMPLOYEES SHOULD HAVE BEEN DEEMED SETTLED AND ALREADY BEYOND THE POWER OF THE COURT OF APPEALS TO RESOLVE, SINCE IT WAS AN ISSUE NEVER RAISED BEFORE IT. — It is also worth noting that although the issue in CA-G.R. SP No. 50806 pertains to private respondents' right to reimbursement from petitioner for the "monetary awards" in favor of the complainants, they limited their arguments to the

monetary awards for underpayment of wages and non-payment of overtime pay, and were conspicuously silent on the monetary award for separation pay. Thus, private respondents' sole liability for the separation pay of their employees should have been deemed settled and already beyond the power of the Court of Appeals to resolve, since it was an issue never raised before it.

7. ID.; ID.; ID.; ID.; WITH PRIVATE RESPONDENT'S SURETY BOND, IT CAN BE SAID THAT THE PURPOSE OF THE LABOR CODE PROVISION ON CIVIL LIABILITY OF THE INDIRECT EMPLOYER IS ALREADY ACCOMPLISHED SINCE THE INTEREST OF THE COMPLAINANTS ARE ALREADY ADEQUATELY PROTECTED. — Although petitioner is not liable for complainants' separation pay, the Court conforms to the consistent findings in the proceedings below that the petitioner is solidarily liable with the private respondents for the judgment awards for underpayment of wages and non-payment of overtime pay. In this case, however, private respondents had already posted a surety bond in an amount sufficient to cover all the judgment awards due the complainants, including those for underpayment of wages and non-payment of overtime pay. The joint and several liability of the principal with the contractor and subcontractor were enacted to ensure compliance with the provisions of the Labor Code, principally those on statutory minimum wage. This liability facilitates, if not guarantees, payment of the workers' compensation, thus, giving the workers ample protection as mandated by the 1987 Constitution. With private respondents' surety bond, it can therefore be said that the purpose of the Labor Code provision on the solidary liability of the indirect employer is already accomplished since the interest of the complainants are already adequately protected. Consequently, it will be futile to continuously hold the petitioner jointly and solidarily liable with the private respondents for the judgment awards for underpayment of wages and non-payment of overtime pay. But while this Court had previously ruled that the indirect employer can recover whatever amount it had paid to the employees in accordance with the terms of the service contract between itself and the contractor, the said ruling cannot be applied in reverse to this case as to allow the private respondents (the independent

contractor), who paid for the judgment awards in full, to recover from the petitioner (the indirect employer).

8. ID.; ID.; ID.; ID.; PRIVATE RESPONDENTS HAVE NOTHING MORE TO RECOVER FROM PETITIONER; HAVING ALREADY RECEIVED FROM PETITIONER THE CORRECT AMOUNT OF WAGES AND BENEFITS, BUT FAILED TO TURN THEM OVER TO THE COMPLAINANTS, PRIVATE RESPONDENTS SHOULD SOLELY BEAR THE LIABILITY FOR THE UNDERPAYMENT OF WAGES AND NON-PAYMENT OF OVERTIME PAY. — Private respondents have nothing more to recover from petitioner. Petitioner had already handed over to private respondent the wages and other benefits of the complainants. Records reveal that it had complied with complainants' salary increases in accordance with the minimum wage set by Republic Act No. 6727 by faithfully adjusting the contract price for the janitorial services it contracted with private respondents. This is a finding of fact made by the Labor Arbiter, untouched by the NLRC and explicitly affirmed by the Court of Appeals, and which should already bind this Court. This Court is not a trier of facts. Well-settled is the rule that the jurisdiction of this Court in a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court is limited to reviewing only errors of law, not of fact, unless the factual findings complained of are completely devoid of support from the evidence on record, or the assailed judgment is based on a gross misapprehension of facts. Besides, factual findings of quasi-judicial agencies like the NLRC, when affirmed by the Court of Appeals, are conclusive upon the parties and binding on this Court. Having already received from petitioner the correct amount of wages and benefits, but having failed to turn them over to the complainants, private respondents should now solely bear the liability for the underpayment of wages and non-payment of the overtime pay.

APPEARANCES OF COUNSEL

Jose T. Collado, Jr. for petitioner.

Ishiwata, Ishiwata Fernadez Lizardo Barot & Associates and *Carlos & Associates* for O. P. Landrito.

D E C I S I O N

CHICO-NAZARIO, *J.*:

Before this Court is a Petition for Review on *Certiorari* under Rule 45 of the 1997 Revised Rules of Civil Procedure seeking to reverse and set aside (1) the Decision[1] of the Court of Appeals in CA-G.R. SP No. 50806, dated 24 April 2000, which modified the Decision[2] of the National Labor Relations Commission (NLRC), dated 30 January 1996 in NLRC NCR CA No. 001737-91 (NLRC NCR Case No. 00-09-04432-89), and thereby held the petitioner solidarily liable with the private respondents for the satisfaction of the separation pay of the latter's employees; and (2) the Resolution[3] of the appellate court, dated 27 September 2000, in the same case which denied the petitioner's Motion for Reconsideration.

Petitioner Meralco Industrial Engineering Services Corporation (MIESCOR) is a corporation duly organized and existing under the laws of the Republic of the Philippines and a client of private respondents. Private respondent Ofelia P. Landrito General Services (OPLGS) is a business firm engaged in providing and rendering general services, such as janitorial and maintenance work to its clients, while private respondent Ofelia P. Landrito is the Proprietor and General Manager of OPLGS.

The factual milieu of the present case is as follows:

On 7 November 1984, petitioner and private respondents executed Contract Order No. 166-84[4] whereby the latter would supply the petitioner janitorial services, which include labor,

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[1] Penned by Associate Justice Andres B. Reyes, Jr. with Associate Justices Fermin A. Martin, Jr. and Romeo A. Brawner, concurring; *rollo*, pp. 34-44.

[2] Penned by Commissioner Vicente S.E. Veloso with Presiding Commissioner Bartolome S. Carale and Commissioner Alberto R. Quimpo, concurring; *rollo*, pp. 120-133.

[3] *Id*. at 46.

[4] *Id*. at 60-63.

materials, tools and equipment, as well as supervision of its assigned employees, at petitioner's Rockwell Thermal Plant in Makati City. Pursuant thereto, private respondents assigned their 49 employees as janitors to petitioner's Rockwell Thermal Plant with a daily wage of ₱51.50 per employee.

On 20 September 1989, however, the aforesaid 49 employees (complainants) lodged a Complaint for illegal deduction, underpayment, non-payment of overtime pay, legal holiday pay, premium pay for holiday and rest day and night differentials[5] against the private respondents before the Labor Arbiter. The case was docketed as NLRC NCR Case No. 00-09-04432-89.

In view of the enactment of Republic Act No. 6727,[6] the contract between the petitioner and the private respondents was amended[7] for the 10th time on 3 November 1989 to increase the minimum daily wage per employee from ₱63.55 to ₱89.00 or ₱2,670.00 per month. Two months thereafter, or on 2 January 1990,[8] petitioner sent a letter to private respondents informing them that effective at the close of business hours on 31 January 1990, petitioner was terminating Contract Order No. 166-84. Accordingly, at the end of the business hours on 31 January 1990, the complainants were pulled out from their work at the petitioner's Rockwell Thermal Plant. Thus, on 27 February 1990, complainants amended their Complaint to include the charge of illegal dismissal and to implead the petitioner as a party respondent therein.

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[5] Records, pp. 1-6.

[6] Its complete title is "An Act to Rationalize Wage Policy Determination by Establishing the Mechanism and Proper Standards Therefor, Amending for the Purpose Article 99 of, and Incorporating Articles 120, 121, 122, 123, 124, 126 and 127 into, Presidential Decree No. 442, as Amended, Otherwise Known as the Labor Code of the Philippines, Fixing New Wage Rates, Providing Wage Incentives for Industrial Dispersal to the Countryside, and for Other Purposes." It is also known as the "Wage Rationalization Act." It took effect on 1 July 1989,

[7] *Rollo*, p. 65.

[8] *Id*. at 64.

Since the parties failed to settle amicably before the Labor Arbiter, they submitted their respective position papers and other pleadings together with their documentary evidence. Thereafter, a Decision was rendered by the Labor Arbiter on 26 March 1991, dismissing the Complaint against the petitioner for lack of merit, but ordering the private respondents to pay the complainants the total amount of ₱487,287.07 representing unpaid wages, separation pay and overtime pay; as well as attorney's fees in an amount equivalent to 10% of the award or ₱48,728.70. All other claims of the complainants against the private respondents were dismissed.[9]

Feeling aggrieved, private respondents appealed the aforesaid Decision to the NLRC. Private respondents alleged, among other things, that: (1) 48 of the 49 complainants had executed affidavits of desistance and they had never attended any hearing nor given any authority to anyone to file a case on their behalf; (2) the Labor Arbiter erred in not conducting a full-blown hearing on the case; (3) there is only one complainant in that case who submitted a position paper on his own; (4) the complainants were not constructively dismissed when they were not given assignments within a period of six months, but had abandoned their jobs when they failed to report to another place of assignment; and **(5) the petitioner, being the principal, was solidarily liable with the private respondents for failure to make an adjustment on the wages of the complainants.**[10] On 28 May 1993, the NLRC issued a Resolution[11] affirming the Decision of the Labor Arbiter dated 26 March 1991 **with the modification that the petitioner was solidarily liable with the private respondents**, ratiocinating thus:

We, however, disagree with the dismissal of the case against [herein petitioner]. Under Art. 107[12] **of the Labor Code of the**

[9] *Id*. at 83-84.

[10] *Id*. at 86-87.

[11] Penned by Commissioner Vicente S.E. Veloso with Commissioner Alberto R. Quimpo, concurring; *id*. at 86-97.

[12] ART. 107. *INDIRECT EMPLOYER*. The provisions of the immediately preceding Article shall likewise apply to any person, partnership, association

Philippines, [herein petitioner] is considered an indirect employer and can be held solidarily liable with [private respondents] as an independent contractor. Under Art. 109,[13] for purposes of determining the extent of its liability, [herein petitioner] is considered a direct employer, hence, it is solidarily liable for complainant's (sic) wage differentials and unpaid overtime. We find this situation obtaining in this case in view of the failure of [private respondents] to pay in full the labor standard benefits of complainants, in which case liability is limited thereto and does not extend to the establishment of employer-employee relations.[14] [Emphasis supplied].

Both private respondents and petitioner separately moved for reconsideration of the aforesaid Resolution of the NLRC. In their Motion for Reconsideration, private respondents reiterated that the complainants abandoned their work, so that private respondents should not be liable for separation pay; and that petitioner, not private respondents, should be liable for complainants' other monetary claims, *i.e.*, for wage differentials and unpaid overtime. The petitioner, in its own Motion for Reconsideration, asked that it be excluded from liability. It averred that private respondents should be solely responsible for their acts as it sufficiently paid private respondents all the benefits due the complainants.

On 30 July 1993, the NLRC issued an Order[15] noting that **based on the records of the case, the judgment award in the amount of ₱487,287.07 was secured by a surety bond**

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or corporation which, not being an employer, contracts with an independent contractor for the performance of any work, task, job or project.

[13] ART. 109. *SOLIDARY LIABILITY*. The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for any violation of any provision of this Code. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers.

[14] *Rollo*, pp. 88-89.

[15] Penned by Commissioner Vicente S.E. Veloso with Presiding Commissioner Bartolome S. Carale and Commissioner Alberto R. Quimpo, concurring; *id*. at 98-101.

posted by the private respondents;[16] hence, there was no longer any impediment to the satisfaction of the complainants' claims. Resultantly, the NLRC denied the private respondents' Motion for Reconsideration. The NLRC likewise directed the Labor Arbiter to enforce the monetary award against the private respondents' surety bond and to determine who should finally shoulder the liability therefor.[17]

Alleging grave abuse of discretion of the NLRC in its issuance of the Resolution and Order dated 28 May 1993 and 30 July 1993, respectively, private respondents filed before this Court a Petition for *Certiorari* with prayer for the issuance of a writ of preliminary injunction. The same was docketed as G.R. No. 111506 entitled *Ofelia Landrito General Services v. National Labor Relations Commission*. The said Petition suspended the proceedings before the Labor Arbiter.

On 23 May 1994, however, this Court issued a Resolution[18] dismissing G.R. No. 111506 for failure of private respondents to sufficiently show that the NLRC had committed grave abuse of discretion in rendering its questioned judgment. This Court's Resolution in G.R. No. 111506 became final and executory on 25 July 1994.[19]

As a consequence thereof, the proceedings before the Labor Arbiter resumed with respect to the determination of who should finally shoulder the liability for the monetary awards granted to the complainants, in accordance with the NLRC Order dated 30 July 1993.

On 5 October 1994, the Labor Arbiter issued an Order,[20] which reads:

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[16] Records, pp. 250-251.

[17] *Rollo*, p. 100.

[18] Records, p. 563.

[19] As shown in the Entry of Judgment bearing date 13 September 1994; *id*. at 573.

[20] Penned by Labor Arbiter Donato G. Quinto, Jr.; *rollo*, pp. 103-105.

As can be gleaned from the Resolution dated [28 May 1993], there is that necessity of clarifying the respective liabilities of [herein petitioner] and [herein private respondents] insofar as the judgment award in the total sum of ₱487,287.07 is concerned.

The **judgment award in the total sum of ₱487,287.07** as contained in the Decision dated [26 March 1991] **consists of three (3) parts**, as follows: **First**, the judgment award on the underpayment; **Second**, the judgment award on separation pay; and **Third**, the judgment award on the overtime pay.

The question now is: **Which of these awards is [petitioner] solidarily liable with [private respondents]?**

An examination of the record elicits the finding that [petitioner] is solidarily liable with [private respondents] on the judgment awards on the underpayment and on the non-payment of the overtime pay. xxx. **This joint and several liability of the contractor [private respondents] and the principal [petitioner] is mandated by the Labor Code** to assure compliance of the provisions therein, including the statutory minimum wage (Art. 99,[21] Labor Code). The contractor-agency is made liable by virtue of his status as direct employer. **The principal, on the other hand, is made the indirect employer of the contractor-agency's employees for purposes of paying the employees their wages should the contractor-agency be unable to pay them**. **This joint and several liability facilitates, if not guarantees, payment of the workers performance of any work, task, job or project, thus giving the workers ample protection as mandated by the 1987 Constitution**.

In sum, the complainants may enforce the judgment award on underpayment and the non-payment of overtime pay against either [private respondents] and/or [petitioner].

However, in view of the finding in the Decision that [petitioner] had adjusted its contract price for the janitorial services it contracted with [private respondents] conforming to the provisions of Republic

[21] Art. 99. *Regional Minimum Wages*. The minimum wage rates for agricultural and non-agricultural employees and workers in each and every region of the country shall be those prescribed by the Regional Tripartite Wages and Productivity Boards. [As amended by Republic Act No. 6727 (Wage Rationalization Act)]. By virtue of Republic Act No. 6727 the Regional Tripartite Wage and Productivity Boards or RTWPBs have issued orders fixing the minimum wages for their respective regions.

Act No. 6727, should the complainants enforce the judgment on the underpayment and on the non-payment of the overtime pay aginst (sic) [petitioner], the latter can seek reimbursement from the former [meaning (private respondents)], but should the judgment award on the underpayment and on the non-payment of the overtime pay be enforced against [private respondents], the latter cannot seek reimbursement against [petitioner].

The judgment award on separation pay is the sole liability of [private respondents].

WHEREFORE, **[petitioner] is jointly and severally liable with [private respondents] in the judgment award on underpayment and on the non-payment of overtime pay. Should the complainants enforce the above judgment award against [petitioner], the latter can seek reimbursement against [private respondents], but should the aforementioned judgment award be enforced against [private respondents], the latter cannot seek reimbursement from the [petitioner]**.

The judgment award on the payment of separation pay is the sole liability of [private respondents].

Let an *alias* writ of execution be issued. [Emphasis supplied].

Again, both the private respondents and the petitioner appealed the afore-quoted Order of the Labor Arbiter to the NLRC. On 25 April 1995, the NLRC issued a Resolution[22] affirming the Order dated 5 October 1994 of the Labor Arbiter and dismissing both appeals for non-posting of the appeal or surety bond and/or for utter lack of merit.[23] When the private respondents and the petitioner moved for reconsideration, however, it was granted by the NLRC in its Order[24] dated 27 July 1995. The NLRC thus set aside its Resolution dated 25 April 1995, and directed the private respondents and the petitioner

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[22] Penned by Commissioner Vicente S.E. Veloso with Presiding Commissioner Bartolome S. Carale and Commissioner Alberto R. Quimpo, concurring; *rollo*, pp. 106-114.

[23] *Id*. at 113.

[24] *Id*. at 115-118.

to each post an appeal bond in the amount of ₱487,287.62 to perfect their respective appeals.[25] Both parties complied.[26]

On 30 January 1996, the NLRC rendered a Decision modifying the Order of the Labor Arbiter dated 5 October 1994, the dispositive portion of which reads:

> WHEREFORE, the [21 November 1994] appeal of [herein petitioner] is hereby granted. The [5 October 1994] Order of Labor Arbiter Donato G. Quinto, Jr., is modified to the extent that **it still held [petitioner] as "jointly and severally liable with [herein private respondents] in the judgment award on underpayment and on the non-payment of overtime pay," our directive being that the Arbiter should now satisfy said labor-standards award, as well as that of the separation pay, exclusively through the surety bond posted by [private respondents]**.[27] [Emphasis supplied].

Dissatisfied, private respondents moved for the reconsideration of the foregoing Decision, but it was denied by the NLRC in an Order[28] dated 30 October 1996. This NLRC Order dated 30 October 1996 became final and executory on 29 November 1996.

On 4 December 1996, private respondents filed a Petition for *Certiorari*[29] before this Court assailing the Decision and the Order of the NLRC dated 30 January 1996 and 30 October 1996, respectively. On 9 December 1998, this Court issued a

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[25] *Id*. at 117.

[26] Records, pp. 714-717 and 814-817.

[27] *Rollo*, pp. 132-133.

[28] *Id*. at 135-136.

[29] In *Molina v. Pacific Plans, Inc.*, G.R. No. 165476, 10 March 2006, 484 SCRA 498, 516, this Court ruled that: "Under Rule VII, Section 2 of the NLRC Omnibus Rules of Procedure, the decision of the NLRC becomes final and executory after ten (10) calendar days from receipt of the same. xxx. Nonetheless, the Court ruled in *St. Martin Funeral Home v. NLRC* that, although the 10-day period for finality of the NLRC decision may have elapsed as contemplated in the last paragraph of Section 223 of the Labor Code, the CA may still take cognizance of and resolve a petition for *certiorari* for the nullification of the decision of the NLRC on jurisdictional and due process considerations."

Resolution[30] referring the case to the Court of Appeals conformably with its ruling in *St. Martin Funeral Home v. National Labor Relations Commission*.[31] The case was docketed before the appellate court as CA-G.R. SP No. 50806.

The Petition made a sole assignment of error, to wit:

THE HONORABLE COMMISSION GRAVELY ERRED AND GRAVELY ABUSED ITS DISCRETION IN FINDING THAT THE ULTIMATE LIABILITY SHOULD FALL ON THE [HEREIN PRIVATE RESPONDENTS] ALONE, WITHOUT REIMBURSEMENT FROM THE [HEREIN PETITIONER], IN ORDER TO SATISFY THE MONETARY AWARDS OF THE [THEREIN COMPLAINANTS].[32]

After due proceedings, the Court of Appeals rendered the assailed Decision on 24 April 2000, **modifying the Decision of the NLRC dated 30 January 1996 and holding the petitioner solidarily liable with the private respondents for the satisfaction of the laborers' separation pay**. According to the Court of Appeals:

The [NLRC] adjudged the payment of separation pay to be the sole responsibility of [herein private respondents] because (1) there is no employer-employee relationship between [herein petitioner] and the forty-nine (49) [therein complainants]; (2) the payment of separation pay is not a labor standard benefit. We disagree.

> Again, We quote Article 109 of the Labor Code, as amended, *viz*:
>
> *"The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor for <u>any</u> violation of <u>any</u> provision of this Code…"*

The abovementioned statute speaks of "any violation of any provision of this Code." Thus, the existence or non-existence of employer-employee relationship and whether or not the violation is

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[30] CA *rollo*, pp. 186-187.

[31] G.R. No. 130866, 16 September 1998, 295 SCRA 494.

[32] CA *rollo,* p. 194.

one of labor standards is immaterial because said provision of law does not make any distinction at all and, therefore, this Court should also refrain from making any distinction. Concomitantly, [herein petitioner] should be jointly and severally liable with [private respondents] for the payment of wage differentials, overtime pay and separation pay of the [therein complainants]. The joint and several liability imposed to [petitioner] is, again, without prejudice to a claim for reimbursement by [petitioner] against [private respondents] for reasons already discusses (sic).

WHEREFORE, premises studiedly considered, the assailed 30 January 1996 decision of [the NLRC] is hereby **modified** insofar as **[petitioner] should be held solidarily liable with [the private respondents] for the satisfaction of the laborers' separation pay**. No pronouncement as to costs.[33] [Emphasis supplied].

The petitioner filed a Motion for Reconsideration of the aforesaid Decision but it was denied by the Court of Appeals in a Resolution dated 27 September 2000.

Petitioner now comes before this Court *via* a Petition for Review on *Certiorari*, docketed as G.R. No. 145402, raising the sole issue of "*whether or not the Honorable Court of Appeals palpably erred when it went beyond the issues of the case as it modified the factual findings of the Labor Arbiter which attained finality after it was affirmed by Public Respondent NLRC and by the Supreme Court which can no longer be disturbed as it became the law of the case*."[34]

Petitioner argues that in the assailed Decision dated 24 April 2000, the Court of Appeals found that the sole issue for its resolution was *whether the ultimate liability to pay the monetary awards in favor of the 49 employees falls on the private respondents without reimbursement from the petitioner*. Hence, the appellate court should have limited itself to determining the right of private respondents to still seek reimbursement from petitioner for the monetary awards on the unpaid wages and overtime pay of the complainants.

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[33] *Rollo*, pp. 42-44.

[34] *Id*. at 173.

According to petitioner, the NLRC, in its Resolution dated 28 May 1993, already found that petitioner had fully complied with its salary obligations to the complainants. Petitioner invokes the same NLRC Resolution to support its claim that it was not liable to share with the private respondents in the payment of separation pay to complainants. When private respondents questioned the said NLRC Resolution in a Petition for *Certiorari* with this Court, docketed as G.R. No. 111506, this Court found that the NLRC did not commit grave abuse of discretion in the issuance thereof and accordingly dismissed private respondents' Petition. Said NLRC Resolution, therefore, has since become final and executory and can no longer be disturbed for it now constitutes the law of the case.

Assuming for the sake of argument that the Court of Appeals can still take cognizance of the issue of petitioner's liability for complainants' separation pay, petitioner asserts that the appellate court seriously erred in concluding that it is jointly and solidarily liable with private respondents for the payment thereof. The payment of separation pay should be the sole responsibility of the private respondents because there was no employer-employee relationship between the petitioner and the complainants, and the payment of separation pay is not a labor standards benefit.

Law of the case has been defined as the opinion delivered on a former appeal. It is a term applied to an established rule that when an appellate court passes on a question and remands the case to the lower court for further proceedings, the **question there settled becomes the law of the case upon subsequent appeal**. It means that whatever is once irrevocably established as the controlling legal rule or decision between the same parties in the same case continues to be the law of the case, *whether correct on general principles or not*, so long as the facts on which such decision was predicated continue to be the facts of the case before the court.[35] Indeed, courts must adhere thereto, whether the legal principles laid down were "correct on general

[35] *Pelayo v. Perez*, G.R. No. 141323, 8 June 2005, 459 SCRA 475, 484, citing *Cucueco v. Court of Appeals*, G.R. No. 139278, 25 October 2004, 441 SCRA 290, 300-301.

principles or not" or "whether the question is right or wrong" because public policy, judicial orderliness and economy require such stability in the final judgments of courts or tribunals of competent jurisdiction.[36]

Petitioner's application of the *law of the case* principle to the case at bar as regards its liability for payment of separation pay is misplaced.

The only matters settled in the 23 May 1994 Resolution of this Court in G.R. No. 111506, which can be regarded as the *law of the case*, were (1) both the petitioner and the private respondents were jointly and solidarily liable for the judgment awards due the complainants; and (2) the said judgment awards shall be enforced against the surety bond posted by the private respondents. However, the issue as regards the liability of the petitioner for payment of separation pay was yet to be resolved because precisely, the NLRC, in its Order dated 30 July 1993, still directed the Labor Arbiter to make a determination on who should finally shoulder the monetary awards granted to the complainants. And it was only after G.R. No. 111506 was dismissed by this Court that the Labor Arbiter promulgated his Decision dated 5 October 1994, wherein he clarified the respective liabilities of the petitioner and the private respondents for the judgment awards. In his 5 October 1994 Decision, the Labor Arbiter explained that the solidary liability of the petitioner was limited to the monetary awards for wage underpayment and non-payment of overtime pay due the complainants, and it did not, in any way, extend to the payment of separation pay as the same was the sole liability of the private respondents.

Nonetheless, this Court finds the present Petition meritorious.

The Court of Appeals indeed erred when it ruled that the petitioner was jointly and solidarily liable with the private respondents as regards the payment of separation pay.

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[36] *Bañes v. Lutheran Church in the Philippines*, G.R. No. 142308, 15 November 2005, 475 SCRA 13, 31.

The appellate court used as basis Article 109 of the Labor Code, as amended, in holding the petitioner solidarily liable with the private respondents for the payment of separation pay:

> ART. 109. Solidary Liability. — The provisions of existing laws to the contrary notwithstanding, every employer or indirect employer shall be held responsible with his contractor or subcontractor **for any violation of any provision of this Code**. For purposes of determining the extent of their civil liability under this Chapter, they shall be considered as direct employers. [Emphasis supplied].

However, the afore-quoted provision must be read in conjunction with Articles 106 and 107 of the Labor Code, as amended.

Article 107 of the Labor Code, as amended, defines an indirect employer as "any person, partnership, association or corporation which, not being an employer, contracts with an independent contractor for the performance of any work, task, job or project." To ensure that the contractor's employees are paid their appropriate wages, Article 106 of the Labor Code, as amended, provides:

> ART. 106. *CONTRACTOR OR SUBCONTRACTOR*. – x x x.
>
> In the event that the contractor or subcontractor fails to pay the wages of his employees in accordance with this Code, the employer shall be jointly and severally liable with his contractor or subcontractor to such employees to the extent of the work performed under the contract, in the same manner and extent that he is liable to employees directly employed by him. [Emphasis supplied].

Taken together, an indirect employer (as defined by Article 107) can only be held solidarily liable with the independent contractor or subcontractor (as provided under Article 109) in the event that the latter fails to pay the wages of its employees (as described in Article 106).

Hence, while it is true that the petitioner was the indirect employer of the complainants, it cannot be held liable in the same way as the employer in every respect. The petitioner may be considered an indirect employer **only for purposes of**

unpaid wages. As this Court succinctly explained in *Philippine Airlines, Inc. v. National Labor Relations Commission;*[37]

> While USSI is an independent contractor under the security service agreement and PAL may be considered an indirect employer, that status did not make PAL the employer of the security guards in every respect. As correctly posited by the Office of the Solicitor General, PAL may be considered an indirect employer only for purposes of unpaid wages since Article 106, which is applicable to the situation contemplated in Section 107, speaks of wages. The concept of indirect employer only relates or refers to the liability for unpaid wages. Read together, Articles 106 and 109 simply mean that the party with whom an independent contractor deals is solidarily liable with the latter for unpaid wages, and only to that extent and for that purpose that the latter is considered a direct employer. The term "wage" is defined in Article 97(f) of the Labor Code as "the remuneration of earnings, however designated, capable of being expressed in terms of money, whether fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the unwritten contract of employment for work done or to be done, or for services rendered or to be rendered and includes the fair and reasonable value, as determined by the Secretary of Labor, of board, lodging, or other facilities customarily furnished by the employer to the employee."

Further, there is no question that private respondents are operating as an independent contractor and that the complainants were their employees. There was no employer-employee relationship that existed between the petitioner and the complainants and, thus, the former could not have dismissed the latter from employment. Only private respondents, as the complainants' employer, can terminate their services, and should it be done illegally, be held liable therefor. The only instance when the principal can also be held liable with the independent contractor or subcontractor for the backwages and separation pay of the latter's employees is when there is proof that the principal conspired with the independent contractor or subcontractor in the illegal dismissal of the employees, thus:

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[37] G.R. No. 120506, 28 October 1996, 263 SCRA 638, 656-657.

The liability arising from an illegal dismissal is unlike an order to pay the statutory minimum wage, because the workers' right to such wage is derived from law. The proposition that payment of back wages and separation pay should be covered by Article 109, which holds an indirect employer solidarily responsible with his contractor or subcontractor for "any violation of any provision of this Code," would have been tenable if there were proof — there was none in this case — that the principal/employer had conspired with the contractor in the acts giving rise to the illegal dismissal.[38]

It is the established fact of conspiracy that will tie the principal or indirect employer to the illegal dismissal of the contractor or subcontractor's employees. In the present case, there is no allegation, much less proof presented, that the petitioner conspired with private respondents in the illegal dismissal of the latter's employees; hence, it cannot be held liable for the same.

Neither can the liability for the separation pay of the complainants be extended to the petitioner based on contract. Contract Order No. 166-84 executed between the petitioner and the private respondents contains no provision for separation pay in the event that the petitioner terminates the same. It is basic that a contract is the law between the parties and the stipulations therein, provided that they are not contrary to law, morals, good customs, public order or public policy, shall be binding as between the parties.[39] Hence, if the contract does not provide for such a liability, this Court cannot just read the same into the contract without possibly violating the intention of the parties.

It is also worth noting that although the issue in CA-G.R. SP No. 50806 pertains to private respondents' right to reimbursement from petitioner for the "monetary awards" in favor of the complainants, they limited their arguments to the monetary awards for underpayment of wages and non-payment

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[38] *Rosewood Processing, Inc. v. National Labor Relations Commission*, G.R. Nos. 116476-84, 21 May 1998, 290 SCRA 408, 427.

[39] *Roxas v. De Zuzuarregui, Jr.*, G.R. No. 152072, 31 January 2006, 481 SCRA 258, 276.

of overtime pay, and were conspicuously silent on the monetary award for separation pay. Thus, private respondents' sole liability for the separation pay of their employees should have been deemed settled and already beyond the power of the Court of Appeals to resolve, since it was an issue never raised before it.[40]

Although petitioner is not liable for complainants' separation pay, the Court conforms to the consistent findings in the proceedings below that the petitioner is solidarily liable with the private respondents for the judgment awards for underpayment of wages and non-payment of overtime pay.

In this case, however, private respondents had already posted a surety bond in an amount sufficient to cover all the judgment awards due the complainants, including those for underpayment of wages and non-payment of overtime pay. The joint and several liability of the principal with the contractor and subcontractor were enacted to ensure compliance with the provisions of the Labor Code, principally those on statutory minimum wage. This liability facilitates, if not guarantees, payment of the workers' compensation, thus, giving the workers ample protection as mandated by the 1987 Constitution.[41] With private respondents' surety bond, it can therefore be said that the purpose of the Labor Code provision on the solidary liability of the indirect employer is already accomplished since the interest of the complainants are already adequately protected. Consequently, it will be futile to continuously hold the petitioner jointly and solidarily liable with the private respondents for the judgment awards for underpayment of wages and non-payment of overtime pay.

But while this Court had previously ruled that the indirect employer can recover whatever amount it had paid to the employees in accordance with the terms of the service contract between itself and the contractor,[42] the said ruling cannot be applied in reverse to this case as to allow the private respondents

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[40] See private respondents' Petition, CA *rollo*, pp. 7-15.

[41] *Rosewood Processing, Inc. v. National Labor Relations Commission*, *supra* note 38 at 425-426.

[42] *Id*.

(the independent contractor), who paid for the judgment awards in full, to recover from the petitioner (the indirect employer).

Private respondents have nothing more to recover from petitioner.

Petitioner had already handed over to private respondent the wages and other benefits of the complainants. Records reveal that it had complied with complainants' salary increases in accordance with the minimum wage set by Republic Act No. 6727 by faithfully adjusting the contract price for the janitorial services it contracted with private respondents.[43] This is a finding of fact made by the Labor Arbiter,[44] untouched by the NLRC[45] and explicitly affirmed by the Court of Appeals,[46] and which should already bind this Court.

This Court is not a trier of facts. Well-settled is the rule that the jurisdiction of this Court in a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court is limited to reviewing only errors of law, not of fact, unless the factual findings complained of are completely devoid of support from the evidence on record, or the assailed judgment is based on a gross misapprehension of facts. Besides, factual findings of quasi-judicial agencies like the NLRC, when affirmed by the Court of Appeals, are conclusive upon the parties and binding on this Court.[47]

Having already received from petitioner the correct amount of wages and benefits, but having failed to turn them over to the complainants, private respondents should now solely bear the liability for the underpayment of wages and non-payment of the overtime pay.

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[43] *Rollo*, pp. 40-41.

[44] *Id*. at 104-105.

[45] *Id*. at 120-133.

[46] *Id*. at 140-141.

[47] *Ramos v. Court of Appeals*, G.R. No. 145405, 29 June 2004, 433 SCRA 177, 182.

WHEREFORE, premises considered, the instant Petition is hereby *GRANTED*. The Decision and Resolution of the Court of Appeals dated 24 April 2000 and 27 September 2000, respectively, in CA-G.R. SP No. 50806, are hereby *REVERSED AND SET ASIDE*. The Decision dated 30 January 1996 of the National Labor Relations Commission in NLRC NCR CA No. 001737-91 (NLRC NCR Case No. 00-09-04432-89) is hereby *REINSTATED*. No costs.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Nachura, and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 147065. March 14, 2008]

JUANITO CHAN *y* LIM, *a.k.a.* ZHANG ZHENTING, *petitioner, vs.* **SECRETARY OF JUSTICE, PABLO C. FORMARAN III and PRESIDENTIAL ANTI-ORGANIZED CRIME TASK FORCE, represented by PO3 DANILO L. SUMPAY,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CRIMINAL PROCEDURE; PRELIMINARY INVESTIGATION; THE POWER OR AUTHORITY OF THE JUSTICE SECRETARY TO REVIEW THE PROSECUTOR'S FINDINGS SUBSISTS EVEN AFTER THE INFORMATION IS FILED IN COURT; THE COURT, HOWEVER, IS NOT BOUND BY THE RESOLUTION OF THE JUSTICE SECRETARY, BUT MUST EVALUATE IT BEFORE PROCEEDING WITH THE TRIAL. — Contrary to petitioner's view, *Crespo* subsists and was not superseded by *Allado. Allado,* which was punctuated by inordinate eagerness in the gathering of evidence and in the preliminary investigation, serves as an exception and may not be invoked unless similar circumstances are clearly shown to exist.

No such circumstances were established in the present case. In *Crespo,* the Court laid down the rule that once an Information is filed in court, any disposition of the case rests on the sound discretion of the court. In subsequent cases, the Court clarified that *Crespo* does not bar the Justice Secretary from reviewing the findings of the investigating prosecutor in the exercise of his power of control over his subordinates. The Justice Secretary is merely advised, as far as practicable, to refrain from entertaining a petition for review of the prosecutor's finding when the Information is already filed in court. In other words, the power or authority of the Justice Secretary to review the prosecutor's findings subsists even after the Information is filed in court. The court, however, is not bound by the Resolution of the Justice Secretary, but must evaluate it before proceeding with the trial. While the ruling of the Justice Secretary is persuasive, it is not binding on courts.

2. ID.; ID.; ID.; FINDINGS OF THE SECRETARY OF JUSTICE ARE NOT SUBJECT TO REVIEW UNLESS MADE WITH GRAVE ABUSE OF DISCRETION. — Albeit the findings of the Justice Secretary are not absolute and are subject to judicial review, this Court generally adheres to the policy of non-interference in the conduct of preliminary investigations, particularly when the said findings are well-supported by the facts as established by the evidence on record. Absent any showing of arbitrariness on the part of the prosecutor or any other officer authorized to conduct preliminary investigation, courts as a rule must defer to said officer's finding and determination of probable cause, since the determination of the existence of probable cause is the function of the prosecutor. Simply stated, findings of the Secretary of Justice are not subject to review, unless made with grave abuse of discretion. As held in one case: "The general rule is that the courts do not interfere with the discretion of the public prosecutor in determining the specificity and adequacy of the averments in a criminal complaint. The determination of probable cause for the purpose of filing an information in court is an executive function which pertains at the first instance to the public prosecutor and then to the Secretary of Justice. The duty of the Court in appropriate cases is merely to determine whether the executive determination was done without or in excess of jurisdiction or with grave abuse of discretion. Resolutions of the Secretary of Justice are not subject to review unless made with grave abuse." Thus,

the findings of the Justice Secretary may be reviewed through a petition for *certiorari* under Rule 65 based on the allegation that he acted with grave abuse of discretion. This remedy is available to the aggrieved party.

3. ID.; ID.; ID.; DECISION OF WHETHER TO DISMISS THE CASE OR NOT RESTS ON THE SOUND DISCRETION OF THE TRIAL COURT. — In dismissing the petition for *certiorari,* the CA primarily anchored its decision on *Crespo,* ratiocinating that it is without authority to restrain the lower court from proceeding with the case since the latter had already assumed jurisdiction. Such concern is clearly of no moment. In the petition for *certiorari,* the CA is not being asked to cause the dismissal of the case in the trial court, but only to resolve the issue of whether the Justice Secretary acted with grave abuse of discretion in affirming the finding of probable cause by the investigating prosecutor. Should it determine that the Justice Secretary acted with grave abuse of discretion, it could nullify his resolution and direct the State Prosecutor to withdraw the Information by filing the appropriate motion with the trial court. But the rule stands — the decision whether to dismiss the case or not rests on the sound discretion of the trial court where the Information was filed.

4. ID.; SPECIAL CIVIL ACTIONS; *CERTIORARI*; PETITION THEREFOR PROPER WHEN THERE IS NO PLAIN, SPEEDY AND ADEQUATE REMEDY. — A petition for *certiorari* may still be availed of even if there is an available remedy, when such remedy does not appear to be plain, speedy, and adequate in the ordinary course of law. The following excerpt from *Land Bank of the Philippines v. Court of Appeals* is instructive — The determination as to what exactly constitutes a plain, speedy and adequate remedy rests on judicial discretion and depends on the particular circumstances of each case. There are many authorities that subscribe to the view that it is the inadequacy, and **not the mere absence**, of all other legal remedies, and the danger of a failure of justice without it, that must usually determine the propriety of the writ. An adequate remedy is a remedy which is equally beneficial, speedy and sufficient, not merely a remedy which at some time in the future will bring about a revival of the judgment of the lower court complained of in the *certiorari* proceeding, but **a remedy which would promptly relieve the petitioner from the injurious effects of that judgment** and the acts of the inferior court, tribunal, board or officer.

5. CRIMINAL PROCEDURE; PRELIMINARY INVESTIGATION; PROBABLE CAUSE; DEFINED. — Probable cause has been defined as the existence of such facts and circumstances as would lead a person of ordinary caution and prudence to entertain an honest and strong suspicion that the person charged is guilty of the crime subject of the investigation. Being based merely on opinion and reasonable belief, it does not import absolute certainty. Probable cause need not be based on clear and convincing evidence of guilt, as the investigating officer acts upon reasonable belief. Probable cause implies probability of guilt and requires more than bare suspicion but less than evidence which would justify a conviction.

6. CRIMINAL LAW; ILLEGAL SALE OF PROHIBITED DRUGS; ELEMENTS. — In the case at bench, petitioner is charged with illegal sale of a prohibited drug. A successful prosecution of this offense requires the concurrence of the following elements: (1) the identity of the buyer and the seller, the object of the sale, and the consideration; and (2) the delivery of the thing sold and the payment therefor.

7. REMEDIAL LAW; CRIMINAL PROCEDURE; PRELIMINARY INVESTIGATION.; ALLEGATION OF FRAME-UP AND EXTORTION ARE EVIDENTIARY IN NATURE AND ARE MATTERS OF DEFENSE WHICH MUST BE PRESENTED AND HEARD DURING THE TRIAL. — Petitioner's allegation of frame-up and extortion is evidentiary in nature, and are matters for his defense. Evidentiary matters must be presented and heard during the trial. They are best left for the trial court to evaluate and resolve after a full-blown trial on the merits. In any case, it is well to note the Court's stance on such defense: "This Court is, of course, aware that in some cases, law enforcers resort to the practice of planting evidence in order to, *inter alia*, harass. But the defense of frame-up in drug cases requires strong and convincing evidence because of the presumption that the police officers performed their duties regularly and that they acted within the bounds of their authority. Besides, the defense of denial or frame-up, like alibi, is viewed with disfavor for it can just as easily be concocted and is a common and standard defense ploy in most prosecutions for violation of the Dangerous Drugs Act."

8. ID.; ID.; BAIL; JUDGES ARE REMINDED TO COMPLY STRICTLY WITH OUR GUIDELINES ON THE GRANT OF BAIL IN CAPITAL

OFFENSES, TO BE CONSCIENTIOUS IN PERFORMING THEIR JUDICIAL FUNCTIONS AND, AT ALL TIMES, TO BE FAITHFUL TO THE LAW AND THE RULES.— We recognize the courts' authority to grant bail in cases involving capital offenses after a determination that evidence of guilt is not strong. But we urge them to be circumspect in exercising such discretion. In this case, it is glaring that the bail bond fixed by the RTC was exceedingly low considering that the crime charged is illegal sale of prohibited drug punishable by *reclusion perpetua* to death and a fine ranging from ₱500,000.00 to ₱10 million, with the risk of flight extremely high, the petitioner being a Chinese citizen. We are, thus, compelled to re-issue a reminder to judges to comply strictly with our guidelines on the grant of bail in capital offenses, to be conscientious in performing their judicial functions and, at all times, to be faithful to the law and the rules. They should maintain professional competence, and abide by the highest standard of integrity and moral uprightness, to ensure the people's confidence in the judicial system. In the exercise of its authority to supervise judges and court personnel, this Court will not hesitate to impose disciplinary sanctions on judges who fail to measure up to these exacting standards of work ethics and morality.

APPEARANCES OF COUNSEL

R. Go & J. Ngo Law Office for petitioner.
The Solicitor General for respondents.

D E C I S I O N

NACHURA, *J.*:

This petition for review on *certiorari* under Rule 45 seeks to set aside the Resolution[1] of the Court of Appeals (CA) dated September 21, 2000, which dismissed the petition for *certiorari* assailing the Resolution of the Secretary of the Department of Justice (DOJ) finding probable cause against the herein petitioner

[1] Penned by Associate Justice Ramon A. Barcelona, with Associate Justices Wenceslao I. Agnir, Jr. and Bienvenido L. Reyes, concurring; *rollo,* pp. 55-58.

for violation of the Dangerous Drugs Act. The petitioner likewise assails the CA Resolution dated February 9, 2001 which denied his motion for reconsideration.

The case flows from the following antecedents:

On April 23, 1999, the Chief of the Presidential Anti-Organized Crime Task Force (PAOCTF), then Police Director Panfilo M. Lacson, referred to the State Prosecutor for appropriate action the evidence collected by the task force during a buy-bust operation against petitioner Juanito Chan, a Chinese citizen who was a resident of Binondo, Manila. The evidence consisted of —

EXH "A" – One (1) self-sealing transparent plastic bag containing white crystalline substance/granules suspected to be Methamphetamine Hydrochloride "SHABU," weighing approximately one (1) kilogram with markings "DLS 04/23/99" placed inside a box of HENNESSY V.S.O.P. COGNAC.

EXH "B" – Buy-bust money amounting to six thousand pesos (₱6,000.00) in twelve (12) pieces of five hundred peso bill denomination placed at the top of each of the twelve (12) bundles of boodle money (pieces of paper cut in the same size and shape of a genuine money) placed inside a yellow paper bag with markings "HAPPY BIRTHDAY."

EXH "C" – one (1) green Hyundai van with plate number ULK 815 used in transporting the confiscated SHABU.[2]

The PAOCTF also submitted the following documents to the State Prosecutor: (1) the Joint Affidavit of Arrest executed by PO3 Danilo L. Sumpay, PO3 Rolly S. Ibañez and SPO1 Ronald C. Parreño, the police officers who conducted the buy-bust operation; (2) booking sheet and arrest report; (3) receipt for property seized; (4) request for laboratory examination; (5) result of laboratory examination; (6) request for medical/physical examination; (7) result of medical/physical examination; (8) request for drug dependency test; (9) receipt for buy-bust money; and (10) photocopy of buy-bust money.

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[2] *Rollo*, pp. 61-62.

In their Joint Affidavit of Arrest,[3] PO3 Danilo L. Sumpay, PO3 Rolly S. Ibañez and SPO1 Ronald C. Parreño narrated that, on April 22, 1999, at about 10:30 p.m., their Confidential Informant (CI) reported to them that a certain Juanito Chan was engaged in the sale of methamphetamine hydrochloride or shabu in different parts of Metro Manila, and that Chan offered him a handsome commission if he would find a buyer of shabu. According to them, the CI received a phone call from Chan later that evening, and the two made a deal for the sale of one kilogram of shabu worth ₱600,000.00 at the parking space in front of Fuji Mart Inc., along Timog Avenue, Quezon City between 5:30 and 7:30 a.m. the following day. They said that based on this information, a buy-bust operation was organized by the PAOCTF. Hence, on April 23, 1999, at 6:00 a.m., they apprehended Chan after he turned over to the poseur-buyer a small box containing one self-sealing transparent plastic bag of white crystalline substance in exchange for the 12 bundles of boodle money (cut bond paper with a marked ₱500.00 peso bill on top) which he received from the poseur-buyer.

Petitioner requested a preliminary investigation and waived his rights under Article 125 of the Revised Penal Code.[4]

Thereafter, Chan submitted his Counter-Affidavit[5] denying the charges against him. He claimed that he was the victim of a frame-up and extortion by the police officers who allegedly demanded ₱2 million in exchange for his release. He contended that his warrantless arrest was illegal because he was not committing a crime at that time. He insisted that the supposed sale of drugs never took place and that the alleged 1 kilo of shabu was just planted by the arresting officers.

After preliminary investigation, State Prosecutor Pablo C. Formaran III issued a Resolution[6] dated June 17, 1999

[3] *Id*. at 63.

[4] *Id*. at 78.

[5] *Id*. at 79-83.

[6] *Id*. at 94-99.

recommending the filing of an Information against the petitioner. Prosecutor Formaran did not give credence to petitioner's unsubstantiated claim of frame up and extortion. He said that the defenses and accusation of petitioner were matters of defense that should be threshed out in court. He further averred that —

> In the face of the laboratory findings that the white crystalline substance weighing 935.80 grams, which appears to have been taken from the possession of the respondent is positive for methylamphetamine hydrochloride, a regulated drug, and considering the existence of the buy-bust money, the undersigned investigating prosecutor finds sufficient ground to engender a well founded belief that [the] crime charged has been committed and that the herein respondent is probably guilty thereof and should, therefore, be held for trial.
>
> WHEREFORE, it is recommended that an Information for violation of Section 15, Article III of Republic Act No. 6425, as amended by Republic Act No. 7659, be filed in court against respondent Juanito Chan y Lim *alias* Zhang Zhenting.[7]

Senior State Prosecutor Archimedes V. Manabat recommended the approval of this Resolution. It was then approved by Assistant Chief State Prosecutor Leonardo Guiyab, Jr., in behalf of the Chief State Prosecutor.

On June 30, 1999, State Prosecutor Formaran filed before the Regional Trial Court (RTC) of Quezon City an Information, alleging —

> That on or about April 23, 1999, in Timog Avenue, Quezon City and within the jurisdiction of this Honorable Court, the abovenamed accused, with deliberate intent and without authority of law, did then and there, willfully, unlawfully and feloniously sell and deliver to a poseur-buyer nine hundred thirty-five point eight (935.80) grams, more or less, of methylamphetamine hydrochloride (*shabu*), a regulated drug.
>
> CONTRARY TO LAW.[8]

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[7] *Id*. at 99.

[8] *Id*. at 101-102.

The case was docketed as Criminal Case No. Q-99-84778, which was raffled to RTC Quezon City, Branch 224.

On July 8, 1999, petitioner filed a petition for review with the Secretary of the Department of Justice (Justice Secretary). In a Resolution dated April 25, 2000, then Secretary of Justice Artemio G. Tuquero denied the petition for review on the ground that there was no reversible error in the investigating prosecutor's finding of probable cause. Petitioner moved for the reconsideration of the said ruling, but this was likewise denied in the Resolution dated July 19, 2000.

Petitioner filed a Petition for *Certiorari* with Very Urgent Prayer for Writ of Preliminary Injunction and/or Temporary Restraining Order with the CA, assailing the Resolutions of the Justice Secretary. The petition prayed, among others, that the appellate court nullify said Resolutions and direct the withdrawal of the Information.

On September 21, 2000, the CA dismissed the petition. Noting that the RTC had already assumed jurisdiction over the case, it dismissed the case in accordance with the doctrine laid down in *Crespo v. Mogul*[9] that once a complaint or information is filed in court, any disposition of the case rests on the sound discretion of the court. The CA further held that *certiorari* will not lie since petitioner may still avail of a motion to quash or dismiss the Information with the trial court.[10]

On February 9, 2001, the CA denied petitioner's motion for reconsideration.[11] Thus, petitioner filed the instant petition for review on *certiorari*, ascribing the following errors to the CA:

I

THE HONORABLE COURT OF APPEALS ACTED IN A MANNER NOT IN ACCORD WITH THE DECISION OF THE SUPREME COURT WHEN IT DISMISSED THE PETITION FOR *CERTIORARI* ON THE

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[9] G.R. No. 53373, June 30, 1987, 151 SCRA 462, 470.

[10] *Rollo,* pp. 55-58.

[11] *Id*. at 60.

BASIS OF THIS COURT'S RULING IN THE CASE OF *CRESPO VS. MOGUL* (151 SCRA 462).

II.

THE HONORABLE COURT OF APPEALS ACTED IN A MANNER NOT IN ACCORD WITH THE CONSTITUTION, LAW AND THE APPLICABLE DECISIONS OF THE SUPREME COURT IN NOT NULLIFYING THE PRELIMINARY INVESTIGATION CONDUCTED BY THE RESPONDENT STATE PROSECUTOR IN I.S. NO. 99-587, AS WELL AS THE RESOLUTION/INFORMATION ISSUED PURSUANT THERETO FOR BEING IN VIOLATION OF THE CONSTITUTIONAL RIGHT OF PETITIONER TO DUE PROCESS OF LAW.

III.

THE HONORABLE COURT OF APPEALS ERRED AS A MATTER OF LAW AND DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN NOT NULLIFYING THE RESOLUTIONS OF THE SECRETARY OF JUSTICE FOR HAVING BEEN RENDERED WITH GRAVE ABUSE OF DISCRETION.[12]

Petitioner argues that the CA erred in dismissing the petition for *certiorari* based on the Court's ruling in *Crespo v. Mogul*.[13] He argues that *Crespo* is not applicable to the present case because it involves a different factual setting. He points out that in said case, it was the provincial fiscal who filed a motion to dismiss the criminal case pending before the trial court on the basis of the resolution of the Undersecretary of Justice, whereas here, the issue involves the validity of the preliminary investigation. He avers that *Crespo* was superseded by *Allado v. Diokno,*[14] which recognized the courts' authority to nullify findings of probable cause by the prosecutor or investigating judge when due process is violated.[15]

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[12] *Id*. at 25-26.

[13] *Supra* note 9.

[14] G.R. No. 113630, May 5, 1994, 232 SCRA 192.

[15] *Rollo*, pp. 28-30.

Petitioner contends that the preliminary investigation was void for being violative of his right to due process, which includes the right to be heard by an impartial authority. He contends that State Prosecutor Formaran could not have been objective and impartial in conducting the preliminary investigation because the latter was a member of the PAOCTF, the agency that initiated the case against him.[16]

Petitioner asserts that the petition for *certiorari* was his speedy and adequate remedy from the ruling of the Justice Secretary, and not a motion to quash or dismiss the Information, as suggested by the CA. He insists that the Justice Secretary committed grave abuse of discretion when he affirmed the State Prosecutor's finding of probable cause, which was based solely on the Joint Affidavit of Arrest. He claims that the State Prosecutor ignored certain facts and circumstances which indicate that there was actually no buy-bust operation but an extortion attempt instead, and capriciously relied on the presumption of regularity in the performance of the police officers' duty.[17] He posits that such presumption cannot prevail over the constitutional presumption of innocence of an accused. Citing *People v. Sapal*,[18] petitioner also submits that the police authorities' undue delay in delivering him to the proper authorities effectively destroys the presumption of regularity in the performance of their duties. Petitioner is referring to the 10-hour delay in turning him over to the PNP Crime Laboratory from the time of his arrest. He alleges that this undue delay confirms the attempted extortion against him.

Respondents, through the Office of the Solicitor General, maintain that *Allado* is an exception to the general rule which may be invoked only if similar circumstances are shown to exist, and such circumstances do not exist in this case. They aver that petitioner cannot feign denial of due process considering that he actively participated in the preliminary investigation and

[16] *Id*. at 32-33.

[17] *Id*. at 39-47.

[18] 385 Phil. 109 (2000).

was given the opportunity to present his side. Respondents dispel petitioner's doubt as to the partiality of State Prosecutor Formaran by pointing out that his findings were reviewed by his superiors, even by the respondent Secretary of Justice.

Respondents contend that petitioner's claim that he is the victim of frame-up in not worthy of credence for being unsubstantiated. Likewise, petitioner cannot rely on the failure to deliver him on time to the proper authorities because there was actually no need to do so since the PAOCTF was already a convergence of various law enforcement units, namely, the police, the military and the National Bureau of Investigation.

We deny the petition.

Contrary to petitioner's view, *Crespo* subsists and was not superseded by *Allado*.

Allado, which was punctuated by inordinate eagerness in the gathering of evidence and in the preliminary investigation, serves as an exception and may not be invoked unless similar circumstances are clearly shown to exist.[19] No such circumstances were established in the present case.

In *Crespo*, the Court laid down the rule that once an Information is filed in court, any disposition of the case rests on the sound discretion of the court. In subsequent cases,[20] the Court clarified that *Crespo* does not bar the Justice Secretary from reviewing the findings of the investigating prosecutor in the exercise of his power of control over his subordinates. The Justice Secretary is merely advised, as far as practicable, to refrain from entertaining a petition for review of the prosecutor's finding when the Information is already filed in court. In other words, the power or authority of the Justice Secretary to review the prosecutor's findings subsists even after the Information is filed in court. The court, however, is not bound by the Resolution of the Justice Secretary, but must evaluate it before proceeding

[19] *People v. Court of Appeals*, 361 Phil. 401, 419 (1999).

[20] *Ledesma v. Court of Appeals*, 344 Phil. 207, 235 (1997); *Roberts, Jr. v. Court of Appeals*, 324 Phil. 568, 594 (1996).

with the trial. While the ruling of the Justice Secretary is persuasive, it is not binding on courts.[21]

Albeit the findings of the Justice Secretary are not absolute and are subject to judicial review, this Court generally adheres to the policy of non-interference in the conduct of preliminary investigations, particularly when the said findings are well-supported by the facts as established by the evidence on record.[22] Absent any showing of arbitrariness on the part of the prosecutor or any other officer authorized to conduct preliminary investigation, courts as a rule must defer to said officer's finding and determination of probable cause, since the determination of the existence of probable cause is the function of the prosecutor.[23] Simply stated, findings of the Secretary of Justice are not subject to review, unless made with grave abuse of discretion.[24] As held in one case:

> The general rule is that the courts do not interfere with the discretion of the public prosecutor in determining the specificity and adequacy of the averments in a criminal complaint. The determination of probable cause for the purpose of filing an information in court is an executive function which pertains at the first instance to the public prosecutor and then to the Secretary of Justice. The duty of the Court in appropriate cases is merely to determine whether the executive determination was done without or in excess of jurisdiction or with grave abuse of discretion. Resolutions of the Secretary of Justice are not subject to review unless made with grave abuse.[25]

Thus, the findings of the Justice Secretary may be reviewed through a petition for *certiorari* under Rule 65 based on the

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[21] *Torres, Jr. v. Aguinaldo*, G.R. No. 164268, June 28, 2005, 461 SCRA 599, 611.

[22] *Marietta K. Ilusorio v. Sylvia K. Ilusorio, et al.,* G.R. No. 171659, December 13, 2007.

[23] *Atty. Serapio v. Sandiganbayan*, 444 Phil. 499, 531 (2003).

[24] *Santos v. Go,* G.R. No. 156081, October 19, 2005, 473 SCRA 350, 362.

[25] *Insular Life Assurance Company Limited v. Serrano,* G.R. No. 163255, June 22, 2007, 525 SCRA 400, 405-406.

allegation that he acted with grave abuse of discretion.[26] This remedy is available to the aggrieved party.

In dismissing the petition for *certiorari*, the CA primarily anchored its decision on *Crespo*, ratiocinating that it is without authority to restrain the lower court from proceeding with the case since the latter had already assumed jurisdiction. Such concern is clearly of no moment.

In the petition for *certiorari*, the CA is not being asked to cause the dismissal of the case in the trial court, but only to resolve the issue of whether the Justice Secretary acted with grave abuse of discretion in affirming the finding of probable cause by the investigating prosecutor. Should it determine that the Justice Secretary acted with grave abuse of discretion, it could nullify his resolution and direct the State Prosecutor to withdraw the Information by filing the appropriate motion with the trial court. But the rule stands — the decision whether to dismiss the case or not rests on the sound discretion of the trial court where the Information was filed.

The CA, likewise, opined that the filing of the petition for *certiorari* was improper since petitioner still had an available remedy, that is, to file a motion to dismiss or to quash the Information with the trial court. We do not agree. A petition for *certiorari* may still be availed of even if there is an available remedy, when such remedy does not appear to be plain, speedy, and adequate in the ordinary course of law. The following excerpt from *Land Bank of the Philippines v. Court of Appeals*[27] is instructive —

> The determination as to what exactly constitutes a plain, speedy and adequate remedy rests on judicial discretion and depends on the particular circumstances of each case. There are many authorities that subscribe to the view that it is the inadequacy, and **not the mere absence**, of all other legal remedies, and the danger of a failure of

[26] *Alcaraz v. Gonzalez*, G.R. No. 164715, September 20, 2006, 502 SCRA 518; *Preferred Home Specialties, Inc. v. Court of Appeals*, G.R. No. 163593, December 16, 2005, 478 SCRA 387.

[27] 456 Phil. 755 (2003).

justice without it, that must usually determine the propriety of the writ. An adequate remedy is a remedy which is equally beneficial, speedy and sufficient, not merely a remedy which at some time in the future will bring about a revival of the judgment of the lower court complained of in the *certiorari* proceeding, but **a remedy which would promptly relieve the petitioner from the injurious effects of that judgment** and the acts of the inferior court, tribunal, board or officer.[28]

However, instead of remanding the case to the CA, we deem it more practical to decide the substantive issue raised in this petition so as not to further delay the disposition of this case. On this issue, we hold that the Secretary of Justice did not commit grave abuse of discretion in affirming the finding of probable cause by the State Prosecutor.

Probable cause has been defined as the existence of such facts and circumstances as would lead a person of ordinary caution and prudence to entertain an honest and strong suspicion that the person charged is guilty of the crime subject of the investigation. Being based merely on opinion and reasonable belief, it does not import absolute certainty.[29] Probable cause need not be based on clear and convincing evidence of guilt, as the investigating officer acts upon reasonable belief. Probable cause implies probability of guilt and requires more than bare suspicion but less than evidence which would justify a conviction.[30]

In the case at bench, petitioner is charged with illegal sale of a prohibited drug. A successful prosecution of this offense requires the concurrence of the following elements: (1) the identity of the buyer and the seller, the object of the sale, and the consideration; and (2) the delivery of the thing sold and the

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[28] *Landbank of the Philippines v. Court of Appeals*, *supra*, at 786. (Emphasis ours.)

[29] *Ilusorio v. Ilusorio, supra* note 22.

[30] *Ching v. The Secretary of Justice,* G.R. No. 164317, February 6, 2006, 481 SCRA 609, 629.

payment therefor.[31] To our mind, the documentary and object evidence submitted to the State Prosecutor, particularly the Joint Affidavit of Arrest, the 935.80 grams of shabu, and the buy-bust money sufficiently establish the existence of probable cause against petitioner for the crime charged. After all, a finding of probable cause needs only to rest on evidence showing that, more likely than not, a crime has been committed by the suspect.[32] Unless there is a clear and convincing evidence that the members of the buy-bust team were impelled by any improper motive, or were not properly performing their duties, their testimonies on the operation deserve full faith and credit.[33]

The allegation that the State Prosecutor was not impartial in conducting the preliminary investigation is merely speculative — a bare allegation unworthy of credence. Such accusation is worthless in light of our finding that there is, indeed, probable cause against petitioner. Moreover, bias and partiality can never be presumed.[34] The mere fact that State Prosecutor Formaran was also a member of the PAOCTF is insignificant. The now defunct PAOCTF was created to investigate and prosecute all crime syndicates. It was a convergence and collaboration of the different agencies of the government, including the Philippine National Police and the DOJ.[35] Unsupported statements of partiality will not suffice in the absence of contrary evidence that will overcome the presumption that the State Prosecutor regularly performed his duty.

Petitioner's allegation of frame-up and extortion is evidentiary in nature, and are matters for his defense. Evidentiary matters

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[31] *People v. Garcia*, G.R. No. 172975, August 8, 2007, 529 SCRA 519, 532.

[32] *Ching v. Secretary of Justice, supra* note 30.

[33] *People v. Sy*, G.R. No. 171397, September 27, 2006, 503 SCRA 772, 780.

[34] *Republic v. Evangelista,* G.R. No. 156015, August 11, 2005, 466 SCRA 544, 555

[35] Executive Order No. 8, July 22, 1998.

must be presented and heard during the trial.[36] They are best left for the trial court to evaluate and resolve after a full-blown trial on the merits.[37] In any case, it is well to note the Court's stance on such defense: "This Court is, of course, aware that in some cases, law enforcers resort to the practice of planting evidence in order to, *inter alia*, harass. But the defense of frame-up in drug cases requires strong and convincing evidence because of the presumption that the police officers performed their duties regularly and that they acted within the bounds of their authority. Besides, the defense of denial or frame-up, like alibi, is viewed with disfavor for it can just as easily be concocted and is a common and standard defense ploy in most prosecutions for violation of the Dangerous Drugs Act."[38]

As a final note, on September 4, 2001, while the case was pending before this Court, petitioner was arraigned, and pleaded not guilty. Thereafter, petitioner filed a motion for bail which was granted by Judge Emilio L. Leachon, Jr., Presiding Judge of RTC Quezon City, Branch 224. The bail bond was fixed at ₱100,000.00. On March 7, 2003, the RTC ordered the release of petitioner upon payment of such amount.[39]

We recognize the courts' authority to grant bail in cases involving capital offenses after a determination that evidence of guilt is not strong. But we urge them to be circumspect in exercising such discretion. In this case, it is glaring that the bail bond fixed by the RTC was exceedingly low considering that the crime charged is illegal sale of prohibited drug punishable by *reclusion perpetua* to death and a fine ranging from ₱500,000.00 to ₱10 milllion, with the risk of flight extremely high, the petitioner being a Chinese citizen. However, upon verification from the Office of the Court Administrator, we found out that Judge Leachon, Jr. had already retired on October

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[36] *People v. Court of Appeals*, *supra* note 19, at 415.

[37] *Marilyn H. Co, et al. v. Republic of the Philippines, et al.*, G.R. No. 168811, November 28, 2007.

[38] *Id*.

[39] *Rollo*, p. 314.

13, 2003; hence, he may no longer be called to account disciplinarily for this apparent transgression.

We are, thus, compelled to re-issue a reminder to judges to comply strictly with our guidelines on the grant of bail in capital offenses, to be conscientious in performing their judicial functions and, at all times, to be faithful to the law and the rules. They should maintain professional competence, and abide by the highest standard of integrity and moral uprightness, to ensure the people's confidence in the judicial system. In the exercise of its authority to supervise judges and court personnel, this Court will not hesitate to impose disciplinary sanctions on judges who fail to measure up to these exacting standards of work ethics and morality.

WHEREFORE, premises considered, the petition is *DENIED***.** Subject to our disquisition on the propriety of *certiorari* under Rule 65 as an appropriate remedy, the Resolutions of the Court of Appeals, dated September 21, 2000 and February 9, 2001, are *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 147628. March 14, 2008]

LUBECA MARINE MANAGEMENT (HK) LTD. and GERMAN MARINE AGENCIES, INC., *petitioners, vs.* **MATEO ALCANTARA,** *respondent.*

SYLLABUS

CIVIL LAW; CONTRACTS; HAVING BEEN VALIDLY EXECUTED AND NOT CONTRARY TO LAW, MORALS, GOOD CUSTOMS, PUBLIC ORDER OR PUBLIC POLICY, THE COURT APPROVES THE COMPROMISE AGREEMENT EXECUTED BY THE PARTIES IN CASE AT BAR. — Article 1306 of the Civil Code of the Philippines provides that contracting parties may agree to such stipulations, clauses, terms, and conditions as they may deem convenient, as long as they are not contrary to law, morals, good customs, public order, or public policy. A compromise agreement is a contract whereby the parties make reciprocal concessions to resolve their differences and put an end to litigation. It is an accepted, even desirable and encouraged, practice in courts of law and administrative tribunals. Finding the above Compromise Agreement to be validly executed and not contrary to law, morals, good customs, public order, or public policy, we, therefore, approve the same.

APPEARANCES OF COUNSEL

Francisco S. De Guzman Law Office for petitioners.
Marcel G. Silvestre for respondent.

R E S O L U T I O N

NACHURA, *J.*:

Before this Court is a Joint Motion to Approve Compromise Agreement dated January 31, 2008 filed by counsel for petitioner and conformed to by respondent with the assistance of his

counsel. The Compromise Agreement, attached to the Joint Motion, reads:

COMPROMISE AGREEMENT
WITH QUITCLAIM, RELEASE, WAIVER AND DESISTANCE

KNOW ALL MEN BY THESE PRESENTS:

This COMPROMISE AGREEMENT, made and entered into this 30th day of January 2008, at Pasay City, Philippines, by and between:

MATEO ALCANTARA, Filipino, of legal age, with residence and postal address at Blk. 53, Lot 11, Teacher's Village, Catmon, Malabon City, hereinafter referred to as the ***FIRST PARTY***, assisted by his counsel, Atty. Marcel G. Silvestre;

- and -

GERMAN MARINE AGENCIES, INC., a duly registered and licensed manning agency, with principal office at No. 3912 General Macabulos Street, Bangkal, Makati City, Philippines, herein represented by its counsel, ATTY. FRANCISCO S. DE GUZMAN, and hereinafter referred to as the ***SECOND PARTY***,

WITNESSETH:

WHEREAS, the ***FIRST PARTY*** is the complainant in NLRC-NCR Case No. ADJ (M) 94-092745 entitled: "*MATEO ALCANTARA vs. GERMAN MARINE AGENCIES, INC., ET AL"*;

WHEREAS, on July 25, 1997 a Decision was rendered in the abovementioned case in favor of the ***FIRST PARTY*** by the Honorable Labor Arbiter RENATO A. BUGARIN:

WHEREAS, the ***SECOND PARTY*** appealed the aforesaid Decision to the National Labor Relations Commission (NLRC) and docketed as NLRC CA No. 013641-97;

WHEREAS, on June 24, 2000, a Resolution was issued by the National Labor Relations Commission (NLRC), modifying the decision of the Labor Arbiter;

WHEREAS, on November 7, 2000, the ***SECOND PARTY*** filed a Petition for *Certiorari* with the Court of Appeals. The same was, however, dismissed in the Resolution dated November 10, 2000 issued by the Court of Appeals;

WHEREAS, on May 15, 2001, the ***SECOND PARTY*** filed [a] Petition for Review with the Supreme Court. To date, the said petition is still pending before the Supreme Court for its resolution;

WHEREAS, considering the length of time that this case has been pending, the parties came to a decision of finally settling the instant case amicably.

NOW THEREFORE, premises considered, the ***FIRST PARTY*** and the ***SECOND PARTY*** have by these presents decided to settle their differences amicably and agree as follows;

1. The ***SECOND PARTY*** agrees and undertakes to pay the ***FIRST PARTY*** the amount of US$9,172.88 in the form of Philippine National Bank Check Nos. 497997 and 497998 by way of full payment and satisfaction of all his claims that may have arisen from or connected with his overseas employment.

2. The ***FIRST PARTY*** hereby acknowledges receipt of the said checks from the ***SECOND PARTY***, as evidenced by the signatures on the vouchers, copies of which are hereto attached, marked as Annexes "A" and "A-1" and made integral part hereof.

3. The ***FIRST PARTY*** declares that he has no more claims or demands, monetary or otherwise, against the ***SECOND PARTY***, its directors, officers and employees and its foreign employer, the same having been fully and finally settled to his complete satisfaction and agrees to irrevocably release and absolutely discharge the latter and all those persons solidarily liable with it for whatever obligation that may have arisen or connected with his overseas recruitment, placement and employment.

4. The ***FIRST PARTY*** hereby forever waives all rights and choses of action against the ***SECOND PARTY***, its directors, officers and employees, and his foreign employer, arising from or connected with his overseas employment.

5. The ***FIRST PARTY*** agrees and undertakes to desist from initiating, instituting and prosecuting any other suit, action or proceeding against the ***SECOND PARTY***, its directors, officers and employees and his foreign employer, arising from or connected with his overseas employment.

IN WITNESS WHEREOF, the ***FIRST PARTY*** and the ***SECOND PARTY*** have by these presents signed this Compromise Agreement with Release, Quitclaim, Waiver and Desistance with full knowledge

of its legal implications this 30th day of January, at Pasay City, Philippines.

(Signed)

MATEO ALCANTARA
First Party

GERMAN MARINE AGENCIES, INC.
Second Party

By:

(Signed)
ATTY. FRANCISCO S. DE GUZMAN
Counsel for the Second Party

With my conformity:

(Signed)
ATTY. MARCEL G. SILVESTRE
Counsel for the First Party

(Signature of two [2] witnesses)

ACKNOWLEDGMENT

Article 1306 of the Civil Code of the Philippines provides that contracting parties may agree to such stipulations, clauses, terms, and conditions as they may deem convenient, as long as they are not contrary to law, morals, good customs, public order, or public policy. A compromise agreement is a contract whereby the parties make reciprocal concessions to resolve their differences and put an end to litigation.[1] It is an accepted, even desirable and encouraged, practice in courts of law and administrative tribunals.[2]

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[1] *Xavierville III Homeowners Association, Inc. v. Xavierville II Homeowners Association, Inc.*, G.R. No. 170092, December 6, 2006, 510 SCRA 619, 621; *Rivero v. Court of Appeals*, G.R. No. 141273, May 17, 2005, 458 SCRA 714, 735; *Magbanua v. Uy*, G.R. No. 161003, May 6, 2005, 458 SCRA 184, 190; *Alonzo v. San Juan*, G.R. No. 137549, February 11, 2005, 451 SCRA 45, 58-59.

[2] *Philippine National Oil Company-Energy Development Corporation (PNOC-EDC) v. Avella,* G.R. No. 153904, January 17, 2005, 448 SCRA 549, 565.

Finding the above Compromise Agreement to be validly executed and not contrary to law, morals, good customs, public order, or public policy, we, therefore, approve the same.

WHEREFORE, in light of the foregoing, the Joint Motion to Approve Compromise Agreement is *GRANTED*, the Compromise Agreement dated January 31, 2008 is *APPROVED* and judgment is hereby rendered in accordance therewith. The instant case is dismissed. No pronouncement as to costs.

SO ORDERED.

Ynares-Santiago, Austria-Martinez, Chico-Nazario, and *Reyes, JJ.,* concur.

FIRST DIVISION

[G.R. No. 149356. March 14, 2008]

REPUBLIC OF THE PHILIPPINES represented by the Department of Trade and Industry, *petitioner, vs.* **WINSTON T. SINGUN,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS; TERMINATION OF OFFICIAL RELATIONSHIP; RESIGNATION; THE FINAL ACT OF A RESIGNATION'S ACCEPTANCE IS THE NOTICE OF ACCEPTANCE.— Resignation implies an expression of the incumbent in some form, express or implied, of the intention to surrender, renounce, and relinquish the office and the acceptance by competent and lawful authority. To constitute a complete and operative resignation from public office, there must be: (a) an intention to relinquish a part of the term; (b) an act of relinquishment; and (c) an acceptance by the proper authority. Petitioner

maintains that respondent's resignation was complete because all the elements of a complete and operative resignation were present. On the other hand, respondent claims that his resignation was not complete because there was no valid acceptance of his offer to resign since he was not duly informed of its acceptance. In our jurisdiction, acceptance is necessary for resignation of a public officer to be operative and effective. Without acceptance, resignation is nothing and the officer remains in office. Resignation to be effective must be accepted by competent authority, either in terms or by something tantamount to an acceptance, such as the appointment of the successor. A public officer cannot abandon his office before his resignation is accepted, otherwise the officer is subject to the penal provisions of Article 238 of the Revised Penal Code. The final or conclusive act of a resignation's acceptance is the notice of acceptance. The incumbent official would not be in a position to determine the acceptance of his resignation unless he had been duly notified therefor.

2. ID.; ID.; ID.; ID.; ID.; RESPONDENT'S RESIGNATION WAS INCOMPLETE AND INOPERATIVE BECAUSE HE WAS NOT NOTIFIED OF THE ACCEPTANCE OF HIS RESIGNATION. — In this case, the Court of Appeals and the CSC declared that there was nothing in the records to show that respondent was duly informed of the acceptance of his resignation. There was no indication that respondent received a copy of his 12 November 1999 application for leave of absence and resignation as accepted by Director Hipolito. Neither was there any indication that respondent received Director Hipolito's 12 November 1999 Memorandum informing him of the acceptance of his resignation. Therefore, we affirm the ruling of the Court of Appeals that respondent's resignation was incomplete and inoperative because respondent was not notified of the acceptance of his resignation. Petitioner's contention that respondent knew that his resignation was accepted because respondent had notice that his application for leave of absence was approved does not deserve any merit. As respondent explained, there is a specific form used for an application of leave of absence and the approval of his application for leave of absence does not necessarily mean the acceptance of his resignation.

3. ID.; ID.; ID.; ID.; ID.; RESPONDENT'S ACCEPTANCE OF EMPLOYMENT DURING HIS APPROVED LEAVE OF ABSENCE IS NOT TANTAMOUNT TO ABANDONMENT; ACT MAY ONLY BE CONSIDERED AS VIOLATION OF CIVIL SERVICE RULES GIVING RISE TO ADMINISTRATIVE LIABILITY. — On respondent's alleged employment with the PRBC, the Court notes that if respondent was employed by PRBC, it was undertaken during his approved leave of absence. It does not have any connection with the acceptance of his resignation. We agree with the findings and conclusions of the Court of Appeals that this does not amount to abandonment. If respondent was indeed employed by PRBC during his approved leave of absence and he violated Civil Service rules, then the proper case should be filed against him.

4. ID.; ID.; ID.; ID.; ID.; RESIGNATION MAY BE WITHDRAWN BEFORE ITS ACCEPTANCE; SINCE RESPONDENT'S RESIGNATION WAS NOT FINALLY AND CONCLUSIVELY ACCEPTED AS HE WAS NOT DULY NOTIFIED OF ITS ACCEPTANCE, HE COULD VALIDLY WITHDRAW HIS RESIGNATION. — Until the resignation is accepted, the tender or offer to resign is revocable. And the resignation is not effective where it was withdrawn before it was accepted. In this case, since respondent's resignation was not finally and conclusively accepted as he was not duly notified of its acceptance, respondent could validly withdraw his resignation. There was no need for Director Hipolito to accept the withdrawal of resignation since there was no valid acceptance of the application of resignation in the first place. Undersecretary Ordoñez also validly issued the detail order as respondent had not effectively resigned from DTI-RO2.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Romeo G. Guillermo for respondent.

D E C I S I O N

CARPIO, *J.*:

The Case

This is a petition for review on *certiorari*[1] of the 1 August 2001 Decision[2] of the Court of Appeals in CA-G.R. SP No. 64953. The 1 August 2001 Decision affirmed Civil Service Commission (CSC) Resolution Nos. 002651[3] and 010843[4] dated 27 November 2000 and 27 April 2001, respectively. CSC Resolution No. 002651 held that respondent Winston T. Singun's (respondent) resignation was inoperative and inefficacious and ordered the payment of his salaries and other benefits from 1 January 2000. CSC Resolution No. 010843 denied petitioner's motion for reconsideration.

The Facts

Petitioner Republic of the Philippines (petitioner) is represented by the Department of Trade and Industry, Regional Office No. 2 (DTI-RO2). Respondent was the former Chief Trade and Industry Development Specialist of DTI-RO2, Cagayan Province.

In a letter[5] dated 20 October 1999, respondent wrote Regional Director Jose Hipolito (Director Hipolito) signifying his intention to apply for an 8½ month leave of absence starting 16 November 1999 until 31 July 2000. Respondent also signified his intention to retire from the service on 1 August 2000. On 4 November

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[1] Under Rule 45 of the Rules on Civil Procedure.

[2] *Rollo*, pp. 65-73. Penned by Associate Justice Martin S. Villarama, Jr., with Associate Justices Conrado M. Vasquez, Jr. and Sergio L. Pestaño, concurring.

[3] CA *rollo*, pp. 51-58.

[4] *Id*. at 59-61.

[5] *Rollo*, p. 74.

1999, respondent filed his application for leave of absence and early retirement.[6] Director Hipolito denied the request.

On 8 November 1999, respondent again filed an application for leave of absence and resignation.[7] In a memorandum dated 9 November 1999, Director Hipolito endorsed the application to Assistant Secretary Zenaida C. Maglaya (Assistant Secretary Maglaya) for comment.[8]

On 12 November 1999, without waiting for Assistant Secretary Maglaya's comment, respondent again filed an application for leave of absence but for a shorter period from 16 November 1999 until 14 January 2000.[9] Respondent also signified his intention to resign "effective at the close of office hours on 14 January 2000." According to Director Hipolito, he immediately approved respondent's application for leave of absence and resignation and he reiterated said approval in a memorandum[10] dated the same day. In a letter[11] dated 23 November 1999, Director Hipolito also notified Regional Director Jose T. Soria (Atty. Soria) of the Civil Service Commission, Regional Office No. 2 (CSC-RO2) of his acceptance of respondent's resignation.

Then on 14 January 2000, at about 4:00 p.m., the DTI-RO2 received, through facsimile, Memorandum Order No. 20[12] issued by Undersecretary Ernesto M. Ordoñez (Undersecretary Ordoñez) detailing respondent to the Office of the Undersecretary for Regional Operations effective 17 January 2000.

On 17 January 2000, the DTI-RO2 received respondent's 14 January 2000 letter[13] informing Director Hipolito that he

[6] *Id*. at 129.

[7] *Id*. at 130.

[8] *Id*. at 131.

[9] *Id*. at 132.

[10] *Id*. at 136.

[11] *Id*. at 137.

[12] *Id*. at 147.

[13] *Id*. at 148.

was reconsidering his earlier letter of resignation and that he decided to wait until he could qualify for early retirement.

On 25 January 2000, Director Hipolito wrote Atty. Soria requesting an opinion on whether respondent was considered resigned as of 12 November 1999 and, hence, Undersecretary Ordoñez's detail order was without effect.

In CSC-RO2 Opinion No. LO-000202[14] dated 2 February 2000, Atty. Soria ruled that respondent was considered resigned effective 14 January 2000. CSC-RO2 opined that respondent effectively resigned on that date because (1) of respondent's voluntary written notice informing Director Hipolito that he was relinquishing his position and the effectivity date of said resignation and (2) Director Hipolito's acceptance of respondent's resignation in writing which indicated the date of effectivity of the resignation. CSC-RO2 also said that respondent's letter withdrawing his resignation did not automatically restore him to his position because Director Hipolito should first approve the withdrawal before it becomes effective.

In a letter[15] dated 11 February 2000, Director Hipolito informed Undersecretary Ordoñez that respondent had resigned effective 14 January 2000 and, thus, the detail order was without effect. Director Hipolito added that during respondent's leave of absence, respondent accepted employment with the Philippine Rural Banking Corporation (PRBC).

In a letter[16] dated 23 February 2000, respondent informed Undersecretary Ordoñez that his application for resignation was made under duress because it was imposed by Director Hipolito as a condition for the approval of his application for leave of absence. Respondent explained that he did not intend to resign on 14 January 2000 as his original intention was to resign on 1 August 2000 after completing 15 years of service in the government. Respondent also stated that his resignation

[14] *Id*. at 152.

[15] *Id*. at 153.

[16] *Id*. at 154-156.

was ineffective because he was not notified of its acceptance for he did not receive a copy of his approved resignation letter and Director Hipolito's memorandum accepting his application for resignation. Respondent added that even assuming he was duly notified of its acceptance, his resignation was still made under duress and, therefore, no amount of acceptance would make it valid.

On 2 March 2000, Undersecretary Ordoñez required Director Hipolito to comment on respondent's 23 February 2000 letter. Undersecretary Ordoñez asked Director Hipolito to submit documentary evidence to show that respondent received a copy of Director Hipolito's formal acceptance in writing of respondent's letter of resignation and that respondent was employed by PRBC during his leave of absence.

On 28 March 2000, respondent demanded from Director Hipolito the payment of his salaries and other benefits from 1 December 1999 to 31 March 2000.

On 5 April 2000, Undersecretary Ordoñez ordered Director Hipolito to advise him as to respondent's request for the payment of his unpaid salaries. Undersecretary Ordoñez also asked Director Hipolito to support his claim that respondent was considered resigned effective 14 January 2000 with a ruling from the CSC.

In a letter[17] dated 18 April 2000, Atty. Soria asked Director Hipolito to comment on respondent's 14 April 2000 letter[18] requesting for the reconsideration of CSC-RO2 Opinion No. LO-000202. In his comment,[19] Director Hipolito denied that he "forced, intimidated, threatened, and unduly pressured" respondent to resign. Director Hipolito also insisted that respondent received a copy of the 12 November 1999 memorandum regarding the acceptance of his resignation.

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[17] *Id*. at 164.

[18] *Id*. at 165-167.

[19] *Id*. at 168-172.

On 5 June 2000, the CSC-RO2 rendered Decision No. A-000601[20] denying respondent's motion for reconsideration. CSC-RO2 ruled that respondent was considered resigned as of 14 January 2000 because the detail order made no mention that its issuance meant that the acceptance of the resignation was revoked. CSC-RO2 added that since Undersecretary Ordoñez was not the appointing authority, he had no power to accept respondent's withdrawal of his resignation.

Respondent appealed to the CSC.

The Ruling of the Civil Service Commission

On 27 November 2000, the CSC rendered Resolution No. 002651 declaring respondent's resignation inoperative and inefficacious. The CSC also ordered the payment of respondent's salaries and other benefits from 1 January 2000. The CSC ruled:

> There is no dispute that Singun tendered his resignation to Regional Director Hipolito to take effect on January 14, 2000. But it is likewise undisputed that on the very day that his cessation from office is to take effect, DTI Undersecretary Ordoñez ordered his detail to his Office. This act of Undersecretary Ordoñez, who is the immediate supervisor of Regional Director Hipolito, is a tacit, if not express, repudiation and revocation of the ostensible acceptance by the latter of the supposed resignation of Singun. This, in effect, can be construed as if no acceptance was ever made on the tender of resignation of Singun.
>
> Finally, even on the assumption that Singun's tender of resignation was indeed accepted, such acceptance is inoperative and inefficacious. This is so simply because there is no showing from the records that Singun was duly informed of said acceptance. In fact, there is no mention whatsoever that Singun was informed of the acceptance of his resignation. This being the case, it cannot be concluded that Singun had, either impliedly or expressly, surrendered, renounced, or relinquished his office. In explaining this precept, the Commission in CSC Resolution No. 00-2394 dated October 18, 2000, held:

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[20] *Id*. at 173-177.

> 'It is explicit that resignation, as a mode of terminating the employee's official relations, is pre-conditioned on the (i) written notice of the concerned employee to sever his employment tie coupled with an act of relinquishing the office; and, (ii) acceptance by the appointing authority for which the employee shall have been properly notified...'[21]

On 15 December 2000, petitioner filed a motion for reconsideration. Two supplemental motions for reconsideration were subsequently filed on 12 January 2001[22] and 11 April 2001.[23] In Resolution No. 010843,[24] the CSC denied petitioner's motion for reconsideration.

Petitioner appealed to the Court of Appeals.[25]

The Ruling of the Court of Appeals

On 1 August 2001, the Court of Appeals denied petitioner's appeal and affirmed CSC Resolution Nos. 002651 and 010843. The Court of Appeals declared that there was substantial evidence to support the CSC's finding that respondent's resignation was inoperative and inefficacious. The Court of Appeals stated that findings of fact of an administrative agency must be respected, as long as such findings are supported by substantial evidence, even if such evidence might not be overwhelming or preponderant. The Court of Appeals said "the fact of resignation cannot be presumed by the petitioner's simple expedient of relying on memoranda or letters merely showing the purported approval of resignation which bore his signature, because to constitute a complete and operative act of resignation, the officer or employee must show a clear intention to relinquish or surrender his position."[26]

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[21] CA *rollo*, pp. 57-58.

[22] *Rollo*, pp. 212-217.

[23] *Id*. at 218-219.

[24] *Id*. at 126-128.

[25] *Id*. at 79-117.

[26] *Id*. at 71.

The Court of Appeals also ruled that respondent's alleged act of accepting employment with PRBC did not amount to abandonment of office. The Court of Appeals held that abandonment is inconsistent with respondent's (1) motion for reconsideration of CSC-RO2's Opinion No. LO-000202, (2) appeal questioning CSC-RO2's Decision No. A-000601, and (3) bringing the matter to the National Office of the CSC for resolution.

The Court of Appeals also declared that petitioner was not denied due process because the essence of due process in administrative proceedings is an opportunity to explain one's side or an opportunity to seek reconsideration of the action or ruling complained of. In this case, petitioner was able to file a motion for reconsideration and two supplemental motions for reconsideration.

Hence, this petition for review with prayer for a temporary restraining order.

On 8 October 2001, the Court issued a temporary restraining order enjoining the CSC from enforcing the 1 August 2001 Decision of the Court of Appeals and respondent from assuming office at the DTI-RO2, Cagayan Province.[27]

The Issues

Petitioner raises the following issues:

1. Whether respondent validly resigned from DTI-RO2 effective 14 January 2000; and
2. Whether the detail order issued by Undersecretary Ordoñez effectively withdrew respondent's resignation.

The Court's Ruling

The petition has no merit.

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[27] *Id.* at 221-222.

The Final Act of a Resignation's Acceptance is the Notice of Acceptance

Resignation implies an expression of the incumbent in some form, express or implied, of the intention to surrender, renounce, and relinquish the office and the acceptance by competent and lawful authority.[28] To constitute a complete and operative resignation from public office, there must be: (a) an intention to relinquish a part of the term; (b) an act of relinquishment; and (c) an acceptance by the proper authority.[29]

Petitioner maintains that respondent's resignation was complete because all the elements of a complete and operative resignation were present. On the other hand, respondent claims that his resignation was not complete because there was no valid acceptance of his offer to resign since he was not duly informed of its acceptance.

In our jurisdiction, acceptance is necessary for resignation of a public officer to be operative and effective. Without acceptance, resignation is nothing and the officer remains in office.[30] Resignation to be effective must be accepted by competent authority, either in terms or by something tantamount to an acceptance, such as the appointment of the successor.[31] A public officer cannot abandon his office before his resignation is accepted, otherwise the officer is subject to the penal provisions of Article 238[32] of the Revised Penal

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[28] *Gamboa v. Court of Appeals*, 194 Phil. 624 (1981).

[29] *Id*.

[30] *Reyes v. Atienza*, G.R. No. 152243, 23 September 2005, 470 SCRA 670.

[31] MARTIN AND MARTIN, *ADMINISTRATIVE LAW, LAW ON PUBLIC OFFICERS AND ELECTION LAW* 200 (1987).

[32] Article 238 of the Revised Penal Code provides:

ART. 238. *Abandonment of office or position*. — Any public officer who, before the acceptance of his resignation, shall abandon his office to the detriment of the public service shall suffer the penalty of *arresto mayor*.

Code.[33] The final or conclusive act of a resignation's acceptance is the notice of acceptance.[34] The incumbent official would not be in a position to determine the acceptance of his resignation unless he had been duly notified therefor.[35]

In this case, the Court of Appeals and the CSC declared that there was nothing in the records to show that respondent was duly informed of the acceptance of his resignation. There was no indication that respondent received a copy of his 12 November 1999 application for leave of absence and resignation as accepted by Director Hipolito. Neither was there any indication that respondent received Director Hipolito's 12 November 1999 Memorandum informing him of the acceptance of his resignation. Therefore, we affirm the ruling of the Court of Appeals that respondent's resignation was incomplete and inoperative because respondent was not notified of the acceptance of his resignation.

Petitioner's contention that respondent knew that his resignation was accepted because respondent had notice that his application for leave of absence was approved does not deserve any merit. As respondent explained, there is a specific form used for an application of leave of absence and the approval of his application for leave of absence does not necessarily mean the acceptance of his resignation.

On respondent's alleged employment with the PRBC, the Court notes that if respondent was employed by PRBC, it was undertaken during his approved leave of absence. It does not

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If such office shall have been abandoned in order to evade the discharge of the duties of preventing, prosecuting or punishing any of the crimes falling within Title One, and Chapter One of Title Three of Book Two of this Code, the offender shall be punished by *prision correccional* in its minimum and medium periods, and by *arresto mayor* if the purpose of such abandonment is to evade the duty of preventing, prosecuting or punishing any other crime.

[33] *Gamboa v. Court of Appeals*, *supra*.

[34] *Re: Administrative Case for Falsification of Official Documents and Dishonesty against Randy S. Villanueva*, A.M. No. 2005-24-SC, 10 August 2007, 529 SCRA 679.

[35] *Gamboa v. Court of Appeals*, *supra* note 28.

have any connection with the acceptance of his resignation. We agree with the findings and conclusions of the Court of Appeals that this does not amount to abandonment. If respondent was indeed employed by PRBC during his approved leave of absence and he violated Civil Service rules, then the proper case should be filed against him.

Resignation may be Withdrawn before its Acceptance

Until the resignation is accepted, the tender or offer to resign is revocable.[36] And the resignation is not effective where it was withdrawn before it was accepted.[37]

In this case, since respondent's resignation was not finally and conclusively accepted as he was not duly notified of its acceptance, respondent could validly withdraw his resignation. There was no need for Director Hipolito to accept the withdrawal of resignation since there was no valid acceptance of the application of resignation in the first place. Undersecretary Ordoñez also validly issued the detail order as respondent had not effectively resigned from DTI-RO2.

WHEREFORE, we *DENY* the petition and *AFFIRM* the 1 August 2001 Decision of the Court of Appeals. We *LIFT* the temporary restraining order enjoining the Civil Service Commission from enforcing the 1 August 2001 Decision of the Court of Appeals and respondent Winston T. Singun from assuming office at the Department of Trade and Industry, Regional Office No. 2, Cagayan Province.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Azcuna, and *Leonardo-de Castro, JJ., concur.*

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[36] *Joson III v. Nario*, G.R. No. 91548, 13 July 1990, 187 SCRA 453.

[37] *Id*.

THIRD DIVISION

[G.R. No. 150900. March 14, 2008]

CYNTHIA LUCES, *petitioner, vs.* **CHERRY DAMOLE, HON. RAMON G. CODILLA, JR., Presiding Judge, Regional Trial Court, Branch 19, Cebu City; and COURT OF APPEALS, FIFTH DIVISION, METRO MANILA,** *respondents.*

SYLLABUS

1. CRIMINAL LAW; SWINDLING; ESTAFA THROUGH MISAPPROPRIATION OR CONVERSION; ELEMENTS. — Also known as "swindling," estafa is committed by any person who shall defraud another by any of the means mentioned in the Revised Penal Code (RPC). Petitioner was tried and convicted for violation of Article 315(1)(b) which states that, among others, fraud may be committed with unfaithfulness or abuse of confidence in the following manner: (b) By misappropriating or converting, to the prejudice of another, money, goods, or any other personal property received by the offender in trust or on commission, or for administration, or under any other obligation involving the duty to make delivery of or to return the same, even though such obligation be totally or partially guaranteed by a bond; or by denying having received such money, goods, or other property. Specifically, the elements of *estafa* through misappropriation or conversion are: 1) that the money, goods or other personal property is received by the offender in trust, or on commission, or for administration, or under any other obligation involving the duty to deliver or return the same; 2) that there be misappropriation or conversion of such money or property by the offender or denial on his part of such receipt; 3) that such misappropriation or conversion or denial is to the prejudice of another; and 4) that there is a demand made by the offended party on the offender.

2. ID.; ID.; ID.; ID.; THERE IS AMPLE CIRCUMSTANTIAL EVIDENCE OF ESTAFA IN CASE AT BAR; NO ADEQUATE EXPLANATION WHY PETITIONER PERSONALLY USED AND ALLOWED HER RELATIVES TO USE THE PURCHASE

ORDER (PO) CARDS; USING THE PURCHASE ORDER CARDS AS OWNER IS CONVERSION. — In the instant case, it was established that petitioner received from the private complainant the subject PO cards to be sold by the former on commission, as evidenced by their Trust Receipt Agreements (TRAs). By such terms and conditions, petitioner agreed to hold in trust the following: the PO cards, for the purpose of selling them to different cardholders and returning to private complainant the cards unsold; and the proceeds of the sale, if any, for remittance to the private complainant. And so, we ask the questions: Were the PO cards disposed of in accordance with their agreements? If so, did petitioner remit the proceeds to the private complainant? The evidence shows that petitioner sold most of the PO cards to Ms. Tamara. The transaction was testified to by petitioner; confirmed by Ms. Tamara; and was, in fact, admitted by the private complainant during cross-examination. Private complainant clearly stated in open court that she was aware of the sale of the PO cards to Ms. Tamara, and that she personally received payment made by the latter through the petitioner. To repeat, the PO cards were entrusted to petitioner for the purpose of selling them to cardholders. Petitioner was at liberty to sell them either in cash or on installment. In fact, the private complainant agreed that the proceeds of the sale may be turned over to her in four installments. When she sold the cards to Ms. Tamara, petitioner did so pursuant to their TRA. It appears, however, that the proceeds of that sale could not be turned over to the private complainant, because Ms. Tamara failed to pay the purchase price of the subject PO cards. Technically, then, there was no conversion since the PO cards sold to Ms. Tamara were not devoted to a purpose or use different from that agreed upon. This notwithstanding, petitioner is not free from criminal liability. As to the PO cards covered by Trust Receipt No. 4103 with a face value of ₱33,600.00, the prosecution sufficiently established that they were used by petitioner herself and her relatives as evidenced by the copies of the PO cards they actually used bearing their names. Although there was no prohibition for petitioner to use or for her relatives to purchase the PO cards, they should have paid the corresponding price, and petitioner should have remitted the proceeds to the private complainant. There being no adequate explanation why she personally used and allowed her relatives to use the cards, there is ample

circumstantial evidence of *estafa.* Using the PO cards as owner is conversion. Accordingly, we agree with the CA's ratiocination in this wise: Thus, using or disposing by LUCES for her and her relatives' own personal purpose and benefit of the said P.O. cards, constitutes breach of trust, unfaithfulness and abuse of confidence. The failure of LUCES to account for them establishes the felony of estafa through abuse of confidence by misappropriation or conversion. The essence of estafa under Article 315, par. 1(b) is the appropriation or conversion of money or property received, to the prejudice of the owner. The words "convert" and "misappropriate" connote an act of using or disposing of another's property as if it were one's own, or of devoting it to a purpose or use different from that agreed upon. To misappropriate for one's own use includes not only conversion to one's personal advantage, but also every attempt to dispose of the property of another without a right.

3. ID.; ID.; ID.; ID.; THE MISAPPROPRIATION OR CONVERSION BY PETITIONER CAUSED PREJUDICED TO PRIVATE RESPONDENT. — The prosecution further showed that the misappropriation or conversion by petitioner caused prejudice to private complainant. Damage as an element of estafa may consist in 1) the offended party being deprived of his money or property as a result of the defraudation; 2) disturbance in property right; or 3) temporary prejudice. Under the given circumstances, it is beyond cavil that private complainant was deprived of her right to enjoy the proceeds of the sale as a result of petitioner's unauthorized use of the PO cards.

4. ID.; ID.; ID.; ID.; PROPER IMPOSABLE PENALTY APPLYING THE INDETERMINATE SENTENCE LAW. — Under the Indeterminate Sentence Law, the maximum term of the penalty shall be "that which in view of the attending circumstances, could be properly imposed" under the RPC and the minimum shall be "within the range of the penalty next lower to that prescribed" for the offense. The range of the penalty provided for in Article 315 is composed of only two periods; thus, to get the maximum period of the indeterminate sentence, the total number of years included in the two periods should be divided into three. Article 65 of the RPC requires the division of the time included in the prescribed penalty into three equal periods of time, forming one period for each of the three portions. The minimum, medium and maximum periods of the prescribed penalty

are therefore: Minimum period – 4 years, 2 months and 1 day to 5 years, 5 months and 10 days, Medium period – 5 years, 5 months and 11 days to 6 years, 8 months and 20 days, Maximum period – 6 years, 8 months and 21 days to 8 years. The amount defrauded is in excess of ₱22,000.00; the penalty imposable should be the maximum period of six (6) years, eight (8) months and twenty-one (21) days to eight (8) years of *prision mayor*. However, Article 315 also provides that an additional one year shall be imposed for each additional ₱10,000.00. Here, the total amount of the fraud is ₱33,600.00 (₱33,600.00—₱22,000.00 = ₱11,600.00). Thus, while we are disposed to impose six (6) years, eight (8) months and twenty-one (21) days of the maximum period provided by the RPC, an additional penalty of one year should likewise be imposed. Accordingly, we hold that the maximum term of the indeterminate sentence shall be seven (7) years, eight (8) months and twenty-one (21) days of *prision mayor*. The minimum period of the indeterminate sentence, on the other hand, should be within the range of the penalty next lower to that prescribed by the RPC for the crime committed. The penalty next lower than *prision correccional* maximum to *prision mayor* minimum is *prision correccional* in its minimum and medium periods. Thus, the minimum term of the indeterminate sentence shall be two (2) years, eleven (11) months and eleven (11) days.

5. REMEDIAL LAW; CRIMINAL PROCEDURE; PREJUDICIAL QUESTION; A FINDING IN THE CIVIL CASE FOR OR AGAINST PETITIONER IS NOT *JURIS ET DE JURE* DETERMINATIVE OF HER INNOCENCE OR GUILT IN THE ESTAFA. — Lastly, as to whether the civil case filed by the private complainant is a prejudicial question, we note with approval the appellate court's conclusion, thus: It is clear from the questioned civil case that the civil liability of LUCES to DAMOLE was founded on the former's failure or refusal to remit to the latter the proceeds arising from the sales of P.O. cards. In contrast, in the instant criminal case, the court *a quo* was tasked to determine whether or not the non-remittance of the proceeds of the sale of P.O. cards or the return thereof by LUCES to DAMOLE, was due to misappropriation or conversion. Stated simply, the issue in the civil (MAN-2031) is DAMOLE's right to recover from LUCES the amount representing the value of the P.O. cards allegedly embezzled by the latter. While the

issue in the criminal case is whether LUCES' failure to account for the proceeds of the sale of P.O. cards and/or to return the unsold P.O. cards as DAMOLE's trustee constitutes estafa under Article 315 par. 1 (b) of the Revised Penal Code. A finding in the civil case for or against the appellant is not *juris et de jure* determinative of her innocence or guilt in the estafa case.

APPEARANCES OF COUNSEL

Eleno V. Andales, Sisinio M. Andales & Eleno M. Andales for petitioner.

D E C I S I O N

NACHURA, *J.*:

This is a petition for review on *certiorari* under Rule 45 of the Rules of Court of the Decision[1] of the Court of Appeals (CA) dated August 30, 2001 and its Resolution[2] dated November 20, 2001, in CA-G.R. CR No. 23412.

In July 1993, petitioner Cynthia Luces approached private complainant Cherry Damole at the latter's place of work at the Robinson's Department Store, located along Fuente Osmeña, Cebu City, and asked for Purchase Order (PO) Cards to be sold by her on commission basis. They agreed[3] that petitioner would sell the PO cards to her customers and that she would get her commission therefrom in the form of marked up prices.[4] Petitioner further agreed that she would hold the PO cards as trustee of the private complainant with the obligation to remit the proceeds of the sale thereof less the commission, and before

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[1] Penned by Associate Justice Bienvenido L. Reyes, with Associate Justices Eubulo G. Verzola and Marina L. Buzon, concurring; *rollo*, pp. 48-60.

[2] *Id*. at 62-63.

[3] Petitioner's and private complainant's agreements were embodied in an instrument denominated as Trust Receipt Agreement; records, pp. 11-17.

[4] *Rollo*, p. 50.

such remittance, to hold the same in trust for the latter.[5] Lastly, petitioner undertook to return the unsold PO cards.[6]

As of September, 1993, petitioner received from the private complainant 870 PO cards with a total face value of ₱412,305.00. Initially, petitioner complied with her obligations, but later she defaulted in remitting the proceeds. Hence, the demand made by the private complainant, through her lawyer, on the petitioner, but the same was unheeded.

Private complainant thereafter instituted a civil case for collection of sum of money.[7] She, likewise, filed a separate criminal complaint. Petitioner was thus charged with *Estafa* in an Information dated March 3, 1995, the accusatory portion of which reads:

> That sometime in the month of July, 1993, and for sometime subsequent thereto, in the City of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the said accused, having received Purchase Order (PO) slips worth ₱412,305.00 from Cherry Damole, with the agreement that she should sell out the said PO slips for and in behalf of Cherry Damole, with the obligation on her part to immediately account for and turn over the proceeds of the sale, if said PO slips are sold, or to return the same to Cherry Damole, if she would not be able to dispose any or all of them within the agreed date, the said accused, once in possession of said PO slips, far from complying with her obligation, with deliberate intent, with intent of gain, with unfaithfulness and grave abuse of confidence and of defrauding Cherry Damole, did then and there misappropriate, misapply and convert into her own personal use and benefit the said PO slips, or the amount of ₱412,305.00, which is the equivalent value thereof, and in spite of repeated demands made upon her by Cherry Damole to let her comply with her obligation, she has failed and refused and up to the present time still fails and refuses to do so, to the damage and prejudice of Cherry Damole in the amount of ₱412,305.00, Philippine Currency.

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[5] Records, pp. 11-17.

[6] *Rollo*, p. 50.

[7] The case was docketed as Civil Case No. MAN-2031; records, pp. 302-305.

CONTRARY TO LAW.[8]

The Information was filed with the Regional Trial Court (RTC) and was raffled to Branch 19, Cebu City. It was docketed as Criminal Case No. CBU-38420.

On April 27, 1995, petitioner moved for the dismissal of the criminal case and/or suspension of the proceedings in view of the pendency of the civil case for collection filed earlier by the private complainant.[9] She contended that the resolution of the civil case is determinative of her culpability in the criminal case. The RTC initially suspended the case[10] but on motion for reconsideration, the court reversed itself and held that the outcome of the civil case would not, in any way, affect the criminal action.[11] The court, thus, set the case for arraignment where the petitioner pleaded "not guilty."

During trial, the prosecution established the existence of the trust receipt agreements; the receipt by petitioner of the subject PO cards; and her failure to comply with her obligation to remit the proceeds of the sale and to return the unsold cards to the private complainant. The prosecution likewise proved that petitioner converted the PO cards to her personal use by using such cards herself and by letting the members of her family use them, contrary to their agreement.[12] By reason of such conversion and misappropriation, private complainant suffered damage.

In defense, petitioner claimed that her liability to private complainant is purely civil, considering that the trust receipt agreements were in fact contracts of sale which transferred to petitioner the ownership of the questioned PO cards, and that, therefore, there was no misappropriation to speak of.

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[8] Records, pp. 1-2.

[9] *Id*. at 70-72.

[10] Embodied in an Order dated April 28, 1995; *id*. at 80.

[11] Records, p. 118.

[12] TSN, September 5, 1996, pp. 5-9.

Petitioner, likewise, testified that she was authorized to sell the PO cards on installment which she did by selling them to a certain Evelyn Tamara who, however, failed to pay. Petitioner further claimed that no damage was ever caused to the private complainant as she continuously paid monthly amortizations. She also insisted that the civil case filed against her by the same complainant is a prejudicial question; hence, the criminal case should have been dismissed.[13]

On August 25, 1997, the RTC rendered a Decision convicting petitioner of the crime of estafa.[14] On appeal, the CA affirmed petitioner's conviction, but modified the penalty imposed by the lower court. The appellate court found that all the elements of estafa, with abuse of confidence through misappropriation, were established, and stressed that the civil case for collection of sum of money would not, in any way, be determinative of the guilt or innocence of petitioner.[15] The CA, however, imposed the indeterminate penalty of four (4) years and two (2) months of *prision correccional*, as minimum, to twenty (20) years of *reclusion temporal*, as maximum, instead of that imposed by the RTC.[16]

Hence, the instant petition raising the following issues:

I.

RESPONDENT COURT OF APPEALS DECIDED A QUESTION OF SUBSTANCE NOT HERETOFORE DETERMINED BY THIS

[13] *Rollo*, p. 51.

[14] The dispositive portion of the RTC decision reads:

WHEREFORE, foregoing premises considered, the court finds the accused guilty beyond reasonable doubt of the crime of estafa as defined and penalized under Article 515, paragraph 1, and hereby sentences the accused to suffer an imprisonment of 5 years, 4 months and 21 days of *prision correccional,* maximum, as minimum, to 12 years of prision mayor, as maximum, applying the Indeterminate Sentence Law. With all the accessory penalties provided by law.

SO ORDERED. (Records, p. 280.)

[15] *Rollo*, p. 58.

[16] *Id*. at 59.

HONORABLE SUPREME COURT, OR HAS DECIDED IT IN A WAY PROBABLY NOT IN ACCORD WITH LAW OR WITH THE APPLICABLE DECISIONS OF THIS HONORABLE SUPREME COURT AND THE CONCLUSIONS ARE FOUNDED ON MERE SPECULATION, SURMISE AND CONJECTURE.

II.

RESPONDENT COURT OF APPEALS GRAVELY ERRED IN AFFIRMING WITH MODIFICATION THE DECISION OF THE HONORABLE REGIONAL TRIAL COURT AND DENYING DUE COURSE THE PETITIONER'S MOTION FOR RECONSIDERATION OF THE JUDGMENT.

III.

RESPONDENT COURT OF APPEALS GRAVELY ERRED IN NOT GIVING WEIGHT THE ISSUE OF PREJUDICIAL QUESTION RAISED BY PETITIONER.

IV.

RESPONDENT COURT OF APPEALS GRAVELY ERRED IN NOT GIVING WEIGHT THE POSITIVE ASSERTION OF THE PETITIONER THAT SHE IS NOT CRIMINALLY LIABLE BUT ONLY CIVIL.[17]

The petition lacks merit.

Also known as "swindling," estafa is committed by any person who shall defraud another by any of the means mentioned in the Revised Penal Code (RPC).[18] Petitioner was tried and convicted for violation of Article 315(1)(b) which states that, among others, fraud may be committed with unfaithfulness or abuse of confidence in the following manner:

(b) By misappropriating or converting, to the prejudice of another, money, goods, or any other personal property received by the offender in trust or on commission, or for administration, or under any other obligation involving the duty to make delivery of or to return the same, even though such obligation be totally or partially guaranteed

[17] *Id*. at 15.

[18] *Tan v. People*, G.R. No. 153460, January 29, 2007, 513 SCRA 194, 202.

by a bond; or by denying having received such money, goods, or other property.[19]

Specifically, the elements of *estafa* through misappropriation or conversion are: 1) that the money, goods or other personal property is received by the offender in trust, or on commission, or for administration, or under any other obligation involving the duty to deliver or return the same; 2) that there be misappropriation or conversion of such money or property by the offender or denial on his part of such receipt; 3) that such misappropriation or conversion or denial is to the prejudice of another; and 4) that there is a demand made by the offended party on the offender.[20]

In the instant case, it was established that petitioner received from the private complainant the subject PO cards to be sold by the former on commission, as evidenced by their Trust Receipt Agreements (TRAs).[21] The Agreements contain identical terms and conditions as follows:

> 2. That the TRUSTEE intends to give P.O. to different cardholders and received (sic) commission in a form of mark-up price but TRUSTEE assumes the responsibility of paying the amount due including penalty, if any, on due dates;
>
> 3. That the TRUSTEE holds P.O. in storage as the property of TRUSTOR, with the right to sell the same for each for TRUSTOR'S account and to hand the proceeds thereof to the trustor less the commission mentioned above;
>
> 4. That TRUSTEE agrees that before remittance to TRUSTOR, she/he shall hold the sum in trust for the TRUSTOR;
>
> 5. That the TRUSTEE is aware that her failure to remit the proceeds or return the P.O. when demanded by the

[19] REVISED PENAL CODE, Art. 315 (1)(b).

[20] *Asejo v. People*, G.R. No. 157433, July 24, 2007, 528 SCRA 114, 120-121; *Isip v. People*, G.R. No. 170298, June 26, 2007, 525 SCRA 735, 757-758; *Tan v. People*, *supra* note 18, at 202-203; *Serona v. Court of Appeals*, 440 Phil. 508, 517 (2002).

[21] Exhs. "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L", "M", "N"; records, pp. 11-20.

TRUSTOR give rise to CRIMINAL LIABILITY and CIVIL LIABILITY.[22]

By such terms and conditions, petitioner agreed to hold in trust the following: the PO cards, for the purpose of selling them to different cardholders and returning to private complainant the cards unsold; and the proceeds of the sale, if any, for remittance to the private complainant.

And so, we ask the questions: Were the PO cards disposed of in accordance with their agreements? If so, did petitioner remit the proceeds to the private complainant?

The evidence shows that petitioner sold most of the PO cards to Ms. Tamara. The transaction was testified to by petitioner; confirmed by Ms. Tamara; and was, in fact, admitted by the private complainant during cross-examination.[23] Private complainant clearly stated in open court that she was aware of the sale of the PO cards to Ms. Tamara, and that she personally received payment made by the latter through the petitioner.[24]

To repeat, the PO cards were entrusted to petitioner for the purpose of selling them to cardholders. Petitioner was at liberty to sell them either in cash or on installment. In fact, the private

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[22] TRA Nos. 4111, 4103, 4131, 4128, 4161, 4144, 4180, 4177, 4188, 4182, 4956, 4952, 49633 and 4969; *id*. at 11-26.

[23] TSN, July 22, 1996, pp. 3-5.

[24] The testimony of the private complainant reads:

ATTY. NODADO

And because of her failure to remit some amount that she collected from her customer, you filed a case for collection of sum of money before the court in Mandaue City, Branch 28, am I correct?

WITNESS

Yes, sir.

ATTY. NODADO

And in that case the defendant also failed (sic) a third party complaint against a certain Evelyn Tabara (sic), are you aware of that?

WITNESS

Yes, I am aware of that.

complainant agreed that the proceeds of the sale may be turned over to her in four installments. When she sold the cards to Ms. Tamara, petitioner did so pursuant to their TRA. It appears, however, that the proceeds of that sale could not be turned over to the private complainant, because Ms. Tamara failed to pay the purchase price of the subject PO cards. Technically, then, there was no conversion since the PO cards sold to Ms. Tamara were not devoted to a purpose or use different from that agreed upon.

This notwithstanding, petitioner is not free from criminal liability. As to the PO cards covered by Trust Receipt No. 4103 with a face value of ₱33,600.00, the prosecution sufficiently established that they were used by petitioner herself and her relatives as evidenced by the copies of the PO cards they actually used bearing their names.[25] Although there was no prohibition for petitioner to use or for her relatives to purchase the PO cards, they should have paid the corresponding price, and petitioner should have remitted the proceeds to the private complainant. There being no adequate explanation why she personally used and allowed her relatives to use the cards, there is ample circumstantial evidence of *estafa.* Using the PO cards as owner is conversion. Accordingly, we agree with the CA's ratiocination in this wise:

Thus, using or disposing by LUCES for her and her relatives' own personal purpose and benefit of the said P.O. cards, constitutes breach of trust, unfaithfulness and abuse of confidence. The failure of LUCES

ATTY. NODADO

And in fact after she filed a case for collection of sum of money from third party defendant Tabara (sic) in the sum of ₱1,600.00 on July 1993, am I right?

WITNESS

Yes, I was able to collect from Tamara but through Cynthia Luces. (TSN, July 22, 1996, pp. 3-5.)

[25] Specifically, the PO cards bore the names of petitioner Cynthia Luces, Geraldine Rosel, and Cristituto Rosel.

to account for them establishes the felony of estafa through abuse of confidence by misappropriation or conversion.[26]

The essence of estafa under Article 315, par. 1(b) is the appropriation or conversion of money or property received, to the prejudice of the owner. The words "convert" and "misappropriate" connote an act of using or disposing of another's property as if it were one's own, or of devoting it to a purpose or use different from that agreed upon. To misappropriate for one's own use includes not only conversion to one's personal advantage, but also every attempt to dispose of the property of another without a right.[27]

The prosecution further showed that the misappropriation or conversion by petitioner caused prejudice to private complainant. Damage as an element of estafa may consist in 1) the offended party being deprived of his money or property as a result of the defraudation; 2) disturbance in property right; or 3) temporary prejudice.[28] Under the given circumstances, it is beyond cavil that private complainant was deprived of her right to enjoy the proceeds of the sale as a result of petitioner's unauthorized use of the PO cards.

As regards the appropriate penalty, the RPC provides:

Art. 315. *Swindling (Estafa)*. – Any person who shall defraud another by any of the means mentioned hereinbelow shall be punished by:

1st. The penalty of *prision correccional* in its maximum period to *prision mayor* in its minimum period, if the amount of the fraud is over 12,000 pesos but does not exceed 22,000 pesos; and if such amount exceeds the latter sum, the penalty provided in this paragraph shall be imposed in its maximum period, adding one year for each additional 10,000 pesos; but the total penalty which may be imposed

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[26] *Rollo*, p. 56.

[27] *Tan v. People*, *supra* note 18, at 204; *Lee v. People*, G.R. No. 157781, April 11, 2005, 455 SCRA 256, 267; *Serona v. Court of Appeals*, *supra* note 20, at 42.

[28] *Tan v. People*, *supra* note 18, at 205.

shall not exceed twenty years. In such cases, and in connection with the accessory penalties which may be imposed and for the purpose of the other provisions of this Code, the penalty shall be termed *prision mayor or reclusion temporal*, as the case may be.

Under the Indeterminate Sentence Law,[29] the maximum term of the penalty shall be "that which in view of the attending circumstances, could be properly imposed" under the RPC and the minimum shall be "within the range of the penalty next lower to that prescribed" for the offense.[30]

The range of the penalty provided for in Article 315 is composed of only two periods; thus, to get the maximum period of the indeterminate sentence, the total number of years included in the two periods should be divided into three. Article 65 of the RPC requires the division of the time included in the prescribed penalty into three equal periods of time, forming one period for each of the three portions. The minimum, medium and maximum periods of the prescribed penalty are therefore:

Minimum period – 4 years, 2 months and 1 day to 5 years, 5 months and 10 days

Medium period – 5 years, 5 months and 11 days to 6 years, 8 months and 20 days

Maximum period – 6 years, 8 months and 21 days to 8 years.[31]

The amount defrauded is in excess of ₱22,000.00; the penalty imposable should be the maximum period of six (6) years, eight (8) months and twenty-one (21) days to eight (8) years of *prision mayor*. However, Article 315 also provides that an additional one year shall be imposed for each additional ₱10,000.00. Here, the total amount of the fraud is ₱33,600.00 (₱33,600.00-₱22,000.00 = ₱11,600.00). Thus, while we are disposed to impose

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[29] Act No. 4103 as amended by Act No. 4225.

[30] *Pucay v. People*, G.R. No. 167084, October 31, 2006, 506 SCRA 411, 424; *Bonifacio v. People*, G.R. No. 153198, July 11, 2006, 494 SCRA 527, 532-533.

[31] *Pucay v. People*, *id*. at 424-425; *Bonifacio v. People*, *id*. at 533.

six (6) years, eight (8) months and twenty-one (21) days of the maximum period provided by the RPC, an additional penalty of one year should likewise be imposed. Accordingly, we hold that the maximum term of the indeterminate sentence shall be seven (7) years, eight (8) months and twenty-one (21) days of *prision mayor*.

The minimum period of the indeterminate sentence, on the other hand, should be within the range of the penalty next lower to that prescribed by the RPC for the crime committed. The penalty next lower than *prision correccional* maximum to *prision mayor* minimum is *prision correccional* in its minimum and medium periods. Thus, the minimum term of the indeterminate sentence shall be two (2) years, eleven (11) months and eleven (11) days.

Lastly, as to whether the civil case filed by the private complainant is a prejudicial question, we note with approval the appellate court's conclusion, thus:

> It is clear from the questioned civil case that the civil liability of LUCES to DAMOLE was founded on the former's failure or refusal to remit to the latter the proceeds arising from the sales of P.O. cards. In contrast, in the instant criminal case, the court *a quo* was tasked to determine whether or not the non-remittance of the proceeds of the sale of P.O. cards or the return thereof by LUCES to DAMOLE, was due to misappropriation or conversion. Stated simply, the issue in the civil (MAN-2031) is DAMOLE's right to recover from LUCES the amount representing the value of the P.O. cards allegedly embezzled by the latter. While the issue in the criminal case is whether LUCES' failure to account for the proceeds of the sale of P.O. cards and/or to return the unsold P.O. cards as DAMOLE's trustee constitutes estafa under Article 315 par. 1 (b) of the Revised Penal Code. A finding in the civil case for or against the appellant is not *juris et de jure* determinative of her innocence or guilt in the estafa case.[32]

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[32] *Rollo*, p. 58.

WHEREFORE, premises considered, the petition is hereby *DENIED*. The Decision of the Court of Appeals, dated August 30, 2001, and its Resolution dated November 20, 2001, in CA-G.R. CR No. 23412, are *AFFIRMED* with *MODIFICATION*. Petitioner Cynthia Luces is sentenced to suffer the indeterminate penalty of two (2) years, eleven (11) months and eleven (11) days of *prision correccional*, as minimum, to seven (7) years, eight (8) months and twenty-one (21) days of *prision mayor*, as maximum.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Reyes, JJ.,* concur.

FIRST DIVISION

[G.R. No. 154632. March 14, 2008]

SPOUSES REYNALDO and ZENAIDA LEONG, RENATO C. LEONG and ALFONSO D. LEONG, JR., *petitioners, vs.* **HON. EDUARDO ISRAEL TANGUANCO, Presiding Judge, Regional Trial Court, Br. 89, Imus, Cavite, BRANCH SHERIFF, Branch 89-RTC, Bacoor, Cavite, and HERMOSA SAVINGS AND LOAN BANK, INC.,** *respondents.*

SYLLABUS

REMEDIAL LAW; CIVIL PROCEDURE; APPEAL BY *CERTIORARI* TO THE SUPREME COURT; THE ISSUANCE OF THE WRIT OF POSSESSION BY THE REGIONAL TRIAL COURT OF BACOOR, CAVITE RENDERED THE PETITION TO CONSOLIDATE THE CASE BEFORE THE LATTER COURT WITH THE CASE PENDING BEFORE THE REGIONAL TRIAL COURT OF LAS PIÑAS CITY MOOT AND ACADEMIC; CASE AT BAR. — Petitioners have not shown any reversible error

on the part of the CA. As the CA correctly found, the RTC of Bacoor, Cavite had already granted the writ of possession sought by Hermosa. Hence, the petition to consolidate the case before the RTC of Bacoor, Cavite with the case pending before the RTC of Las Piñas, had become moot and academic. This does not, however, preclude petitioners from availing themselves of appropriate remedies depending upon the outcome in the RTC of Las Piñas case.

APPEARANCES OF COUNSEL

Kapunan Migallos Perez and Luna for petitioners.

Advocates Circle Lawyers for Hermosa Savings and Loan Bank, Inc.

. D E C I S I O N

AZCUNA, *J.*:

In this petition for review on *certiorari* under Rule 45 of the Rules on Civil Procedure, petitioners seek the reversal of the March 21, 2002 Decision[1] and July 19, 2002 Resolution[2] of the Court of Appeals (CA) in CA-G.R. SP No. 54320 dismissing their petition and, in effect, upholding the May 18, 1999 and June 28, 1999 Orders[3] of respondent judge which denied their twin motions to dismiss/suspend proceedings and for consolidation.

On February 5, 1999, respondent Hermosa Savings and Loan Bank, Inc. (Hermosa Bank) filed an *Ex-Parte* Petition for the Issuance of Writ of Possession[4] against petitioners before the Regional Trial Court (RTC) of Bacoor, Cavite. Docketed as

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[1] Penned by Justice Candido V. Rivera, with Associate Justices Delilah Vidallon-Magtolis and Juan Q. Enriquez, Jr., concurring; CA *rollo*, pp. 204-209.

[2] *Id.* at 232-233.

[3] *Records*, pp. 107-111, 167.

[4] *Id.* at 1-6.

LRC Case No. 8843-99-11 and raffled in the sala of respondent judge, the petition alleged that on November 28, 1997 Hermosa Bank purchased at an extra-judicial foreclosure sale three parcels of land together with improvements therein, with a total area of ten thousand eight hundred sixty (10,860) square meters, situated in Bacoor, Cavite and covered by Transfer Certificate of Title (TCT) Nos. T-107260, T-225973 and T-225960; that the Certificate of Sale of Realty issued to it was duly registered and annotated with the Registry of Deeds of Cavite on December 17, 1997; that twelve (12) months from the date of registration of the sale had already elapsed and neither petitioners nor any person entitled thereto had exercised their right of redemption; that upon the expiration of the period, Hermosa Bank caused the consolidation of ownership over said parcels and secured under its name TCT Nos. 845841, 845801, and 845845; and that having consolidated its ownership thereon, it is entitled as a matter of right to a writ of possession.

Petitioners filed an Opposition with Urgent Motion to Dismiss/ Suspend Proceedings and Motion for Consolidation,[5] countering that the extrajudicial foreclosure of the real estate mortgages as well as the subsequent auction sale of the three parcels of land are null and void. They asserted that the mortgage contracts, loan agreements, promissory notes and other documents needed to implement the loan were executed by petitioner Alfonso in favor of Hermosa Bank without consideration and were absolutely simulated. Petitioners claimed that Alfonso only agreed to sign the documents upon the insistent prodding of the bank's president, Benjamin J. Cruz, that they were needed for purposes only of the Bangko Sentral's audit of Hermosa Bank; in truth, the documents were required to cover up the loan of spouses Rene and Remedios Dado and Sierra Madre Development Corporation, who are the real debtors of the bank. To bolster their point, petitioners substantially restated the factual allegations embodied in their Complaint[6] filed against Hermosa Bank on

[5] *Id.* at 42-58.

[6] *Id.* at 65-79.

March 16, 1999 for Declaration of Nullity of Contracts/Discharge of Mortgage, Annulment of Extra-judicial Foreclosure Sales, Reconveyance, Damages, and Injunction with Prayer for Restraining Order before the RTC of Las Piñas, Br. 255, and docketed as Civil Case No. LP-99-0072, thus:

3. Sometime in 1987, plaintiff Alfonso was employed as the Assistant Vice-President of Asia Trust Development Bank for Countryside Banking. On 25 February 1987, he was introduced by Remedios L. Dado ("Dado") by Norman Enriquez, a mutual friend. Dado asked him if he could help her secure a loan to set up a corporation to engage in the logging business, to be known as Sierra Madre Forest & Development Corporation ("Sierra Madre").

4. Dado showed a very attractive project study that would give a minimum potential income of ₱50 Million in a year's operation. She gave her assurance that the loan will be paid within a month from the time the stumpage contract is released and executed by the Natural Resources Development Corporation. Finally, she offered 30% ownership to the bank which would grant the needed loan.

5. Plaintiff Alfonso agreed to help her secure the necessary loan. They sought the help of defendant Cruz, who is the President and General Manager of Hermosa Bank. Moreover, defendant Cruz is a close friend and "*kumpare*" of plaintiff Alfonso.

6. During the meeting, Dado laid down her proposal on the intended project to defendant Cruz. Defendant Cruz agreed to extend the needed loan thru defendant Hermosa Bank on the condition that plaintiff Alfonso would act as his nominee in the board of the corporation to represent his 30% holdings.

7. Dado was able to secure the loan from defendant Hermosa Bank in the amount of ONE MILLION EIGHT HUNDRED FORTY FIVE THOUSAND PESOS (₱1,845,000.00). On **4 March 1987 and 20 April 1987** they executed two loan agreements. She likewise executed a total of four promissory notes, with maturity dates of 2 June and 19 July 1987.

8. Dado was not able to pay the loan when the promissory notes matured. She requested for another 90 days extension

by issuing her personal checks to cover the payment of interest and penalties thereon. The maturity dates of the promissory notes were extended to **22 September 1987 and 18 October 1987**. Dado's personal checks were[,] however[,] dishonored for reason of "Closed Account."

9. Plaintiff Alfonso was forced to advance partial payment in the amount of ₱128,550.00, representing interest and penalties, to give Dado more time to pay the loan and to preserve his good relations with defendant Cruz.

10. Dado did not pay the loan when it matured. Defendant Cruz, Dado, and plaintiff Alfonso even met at Sheraton Hotel on 2 June 1987 to discuss the loan[;] however, nothing materialized from the talks.

11. Defendant Cruz requested plaintiff Alfonso to do something about Dado's loan since the audit of the bank by the Central Bank was forthcoming. He asked plaintiff Alfonso to borrow from other banks and apply the proceeds to his loan to pay Dado's loan. Plaintiff Alfonso ignored such request.

12. In the meantime, plaintiff Alfonso, as Assistant Vice President of Asia Trust, continued to facilitate "buy-back" transactions of government securities between defendant Hermosa Bank and Asia Trust. This involves the sale of government securities with a guarantee from the seller that he will buy-back from the buyer the same securities at a given future date.

13. Without the knowledge and consent of plaintiff Alfonso, defendant Cruz [had] been applying the proceeds of the "buy-back" transactions to pay Dado's loan. Defendant Cruz and Hermosa Bank applied **Asia Trust Check No. 13842 for ONE MILLION PESOS (₱1,000,000.00) and Asia Trust Check No. 193669 for EIGHT HUNDRED FORTY FIVE THOUSAND PESOS (₱845,000.00)** to pay Dado's loan, in full, even before their maturity dates. Four official receipts were thereafter issued showing that said amounts were received from "Remedios Dado" x x x.

14. Plaintiff Alfonso confronted defendant Cruz upon learning that Dado's loan [had] been paid. He expressed his concern that if Dado discovers that her loan [had] been paid she may not pay it anymore. Defendant Cruz, however, informed him that the payments were necessary only for the purposes of Central Bank

audit and that it would only appear in the books of defendant Hermosa Bank. Defendant Cruz, likewise, stated that Dado would not be informed of the same, in order for her and/or Sierra Madre to still be compelled to pay their obligation to defendant Hermosa Bank.

15. Defendant Hermosa Bank through defendant Cruz then sent two demand letters to Dado and Sierra Madre on **8 March and 19 April 1988**. Dado and Sierra Madre still did not pay the loan despite the demands x x x.

16. Defendant Cruz later insisted to plaintiff Alfonso that he should help him with the payment of the loan of defendant Hermosa Bank with Asia Trust under the "buy back" transactions. The loan by then amounted to ₱2,600,000.00. He said that he would make it appear on the books of defendant Hermosa Bank that plaintiff Alfonso borrowed money from them. The proceeds of the fictitious loan will then be used to pay the loan with Asia Trust. He said that this would be for record purposes only until Dado shall have paid the loan and the Central Bank audit completed.

17. Plaintiff Alfonso, due to the persistence and intimidations of defendant Cruz, agreed to his proposal. On **28 June 1988**, he was made to sign two loan agreements amounting to ONE MILLION THREE HUNDRED THOUSAND PESOS (₱1,300,000.00) each or a total of TWO MILLION SIX HUNDRED THOUSAND PESOS (₱2,600,000.00), the approximate amount of the loan with Asia Trust at that time.

18. Under the fictitious loan agreements, the loans were supposed to be secured by real estate mortgages particularly Transfer Certificate of Title Nos. 30740, 225976, 225973 and T-107260, which are all owned by the plaintiffs. However, **at the same time[,] the plaintiffs have not executed any mortgage contract**. The spaces provided for the payment of interests were not even filled up. The loan agreements were, likewise, made to appear to have been executed on **19 July 1988, when it was actually executed on 28 June 1988**. In fact, in one of the agreements the date was erased and "28" and "June" was typed over it, when defendant Hermosa Bank discovered that plaintiff Alfonso dated his signature to reflect the true date of signing x x x.

19. On the same date of 28 June 1988, defendants Hermosa Bank and Cruz prepared two "Discount/Loan Release Sheet" and made it appear that Manager's Check Nos. 9549 and 9559 both for ₱1,151,366.66 were supposedly released to plaintiff Alfonso and/or Carmelita Leong on **18 July 1988**. Plaintiff Alfonso, however, dated his signature to again reflect the true date of signing which was **28 June 1988, and to prove that the same are fictitious. It thus appeared that the money was released to plaintiff Alfonso even before the alleged signing of the loan agreements, which is obviously highly irregular** x x x.

20. On **8 July 1988**, defendant Cruz compelled plaintiff Alfonso to execute and sign real estate mortgages in favor of defendant Hermosa Bank. He said that this is necessary to make it appear that the loan agreements are legitimate for purposes of the Central Bank audit. Plaintiff Alfonso's property being insufficient, he secured the necessary power of attorney from plaintiffs Renato Leong, Sps. Reynaldo and Zenaida Leong, and Sps. Roberto and Yolanda Leong to mortgage their properties.

21. Defendant Cruz prepared two (2) deeds of mortgage and made it appear that it was the security for the two loans. The said mortgage contracts were registered and annotated to the Transfer Certificate of Titles on **15 July 1988** x x x.

22. On **18 July 1988**, defendants Hermosa Bank and Cruz prepared two (2) promissory notes for plaintiff Alfonso to execute and sign. Plaintiff Alfonso inquired as to the purpose of said notes and why it appeared on the said notes that the loans therein were secured by the mortgage contracts executed on 8 July 1988. Defendant Cruz informed him again that it was necessary only for purposes of Central Bank audit. Plaintiff Alfonso signed the promissory notes on the basis of defendant Cruz's assurances that the promissory notes were for that sole purpose alone x x x.

23. On the same day of **18 July 1988**, defendant Hermosa Bank through defendant Cruz issued a manager's check for ₱2,539,425.89 payable to Asia Trust Bank, as payment of its loan. Defendant Cruz, however, surreptitiously typed the phrase "FAO: A. C. LEONG" beside the machine printed name

of Asia Trust Bank, without the knowledge and consent of plaintiff Alfonso x x x.

24. After the said payment, defendant Cruz, in his own behalf and as President of defendant Hermosa Bank, and plaintiff Alfonso executed and signed a "Release and Quitclaim." Under the deed[,] defendants Hermosa Bank and Cruz and plaintiff Alfonso agreed to mutually hold one another free, harmless and discharged from any and all claims and damages arising from transaction between defendant Hermosa Bank and Asia Trust. The parties[,] in effect[,] discharged plaintiff Alfonso and the other plaintiffs from the loan agreements, the mortgage contracts, and the promissory notes they executed earlier x x x.

25. Defendant Cruz assured the latter that the mortgages and the promissory notes would subsequently be discharged and released as soon as the Central Bank audit of their bank books was over.

26. Defendant Cruz did not fulfill his promise to plaintiff Alfonso. The mortgages and promissory notes were not discharged. On 22 July 1988, plaintiff Alfonso received a letter from defendant Cruz requesting him to submit required documents for the loan, such as ID pictures, audited financial statements, photos of the mortgage properties and location plan. It thus appeared that the loan was released even before the required documents were submitted. This only shows that the loan was absolutely fictitious or that defendant Hermosa Bank is in violation of Central Bank rules x x x.

27. On 7 February 1989, plaintiffs filed a complaint [docketed as Civil Case No. 89-3101] with the Regional Trial Court of Makati, Branch 139 (now Branch 63) for discharge of mortgage, annulment of contract, damages, and injunction with prayer for temporary restraining order against Sps. Rene and Remedios Dado, Sierra Madre Forest Development Corporation and Management Corporation, Benjamin J. Cruz, Hermosa Savings and Loan Bank, and the two sheriffs implementing the extra-judicial foreclosure sale.

28. Defendants Hermosa Bank and Cruz, thereafter, filed their answer with a cross-claim against [cross-defendants] Sps. Dado and Sierra Madre. Defendants prayed that "in the

event that judgment be rendered nullifying or diminishing the right of cross-claimant Bank in the ₱2,600,000.00 loan of plaintiffs, cross-defendants Dado and Corporation be ordered to indemnify cross-claimant Bank therefor."

29. On 13 April 1990, then defendants Sps. Dados and Sierra Madre were declared in default for their failure to file "Answer" despite the service summons to them.

30. On **14 September 1990**, plaintiffs and defendants Cruz and Hermosa Bank filed a "Joint Manifestation and Motion" for the court to render judgment as to the defaulted defendants Dado and Sierra Madre, and to allow plaintiff Alfonso to present his evidence [*ex-parte*]. They alleged, among other things, that a judgment as against defaulted defendants might pave the way for the settlement of the case as to the other defendants, Benjamin Cruz and Hermosa Savings Bank x x x.

31. On **10 September 1991**, Judge Julio R. Logarta rendered a Decision against defendants [in default]. It found plaintiffs [claims] to be valid and ordered the defendants [in default] Dado and Sierra Madre to pay the total amount of loan being claimed by defendant Hermosa Bank and [ordered] them to pay the costs of the suit x x x.

32 On **19 February 1998** the Trial Court rendered [an] Order **dismissing the case without prejudice** for failure to prosecute due to the [absence] of plaintiffs' former counsel during the hearings. Plaintiffs' previous counsel[,] the SANCHEZ ROSALES MERCADO and MELCHOR Law Firm[,] never informed them that the case was dismissed. Plaintiffs only knew of the dismissal sometime [in] October 1998, when plaintiff Alfonso went to the trial court to personally check what [had] happened to the case x x x.

33. The undersigned law firm filed a motion for New Trial on 5 January 1999. However, before the [trial court] can render its decision, plaintiffs received on 15 January 1999 two letters from defendants Cruz and Hermosa Bank ordering them to vacate the properties covered by TCT Nos. 107260, T-225973, and T-225476. Defendant Cruz informed them that the said properties have already been transferred to defendant

Hermosa Bank under [TCT] Nos. T-845841, T-845845, and T-845801 x x x.

34. Plaintiff Alfonso upon checking with the Register of Deeds of Las Piñas City also found out that title to his property, TCT No. 304740, [had] likewise been cancelled and a new one a [*sic*] has been issued, TCT No. T-69716, in defendant Hermosa Bank's name.

35. Plaintiff[,] because of the unjust acts of defendants Cruz and Hermosa Bank in transferring the title of their properties to its name and threatening to oust [them] from their properties[,] decided to withdraw their pending motion for new trial. They instead decided to avail of their right to file the action anew and initiate this complaint before this Honorable Court.

Citing *Cometa v. Intermediate Appellate Court*,[7] petitioners alleged that before the Cavite RTC could issue a writ of possession, the issues as to the validity of the real estate mortgage contracts, loan agreements, promissory notes, extrajudicial foreclosure and auction sale of the subject properties must first be resolved by the Las Piñas RTC. They averred that their rights in Civil Case No. LP-99-0072 would be greatly and gravely prejudiced and that their claims in said case would be rendered nugatory if the court would allow Hermosa Bank to prematurely take possession of the properties. While petitioners agreed that it is ministerial for the court to issue a writ of possession in favor of the purchaser in a foreclosure sale, they referred to the case of *Barican v. Intermediate Appellate Court*[8] wherein this Court disposed that the rule is not unqualified if justice and equity would be better served thereby.

Petitioners noted that Hermosa Bank violated their *status quo* agreement in Civil Case No. 89-3101 before the Makati RTC. They recalled that in said case they prayed for the issuance of a preliminary injunction to enjoin the bank from extrajudicially foreclosing and selling the subject properties at public auction. In the March 20, 1989 hearing, however, Hermosa Bank

[7] G.R. No. 69294, June 30, 1987, 151 SCRA 563.

[8] G.R. No. 79906, June 20, 1988, 162 SCRA 358.

manifested that the issue on preliminary injunction should be deferred and integrated on the trial on the merits and that, in the meantime, it would be amenable to maintain the *status quo*. Relying on its statement, petitioners no longer pursued their prayer. But contrary to their accord, Hermosa Bank conducted the public auction while the case was pending and the trial court was yet to render its decision on the merits of the case.

The fact that they did not exercise their right of redemption was not denied by petitioners. Nonetheless, citing again the case of *Cometa*, they argued that the redemption of the subject properties would be inconsistent with their claim of invalidity of the mortgage contracts, loan agreements and promissory notes, and would mean an implied admission or conformity to the regularity of the extrajudicial foreclosure and auction sales held. In any case, petitioners pointed out that the period of redemption has not even elapsed since, according to *Consolidated Bank and Trust Corporation (Solidbank) v. Intermediate Appellate Court*,[9] the pendency of an action tolls the term for the exercise of the right of redemption.

Lastly, petitioners posited that the instant case should be dismissed/suspended and consolidated with the civil case pending before the Las Piñas RTC. Taking their cue from *Active Wood Products Co., Inc. v. Court of Appeals*,[10] they advanced that the consolidation of their case, Civil Case No. LP-99-0072, with Hermosa Bank's case, LRC Case No. 8843-99-11, is proper since both cases involve a common question of law and fact, with the same parties and subject matter. Aside from avoiding confusion and unnecessary cost and expense, petitioners also opined that the Las Piñas RTC, as a court of general jurisdiction, has broader jurisdiction and competence to rule upon the validity of the mortgage contracts, loan agreements, promissory notes, extrajudicial foreclosure and auction sale. They further asserted that the issues raised in this case would only be determined in an ordinary civil action and not in a summary *ex-parte* proceeding.

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[9] G.R. No. 73976, May 29, 1987, 150 SCRA 591.

[10] G.R. No. 86603, February 5, 1990, 181 SCRA 774.

After giving Hermosa Bank the opportunity to file its Reply to the Opposition, the Cavite RTC issued its assailed Order[11] on May 18, 1999. In denying the relief prayed for by petitioners, the court held:

> The factual backgrounds of the Cometa and Barican cases, however, are vastly different from the case at bar.
>
> The Cometa case involved an execution under Rule 39, Section 35 of the Rules of Court and the properties were sold at an unusually lower price than their true value, while in Barican, the mortgagee bank took five years form the time of foreclosure on 10 October 1980 before filing the petition for issuance of writ of possession on 16 August 1985. Earlier, the property had been sold to third parties who assumed the indebtedness of the mortgagor and took possession of the property.
>
> The Supreme Court held that under the circumstances the obligation of the court to issue the writ of possession ceased to be ministerial.
>
> In the case at bar, however, none of these equitable circumstances is present so as to justify making an exception to the rule that the issuance of a writ of possession to a purchaser in an extra judicial foreclosure is ministerial on the part of the court.
>
> The mere pendency of Civil Case No. LP-99-0072 is not sufficient legal ground to justify the non-issuance of a writ of possession in favor of the petitioner.
>
> In the case of *Spouses Eduardo Vaca and Ma. Luisita Pilar v. Court of Appeals and Associated Bank* (G.R. No. 109672, 14 July 1994), the Supreme Court, citing the earlier cases of *Vda. de Jacob v. Court of Appeals* (G.R. Nos. 88602 & 89544, 06 April 1990, 184 SCRA 1990) and *Navarra v. Court of Appeals* (G.R. No. 86237, 17 December 1991, 204 SCRA 850), decreed that the pendency of a separate civil suit questioning the validity of the mortgage or its foreclosure cannot be a legal ground for refusing the issuance of a writ of possession because the same is a ministerial act of the trial court after title has been consolidated in the name of the mortgagee.
>
> Likewise, for obvious reasons, respondents' prayer for the consolidation of this case with the civil case in Las Piñas is not warranted.

[11] *Records*, pp. 107-111.

Pursuant to Section 7 of Act No. 3135, it is this Court which has jurisdiction over this case considering that the subject parcels of land are all situated in Bacoor, Cavite.

Petitioners moved to reconsider the Order but reconsideration was denied;[12] hence, on August 12, 1999, they filed a Petition for *Certiorari* with Prayer for Temporary Restraining Order and/or Preliminary Injunction[13] before the CA. The following day, however, the Cavite RTC issued the writ of possession in favor of Hermosa Bank.

On March 21, 2002, the CA dismissed the petition for being moot and academic.[14] It briefly stated that:

> As early as August 13, 1999, LRC Case No. 8843-99-11 had already been decided and a Writ of Possession had been issued in favor of the herein Private Respondents x x x. In fact, Respondent bank had already been placed in possession and occupancy of the properties subject of said writ. By reason thereof, LRC Case No. 8843-99-11 is deemed terminated with finality and therefore, there is nothing more to consolidate with Civil Case No. LP 99-0072.[15]

The motion for reconsideration filed by petitioners was denied;[16] hence, this petition.

Petitioners assert that:

1. The dismissal of the petition under Rule 65 by the CA based on it being moot and academic is patently erroneous;
2. The issues as to the validity of the real estate mortgage contracts, loan agreements, promissory notes, extrajudicial foreclosure and auction sale of petitioners' properties must first be resolved in the civil case pending in the Las Piñas RTC since the question of whether respondent Hermosa Bank

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[12] *Id.* at 118-126, 167.

[13] CA *rollo*, pp. 2-21.

[14] *Id.* at 204-209.

[15] *Id*.

[16] *Id.* at 213-222, 232-233.

is entitled to a writ of possession in the LRC case is dependent thereon; and that

3. The consolidation and transfer of the title to the subject properties in favor of Hermosa Bank are null and void because the period of redemption is tolled by the pendency of the civil action.

Petitioners contend that the CA was clearly mistaken in hastily concluding that their petition was moot and academic because at the time they filed the petition on August 12, 1999 it still had the opportunity to promptly act on the incident and issue, at the very least, a temporary restraining order to preserve the *status quo* just in time before the trial court issued the writ of possession a day after. Now, they stress that this Court has the power to correct the CA's error with our authority to declare the nullity of the questioned orders of the Cavite RTC, which would necessarily remove the legal basis for the issuance of the writ of possession.

It is now prayed for by petitioners that this Court look upon the "iniquitous" situation that they were forced into for being "morally compelled" to execute absolutely simulated loan agreements secured by real estate mortgages. They claim that the mortgage contracts they signed in favor of Hermosa Bank are considered as contracts of adhesion that may be struck down as void and unenforceable since petitioners were deprived of the opportunity to bargain on equal footing. Petitioners assert that they are mere individuals with limited resources compared to the bank which is a corporation with financial means such that what is a question of survival to the former is just a mere bad investment on the part of the latter.

Petitioners insist that their dispossession of the subject properties would bring grave and irreparable injury, a damage that is greater to them than it would cause to Hermosa Bank if the turnover is delayed. They maintain that even without the writ of possession, the right of the bank is protected and secured as the titles to the properties have already been transferred in its name. There is, therefore, no urgent need to evict them and the students of Holy Infant of Jesus High School, Inc., the

school building of which also occupied around 538 sq. m. of the litigated lots. In the meantime, petitioners are inviting this Court to give them the opportunity to fully present their claims before the Las Piñas RTC.

Lastly and essentially, petitioners again fervidly invoke this Court's rulings in *Barican, Cometa, Active Wood*, and *Consolidated Bank* cases to support their proposition that courts have the jurisdiction and discretion to stay the writ of possession or declare its issuance as premature, to order the consolidation of cases, and to consider that a pending action tolls the period for the exercise of the right of redemption.

Petitioners have not shown any reversible error on the part of the CA.

As the CA correctly found, the RTC of Bacoor, Cavite had already granted the writ of possession sought by Hermosa. Hence, the petition to consolidate the case before the RTC of Bacoor, Cavite with the case pending before the RTC of Las Piñas, had become moot and academic.

This does not, however, preclude petitioners from availing themselves of appropriate remedies depending upon the outcome in the RTC of Las Piñas case.

WHEREFORE, the petition is *DENIED*.

No costs.

SO ORDERED.

Puno, C.J. (Chairperson), Carpio, Corona, and *Leonardo-de Castro, JJ.,* concur.

FIRST DIVISION

[G.R. No. 155804. March 14, 2008]

VICTORINO F. VILLANUEVA, ROSITA M. VILLANUEVA, *petitioners, vs.* **FRANCISCO VILORIA and, as Attorney-in-Fact, SAMUEL P. VERA CRUZ,** *respondents*.

SYLLABUS

CIVIL LAW; LAND REGISTRATION; PROPERTY REGISTRATION DECREE; RECONSTITUTION OF TORRENS CERTIFICATE OF TITLE; ORDER OF TRIAL COURT DIRECTING RECONSTITUTION COULD NOT HAVE BECOME FINAL AND EXECUTORY, IT BEING VOID FOR LACK OF JURISDICTION, CONSIDERING THAT THE SUBJECT CERTIFICATE OF TITLE TO BE RECONSTITUTED IS NOT LOST BUT IS IN THE POSSESSION OF PETITIONERS WHO HAD PURCHASED THE PROPERTY FROM ITS LATE OWNER.— The present case is on all fours with the *Strait Times* case, in that the trial court could not have validly acquired jurisdiction to reconstitute the alleged lost owner's duplicate copy of TCT No. T-16156 since the same was not lost but was in the possession of petitioners who had purchased the property from its late owner. Such being the case, the Order of the trial court dated March 27, 2001 directing the reconstitution could not have become final and executory, it being void for lack of jurisdiction.

APPEARANCES OF COUNSEL

Jude John F. Perez for petitioners.
Sayuno Mendoza & San Jose Law Offices for respondents.

D E C I S I O N

AZCUNA, *J.*:

This petition for review under Rule 45 assails the August 7, 2002 Decision[1] and October 9, 2002 Resolution[2] of the Court of Appeals (CA) in CA-G.R. SP No. 70560 dismissing the petition for annulment of judgment, under Rule 47 of the 1997 Revised Rules of Civil Procedure, filed by petitioners for lack of merit.

The antecedents are that on February 22, 2001, respondent Francisco Viloria, acting through his Attorney-in-Fact Samuel P. Vera Cruz, filed a verified petition for the issuance of a new owner's duplicate copy of Transfer Certificate of Title (TCT) No. T-16156 in lieu of the lost one,[3] before the Regional Trial Court (RTC) of Iba, Zambales, Branch 70, alleging the following: (1) that he is the registered and absolute owner of a certain parcel of land located in the Poblacion of Iba, Zambales, covered by TCT No. T-16156; (2) that respondent Viloria and his wife were former residents of Iba, Zambales until the year 1988, when they moved to Ilocos Sur bringing with them, among others, important documents which they kept in a wooden chest, including the owner's duplicate copy of TCT No. T-16156; (3) that after the death of his wife in 1995, he began to sort their personal effects, as well as the documents kept in the wooden chest, and thereafter found that the wooden chest was infested and partially eaten by termites, while most of the papers and important documents therein have been completely destroyed, reduced to pieces and beyond recognition; (4) that no trace of the owner's duplicate copy of TCT No. T-16156 could be found inside the wooden chest where it was kept and he supposed that among the important documents inside the wooden chest, eaten and destroyed by termites, was the said owner's

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[1] Penned by Associate Justice Martin S. Villarama, Jr., with Associate Justices Conchita Carpio Morales (now an Associate Justice of the Supreme Court) and Mariano C. Del Castillo, concurring, *rollo*, pp. 23-29.

[2] Penned by Associate Justice Martin S. Villarama, with Associate Justices Bienvenido L. Reyes and Mariano C. Del Castillo, concurring, *id.* at 32.

[3] *Id.* at 34-36.

duplicate copy of title; (5) that the owner's duplicate copy of title is beyond recovery and irretrievably lost; (6) that he executed an Affidavit of Loss and registered the same with the Register of Deeds of Zambales; and (7) that said owner's duplicate copy of title was not delivered or conveyed to any third person or entity to satisfy or guarantee an obligation.[4] Respondent Viloria prayed that the court declare null and void the owner's duplicate copy of TCT No. T-16156, which was lost, and order the Register of Deeds of Zambales, upon payment of fees, to issue a new owner's duplicate copy of TCT No. T-16156 in lieu of the lost one.[5]

After preliminary requirements and certificate of posting were complied with, trial ensued. On March 27, 2001, the trial court issued an Order,[6] the dispositive portion of which reads:

> WHEREFORE, finding the evidence submitted to be sufficiently meritorious, pursuant to Section 109 of P.D. 1529, the Register of Deeds of Zambales is hereby directed and authorized, upon payment of the corresponding fees, to issue another owner's copy of Transfer Certificate of Title No. T-16156 under the same terms and conditions as the one lost, which is hereby declared cancelled, null and void.
>
> The new owner's duplicate issued shall in all respect be entitled to like faith and credit as the original duplicate and shall thereafter be honored as such for all purposes.
>
> SO ORDERED.[7]

Finding that its order became final and executory on April 11, 2001, the trial court made an Entry of Judgment dated June 5, 2001.[8] Thereafter, and pursuant to the said Order, the Registry of Deeds of Zambales issued on June 14, 2001 a new owner's duplicate copy of TCT No. T-16156 with SN No. 057212 in the name of respondent Viloria, married to Cresencia P. Viloria.[9]

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[4] *Id*. at 34-35.

[5] *Id.* at 35.

[6] Penned by Acting Presiding Judge Angel L. Hernando, Jr., *id.* at 42-44.

[7] *Id*. at 43-44.

[8] *Records*, p. 25.

[9] CA *rollo*, pp. 46-48.

Respondent Viloria lost no time in executing an Affidavit of Self-Adjudication of Sole Heir of the late Cresencia P. Viloria, whose estate is covered by TCT No. T-16156. The Notice of Self-Adjudication was published in the Philippine Recorder on January 14, 21, and 28, 2002.[10]

On March 4, 2002, Lot 227-C, covered by TCT No. T-16156, and with an area of 585 square meters, was sold by respondent Viloria to Ruben M. Marty in consideration of the sum of ₱350,000.[11] As a consequence of the sale, TCT No. T-16156 was cancelled and TCT No. T-54657 in the name of Ruben M. Marty was issued on April 25, 2002 by the Registry of Deeds of Zambales.[12]

On May 10, 2002, petitioners filed a petition for annulment of judgment under Rule 47 of the 1997 Revised Rules of Civil Procedure, as amended, on the grounds of lack of jurisdiction and extrinsic fraud.

In the petition before the CA, petitioners claimed to have learned about the petition for the issuance of a new owner's duplicate copy of TCT No. T-16156 only sometime in March 2002, when a certain Emmy Angeles came to their house to inform them about the Order dated March 27, 2001, of the trial court. They alleged that they were never given the necessary notices and information regarding the pendency of respondent Viloria's petition despite the fact that they are the actual possessors and owners of the land covered by TCT No. T-16156.

On August 7, 2002, the CA dismissed the petition for lack of merit. As to the issue of lack of jurisdiction, the appellate court ratiocinated that the requirements laid down under Section 109 of Presidential Decree No. 1529 were duly complied with; hence, the lower court acted within its jurisdiction when it ordered the issuance of a new owner's duplicate of TCT No. T-16156 in lieu of the lost one. The CA held that alleged ground of

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[10] *Id*. at 51.

[11] *See* Deed of Absolute Sale, *id.* at 49-50.

[12] *Id.* at 52-53.

extrinsic fraud failed because the failure to disclose to the adversary, or to the court, matters which would defeat one's own claim or defense is not such extrinsic fraud as will justify or require a vacation of the judgment. The appellate court added that petitioners were not entitled to be notified of the petition before the RTC for not being persons whose claim, right or interest is annotated at the back of TCT No. T-16156 under its Memorandum of Encumbrances.

On October 9, 2002, the motion for reconsideration filed by petitioners was denied for lack of merit.

Hence, the present petition.

Petitioners claim that at the time that the petition for the issuance of a new owner's duplicate copy of TCT No. T-16156 was filed by respondent Viloria, the subject land had already been sold to them, who are the actual possessors of the property. They further allege that they are in possession of TCT No. T-16156, with serial number 2136412,[13] which was delivered to them by the late wife of respondent Viloria, Cresencia P. Viloria, along with a copy of the sales contract[14] dated June 5, 1986. Petitioners likewise annexed in their petition for review copies of the receipts of payment[15] for the sale, duly signed by Cresencia.

The issues raised by the petitioners are:

A. WHETHER OR NOT THE REGIONAL TRIAL COURT HAD JURISDICTION TO ORDER THE ISSUANCE OF A NEW OWNER'S DUPLICATE COPY OF TRANSFER CERTIFICATE OF TITLE NO. 16156

B. WHETHER OR NOT THE COURT OF APPEALS HAD DECIDED THE CASE IN ACCORDANCE TO THE APPLICABLE DECISIONS OF THE SUPREME COURT ON THE MATTER.[16]

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[13] CA *rollo*, pp. 24-25.

[14] *Rollo*, p. 45.

[15] *Id.* at 46.

[16] *Id.* at 8.

Petitioners submit that the decision of the CA is not in consonance with the Court's decision in the case of *Rexlon Realty Group Inc. v. Court of Appeals.*[17] In their petition, petitioners state that:

> In the said case the Supreme Court ruled in favor of the Petitioner and **GRANTED** the Petition for Review filed by the Petitioner, it reversed and set aside the assailed Decision of the Court of Appeals dismissing the Petition for Annulment of Judgment and the Decision of the Regional Trial Court of Cavite (w)as ANNULLED; declaring void the new owner's duplicate copies of TCT Nos. T-72537 and T-72538 in the name of Alex L. David issued by virtue of the said Decision of the Regional Trial Court as well as the replacement thereof and explained its decision as follows:
>
> > In the case of ***Strait Times, Inc. v. Court of Appeals,*** where this Court was faced with the same facts and issue, therein respondent Peñalosa filed a petition for the issuance of a new owner's duplicate certificate of title. He alleged therein that his copy was lost and was not pledged or otherwise delivered to any person or entity to guaranty any obligation or for any purpose. When the trial court issued a new owner's duplicate title, therein petitioner Strait Times, Inc filed a petition to annul judgment based on extrinsic fraud and lack of jurisdiction. Strait Times, Inc. claimed that Peñalosa misrepresented before the trial court that the said owner's duplicate copy of the title was lost when in fact it was in the possession of the former pursuant to a contract of sale between Peñalosa and a certain Conrado Callera. Callera later sold the lot represented by the alleged lost title to therein petitioner Strait Times, Inc.
> >
> > We ruled therein, as we now rule in the case at bar, that extrinsic fraud did not attend the proceedings before the trial court for the reason that:
> >
> > xxx It is well-settled that the use of forged instrument or perjured testimonies during trial is not an extrinsic fraud, because such evidence does not preclude the participation of any party in the proceedings. While a perjured testimony may prevent a fair and just determination of a case, it does not bar the adverse party from rebutting or opposing the use of such evidence.

[17] 429 Phil. 31 (2002).

> Furthermore, it should be stressed that extrinsic fraud pertains to an act committed outside of the trial. The alleged fraud in this case was perpetrated during the trial.
>
> x x x x x x x x x
>
> However, in consonance with the Strait Times case, respondent **Davids' act of misrepresentation, though not constituting extrinsic fraud, is still an evidence of absence of jurisdiction.** In the **Strait Times** case and in **Demetriou v. Court of Appeals**, also on facts analogous to those involved in this case, we held that **if an owner's duplicate copy of a certificate of title has not been lost but is in fact in possession of another person, the reconstituted title is void and the court rendering the decision has not acquired jurisdiction. Consequently, the decision may be attacked any time.** In the case at bar, the authenticity and genuineness of the owner's duplicate of TCT Nos. T-52537 and T-52538 in the possession of petitioner Rexlon and the Absolute Deed of Sale in its favor have not been disputed. **As there is no proof to support actual loss of the said owner's duplicate copies of said certificates of title, the trial court did not acquire jurisdiction and the new titles issued in replacement thereof are void**.[18]

The petition has merit.

The present case is on all fours with the *Strait Times* case, in that the trial court could not have validly acquired jurisdiction to reconstitute the alleged lost owner's duplicate copy of TCT No. T-16156 since the same was not lost but was in the possession of petitioners who had purchased the property from its late owner.

Such being the case, the Order of the trial court dated March 27, 2001 directing the reconstitution could not have become final and executory, it being void for lack of jurisdiction.

WHEREFORE, the petition is *GRANTED* and the Decision and Resolution of the Court of Appeals in CA-G.R. SP No. 70560 are *REVERSED and SET ASIDE*. The Order of the Regional Trial Court of Iba, Zambales dated March 27, 2001 is *DECLARED NULL and VOID* for lack of jurisdiction.

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[18] *Rollo*, pp. 14-15.

SO ORDERED.

Puno, C.J. (Chairperson), Carpio, Corona, and *Leonardo-de Castro, JJ.,* concur.

THIRD DIVISION

[G.R. No. 156078. March 14, 2008]

HEIRS OF CESAR MARASIGAN namely: LUZ REGINA, CESAR JR., BENITO, SANTIAGO, RENATO, JOSE, GERALDO, ORLANDO, PETER, PAUL, MAURICIO, ROMMEL, MICHAEL, GABRIEL, AND MARIA LUZ, all surnamed MARASIGAN, *petitioners, vs.* **APOLONIO, LILIA, OCTAVIO, JR., HORACIO, BENITO JR., and MARISSA, all surnamed MARASIGAN, and THE COURT OF APPEALS,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEAL BY *CERTIORARI* TO THE SUPREME COURT; NO NEW ISSUES MAY BE RAISED BY A PARTY IN HIS/ITS MEMORANDUM AND THE ISSUES RAISED IN HIS/ITS PLEADINGS BUT NOT INCLUDED IN THE MEMORANDUM SHALL BE DEEMED WAIVED OR ABANDONED; PETITIONER FAILED TO HEED THE COURT'S PROHIBITION. — This Court significantly notes that the first three issues, alleging lack of jurisdiction and cause of action, are raised by petitioners for the first time in their Memorandum. No amount of interpretation or argumentation can place them within the scope of the assignment of errors they raised in their Petition. The parties were duly informed by the Court in its Resolution dated 17 September 2003 that ***no new issues may be raised by a party in his/its Memorandum and the issues raised in his/its pleadings but***

not included in the Memorandum shall be deemed waived or abandoned. The raising of additional issues in a memorandum before the Supreme Court is irregular, because said memorandum is supposed to be in support merely of the position taken by the party concerned in his petition, and the raising of new issues amounts to the filing of a petition beyond the reglementary period. The purpose of this rule is to provide all parties to a case a fair opportunity to be heard. No new points of law, theories, issues or arguments may be raised by a party in the Memorandum for the reason that to permit these would be offensive to the basic rules of fair play, justice and due process. Petitioners failed to heed the Court's prohibition on the raising of new issues in the Memorandum.

2. ID.; ID.; ID.; EFFECT OF FAILURE TO PLEAD; PETITIONER'S PREDECESSOR DID NOT FILE ANY MOTION TO DISMISS AND HIS ANSWER BEFORE THE TRIAL COURT DID NOT BEAR THE DEFENSES/OBJECTIONS OF LACK OF JURISDICTION OR CAUSE OF ACTION ON THE SAID GROUNDS; CONSEQUENTLY, THEY ARE CONSIDERED WAIVED. — First, it bears to point out that Cesar, petitioners' predecessor, did not file any motion to dismiss, and his answer before the RTC did not bear the defenses/objections of lack of jurisdiction or cause of action on these grounds; consequently, these must be considered waived. The exception that the court may still dismiss a case for lack of jurisdiction over the subject matter, although the same is not pleaded, but is apparent in the pleadings or evidence on record, does not find application to the present Petition. Second, petitioners' arguments on the lack of jurisdiction of the RTC over the case more appropriately pertain to venue, rather than jurisdiction over the subject matter, and are, moreover, not apparent from the pleadings and evidence on record. Third, the property subject of partition is only the 47.2 hectare ***pro-indiviso*** area representing the estate of Alicia. It does not include the entire 496 hectares of land comprising Hacienda Sta. Rita.

3. ID.; ID.; ID.; ID.; PETITIONERS RAISED THE ISSUES OF JURISDICTION FOR LACK OF PAYMENT OF APPROPRIATE DOCKET FEES AND LACK OF CAUSE OF ACTION BELATEDLY IN THEIR MEMORANDUM BEFORE THE COURT AND ARE THEREBY ESTOPPED FROM ASSAILING THE JURISDICTION OF THE TRIAL COURT ON

THE ALLEGED GROUND. — It is conceded that this Court adheres to the policy that "where the court itself clearly has no jurisdiction over the subject matter or the nature of the action, the invocation of this defense may be done at any time." While it is the general rule that neither waiver nor estoppel shall apply to confer jurisdiction upon a court, the Court may rule otherwise under meritorious and exceptional circumstances. One such exception is ***Tijam v. Sibonghanoy,*** which finds application in this case. This Court held in ***Tijam*** that "after voluntarily submitting a cause and encountering an adverse decision on the merits, it is too late for the loser to question the jurisdiction or power of the court."

4. ID.; ID.; ID.; ID.; PETITIONERS ARE ADMONISHED FOR THEIR FAILURE TO PROVIDE THE COURT WITH INFORMATION ON THE DEVELOPMENTS OF CA-G.R. SP. NO. 78912 WHICH IS NOT ONLY A VIOLATION ON THE RULES ON NON-FORUM SHOPPING BUT ALSO GROSSLY MISLEADING. — This Court further notes that while petitioners filed their last pleading in this case, their Memorandum, on 26 December 2003, they failed to mention therein that the Court of Appeals had already dismissed CA-G.R. SP No. 78912. To recall, CA-G.R. No. 78912 is a Petition for *Certiorar*i and *Mandamus* involving the RTC Order dated 2 July 2003, which denied petitioners' Notice of Appeal. Petitioners intended to appeal the RTC Omnibus Order dated 5 May 2003 sustaining the public auction and sale of petitioners' share in Alicia's estate. Petitioners' failure to provide this Court with information on the developments in CA-G.R. SP No. 78912 is not only in violation of the rules on non-forum shopping, but is also grossly misleading, because they are raising in their Memorandum in the present case the same issues concerning the public auction and sale of their share in Alicia's estate. The purpose of the rule against forum shopping is to promote and facilitate the orderly administration of justice. Petitioners have indeed managed to muddle the issues in the instant case by raising issues for the first time in their Memorandum, as well as including issues that were already pending before another tribunal and have eventually been decided with finality, for which reason petitioners are herein admonished by this Court.

5. ID.; ID.; ID.; ID.; THE APPELLATE COURT DID NOT ERR IN AFFIRMING THE ORDER OF THE TRIAL COURT WHICH

APPROVED THE COMMISSIONER'S RECOMMENDATION AS TO THE MANNER OF IMPLEMENTING THE ORDER OF PARTITION OF THE SUBJECT ESTATE. — After an exhaustive study of the merits of the case and the pleadings submitted by the parties, this Court is convinced that the Court of Appeals did not err in affirming the Order of the RTC which approved the Commissioners' recommendations as to the manner of implementing the Order of Partition of Alicia's estate. There is no reason to reverse the Court of Appeal's dismissal of petitioners' Petition for *Certiorari* and Prohibition and ruling that the RTC acted well-within its jurisdiction in issuing the assailed Order. Nowhere is it shown that the RTC committed such patent, gross and prejudicial errors of law or fact, or a capricious disregard of settled law and jurisprudence, as to amount to a grave abuse of discretion or lack of jurisdiction on its part, in adopting and confirming the recommendations submitted by the Commissioners, and which would have warranted the issuance of a writ of *certiorari.*

6. ID.; ID.; ID.; ID.; FACTUAL QUESTIONS ARE NOT WITHIN THE PROVINCE OF A PETITION FOR *CERTIORARI.* — The correctness of the finding of the RTC and the Commissioners that dividing Alicia's estate would be prejudicial to the parties cannot be passed upon by the Court of Appeals in a petition for *certiorari.* Factual questions are not within the province of a petition for *certiorari.* There is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. As to whether the court *a quo* decided the question wrongly is immaterial in a petition for *certiorari.* It is a legal presumption that findings of fact of a trial court carry great weight and are entitled to respect on appeal, absent any strong and cogent reason to the contrary, since it is in a better position to decide the question of credibility of witnesses. The writ of *certiorari* issues for the correction of errors of jurisdiction only or grave abuse of discretion amounting to lack or excess of jurisdiction. The writ of *certiorari* cannot be legally used for any other purpose. At most, the petition pertains to an error of judgment, and not of jurisdiction, for clearly under Section 5 of Rule 69, the question of whether a party's interest shall be prejudiced by the division of the real property is left to the determination and discretion of the Commissioners.

7. ID.; ID.; ID.; ID.; THE PRESENT QUESTION OF PARTITION BY CO-HEIRS/CO-OWNERS CAN BE RESOLVED WITHOUT ELEVATING THEIR CASE TO ONE OF CONSTITUTIONALITY. — It is totally unnecessary for this Court to address the issue raised by petitioners concerning the alleged unconstitutionality of Section 5, Rule 69 of the Rules of Court for having been issued beyond the constitutional limitation on the rule-making power of this Court. Basic is the principle that a constitutional issue may only be passed upon if essential to the decision of a case or controversy. A purported constitutional issue raised by petitioners may only be resolved if essential to the decision of a case and controversy. Even if all the requisites for judicial review are present, this Court will not entertain a constitutional question unless it is the very *lis mota* of the case or if the case can be disposed of on some other grounds, such as the application of a statute or general law. The present problem of partition by co-heirs/co-owners can be resolved without elevating their case to one of constitutionality.

8. ID.; ID.; ID.; ID.; THE TRIAL COURT DID NOT ACT WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR IN EXCESS OF JURISDICTION WHEN IT APPROVED THE COMMISSIONER'S RECOMMENDATION THAT THE CO-HEIRS/CO-OWNERS ASSIGN THEIR SHARES TO ONE OF THEM FOR PROPER COMPENSATION; COURTS ARE ORGANIZED TO PUT AN END TO CONTROVERSIES. — Petitioners' argument that the assignment of the property will not terminate the co-ownership is specious, considering that partition, in general, is the separation, division, and ASSIGNMENT of a thing held in common by those to whom it may belong. Inasmuch as the parties continued to manifest their desire to terminate their co-ownership, but the co-heirs/co-owners could not agree on which properties would be allotted to each of them, this Court finds that the Court of Appeals was correct in ruling that the RTC did not act with grave abuse of discretion amounting to lack or excess of jurisdiction when it approved the Commissioners' recommendation that the co-heirs/co-owners assign their shares to one of them in exchange for proper compensation. This Court has consistently held that one of the purposes for which courts are organized is to put an end to controversy in the determination of the respective rights of the contending parties. With the full knowledge that courts

are not infallible, the litigants submit their respective claims for judgment, and they have a right at some time or another to have final judgment on which they can rely over a final disposition of the issue or issues submitted, and to know that there is an end to the litigation; otherwise, there would be no end to legal processes.

9. ID.; ID.; ID.; ID.; THE COURT IS ALREADY BARRED FROM RULING ON THE VALIDITY OF THE PUBLIC AUCTION SALE. — Petitioners raise before this Court the issue that the public auction sale of their shares is null and void; at the same time they allege deficiency in the bid price for their 1/7 share in Alicia's estate *vis-à-vis* the valuation of the same by the Commissioners. This Court is already barred from ruling on the validity of the public auction sale. This Court's ruling dated 13 October 2004 in G.R. No. 164970 denying their petition for *certiorari* lays to rest petitioners' questioning of the Court of Appeals' Resolution dismissing their appeal therein of the issue of the validity of the public sale of their share in Alicia's estate. Such decision or order can no longer be disturbed or reopened no matter how erroneous it may have been.

10. ID.; ID.; ID.; ID.; WHILE IT IS UNDERSTANDABLE FOR PETITIONERS TO PROTECT THEIR RIGHTS TO THEIR PORTIONS OF THE ESTATE, THE CORRELATIVE RIGHTS OF THE OTHER CO-OWNERS/CO-HEIRS MUST ALSO BE TAKEN INTO CONSIDERATION TO BALANCE THE SCALES OF JUSTICE. — While it is understandable for petitioners to protect their rights to their portions of the estate, the correlative rights of the other co-owners/co-heirs must also be taken into consideration to balance the scales of justice. And, by finding the course of action, within the boundaries of law and jurisprudence, that is most beneficial and equitable for all of the parties, the courts' duty has been satisfactorily fulfilled. Thus, contrary to petitioners' averments, this Court finds that the Court of Appeals did not err in ruling that the RTC did not commit grave abuse of discretion amounting to lack or excess of jurisdiction in adopting and confirming the recommendations of the Commissioners.

11. ID.; SPECIAL CIVIL ACTIONS; PARTITION; TWO PHASES OF PARTITION; EXPOUNDED. — In this jurisdiction, an action for partition is comprised of two phases: ***first***, the trial court,

after determining that a co-ownership in fact exists and that partition is proper, issues an order for partition; and, ***second,*** the trial court promulgates a decision confirming the sketch and subdivision of the properties submitted by the parties (if the parties reach an agreement) or by the appointed commissioners (if the parties fail to agree), as the case may be. The delineations of these two phases have already been thoroughly discussed by this Court in several cases where it explained: The first phase of a partition and/or accounting suit is taken up with the determination of whether or not a co-ownership in fact exists, (*i.e.*, not otherwise legally proscribed) and may be made by voluntary agreement of all the parties interested in the property. This phase may end with a declaration that plaintiff is not entitled to have a partition either because a co-ownership does not exist, or partition is legally prohibited. It may end, upon the other hand, with an adjudgment that a co-ownership does in truth exist, partition is proper in the premises and an accounting of rents and profits received by the defendant from the real estate in question is in order. In the latter case, the parties may, if they are able to agree, make partition among themselves by proper instruments of conveyance, and the court shall confirm the partition so agreed upon. In either case — *i.e.*, either the action is dismissed or partition and/or accounting is decreed — the order is a final one, and may be appealed by any party aggrieved thereby. The second phase commences when it appears that "the parties are unable to agree upon the partition" directed by the court. In that event, partition shall be done for the parties by the court with the assistance of not more than three (3) commissioners. This second stage may well also deal with the rendition of the accounting itself and its approval by the court after the parties have been accorded opportunity to be heard thereon, and an award for the recovery by the party or parties thereto entitled of their just share in the rents and profits of the real estate in question. Such an order is, to be sure, final and appealable.

12. ID.; ID.; ID.; ID.; PETITIONERS' ASSERTION THAT THEIR RIGHTS WERE PREJUDICED BY THE LACK OF NOTICE REGARDING THE VIEWING AND EXAMINATION OF THE ESTATE IS NOT ENOUGH ABSENT COMPETENT PROOF TO PROVE THEIR ALLEGATION. — Petitioners' opposition is anchored on Section 4 of Rule 69 of the Rules of Court, which

reads: xxx ***In making the partition, the commissioners shall view and examine the real estate, after due notice to the parties to attend at such view and examination, and shall hear the parties as to their preference in the portion of the property to be set apart to them and the comparative value thereof,*** and shall set apart the same to the parties in lots or parcels as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts thereof. Petitioners insist that the above provision is explicit and does not allow any qualification, contending that it does not require that the lack of notice must first be proven to have caused prejudice to the interest of a party before the latter may object to the Commissioners' viewing and examination of the real properties on the basis thereof. They maintain that they were prejudiced by the mere lack of notice. We, on the other hand, find that the scales of justice have remained equal throughout the proceedings before the RTC and the Commissioners. This Court, in the performance of its constitutionally mandated duty 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, is duty-bound to ensure that due process is afforded to all the parties to a case. As the Court of Appeals declared, due process is not a mantra, the mere invocation of which shall warrant a reversal of a decision. Well-settled is the rule that the essence of due process is the opportunity to be heard. In *Legarda v. Court of Appeals*, the Court held that as long as parties to a case were given the opportunity to defend their interest in due course, they cannot be said to have been denied due process of the law. Neither do the records show any indicia that the preference of petitioners for the physical subdivision of the property was not taken into consideration by the Commissioners. Petitioners' persistent assertion that their rights were prejudiced by the lack of notice is not enough. Black's Law Dictionary defines the word ***prejudice*** as damage or detriment to one's legal rights or claims. Prejudice means injury or damage. No competent proof was adduced by petitioners to prove their allegation. Mere allegations cannot be the basis of a finding of prejudice. He who alleges a fact has the burden of proving it and a mere allegation is not evidence.

13. ID.; ID.; ID.; ID.; WHILE THE LACK OF NOTICE OF THE VIEWING AND EXAMINATION BY COMMISSIONERS OF THE REAL PROPERTIES COMPRISING THE SUBJECT ESTATE IS A PROCEDURAL INFIRMITY, IT DID NOT VIOLATE ANY SUBSTANTIVE RIGHTS NOR DID IT DEPRIVE ANYONE OF DUE PROCESS. — It should not be forgotten that the purpose of the rules of procedure is to secure for the parties a just, speedy and inexpensive determination of every action or proceeding. The ultimate purpose of the rules of procedure is to attain, not defeat, substantial justice. Records reveal that the parties were given sufficient opportunity to raise their concerns. From the time the action for partition was filed by private respondents, all the parties, including the late Cesar, petitioners' predecessor, were given a fair opportunity to be heard. Since the parties were unable to agree on how the properties shall be divided, Commissioners were appointed by the Court pursuant to Section 3 of Rule 69 of the Rules of Court. Section 3. Commissioners to make partition when parties fail to agree. — If the parties are unable to agree upon the partition, the court shall appoint not more than three (3) competent and disinterested persons as commissioners to make the partition, commanding them to set off to the plaintiff and to each party in interest such part and proportion of the property as the court shall direct. While the lack of notice to Cesar of the viewing and examination by the Commissioners of the real properties comprising Alicia's estate is a procedural infirmity, it did not violate any of his substantive rights nor did it deprive him of due process. It is a matter of record, and petitioners cannot deny, that Cesar was able to file his Comment/Opposition to the Commissioners' Report. And after the RTC adopted and confirmed the Commissioners' recommendations in its Order dated 22 June 2001, Cesar was able to file a Motion for Reconsideration of the said Order. He had sufficient opportunity to present before the RTC whatever objections or oppositions he may have had to the Commissioners' Report, including the valuation of his share in Alicia's estate.

14. ID.; ID.; ID.; ID.; THE COMMISSIONERS' FINDING THAT THE SUBJECT ESTATE CANNOT BE DIVIDED WITHOUT CAUSING PREJUDICE TO THE INTEREST OF THE PARTIES IS WELL SUPPORTED. — Article 498 of the New Civil Code, referred to by Article 495 of the same Code, states: Article 498.

Whenever the thing is essentially indivisible and the co-owners cannot agree that it be allotted to one of them who shall indemnify the others, it shall be sold and its proceeds distributed. Evidently, the afore-quoted Civil Code provisions and the Rules of Court must be interpreted so as to give effect to the very purpose thereof, which is to put to an end to co-ownership in a manner most beneficial and fair to all the co-owners. As to whether a particular property may be divided without prejudice to the interests of the parties is a question of fact. To answer it, the court must take into consideration the type, condition, location, and use of the subject property. In appropriate cases such as the one at bar, the court may delegate the determination of the same to the Commissioners. The Commissioners found, after a viewing and examination of Alicia's estate, that the same cannot be divided without causing prejudice to the interests of the parties. This finding is further supported by the testimony of Apolonio Marasigan that the estate cannot be divided into smaller portions, since only certain portions of the land are suitable to agriculture, while others are not, due to the contours of the land and unavailability of water supply. The impracticality of physically dividing Alicia's estate becomes more apparent, considering that Hacienda Sta. Rita is composed of parcels and snippets of land located in two different municipalities, Pili and Minalabac, Camarines Sur. The actual area representing Alicia's 2/21 *pro-indiviso* shares in Hacienda Sta. Rita is 422,422.65 square meters, more or less. Each of Alicia's heirs is entitled to 1/7 share in her estate equivalent to 67,496.09 square meters or roughly seven hectares. Cesar and his heirs are entitled only to his 1/7 share in the yet unidentified, unsegregated 2/21 *pro-indiviso* shares of Alicia in each of the 13 parcels of land that comprises Hacienda Sta. Rita. Dividing the parcels of land even further, each portion allotted to Alicia's heirs, with a significantly reduced land area and widely scattered in two municipalities, would irrefragably diminish the value and use of each portion, as compared to keeping the entire estate intact.

APPEARANCES OF COUNSEL

Euclides G. Forbes and *Romulo Mabanta Buenaventura Sayoc & De Los Angeles* for petitioners.

Falcon Law Office for respondents.

D E C I S I O N

CHICO-NAZARIO, *J.*:

This is a Petition for Review under Rule 45 of the Revised Rules of Court, with petitioners praying for the reversal of the Decision[1] of the Court of Appeals dated 31 July 2002 and its Resolution[2] dated 13 November 2002 denying the Petition for *Certiorari* and Prohibition, with prayer for the issuance of a writ of preliminary injunction and restraining order, in CA- G.R. SP No. 67529. Petitioners are asking this Court to (a) give due course to their petition; and (b) reverse and set aside, and thus, declare null and void the Decision of the Court of Appeals in CA-G.R. SP No. 67529. However, petitioners are asking for the following reliefs in their Memorandum: (a) the dismissal of the complaint for partition of the estate of the late Alicia Marasigan, docketed as Special Civil Action No. P-77-97, filed before the Regional Trial Court (RTC) of Pili, Camarines Sur; (b) annulment or rescission of the public auction sale of petitioners' 1/7th undivided share in the estate of Alicia Marasigan, and direct Apolonio Marasigan to restore the same to petitioners; or (c) in the alternative, allowance of the physical partition of the entire 496 hectares of Hacienda Sta. Rita.

Central to the instant Petition is the estate of Alicia Marasigan (**Alicia**).

Alicia was survived by her siblings: **Cesar**, **Apolonio**, **Lilia**, and **Benito**; **Marissa**, a sister-in-law; and the children of her brothers who predeceased her: **Francisco, Horacio,** and **Octavio**. She died intestate and without issue on 21 January 1995.

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[1] Penned by Court of Appeals Associate Justice Conchita Carpio Morales (now Supreme Court Justice) with Associate Justices Martin S. Villarama, Jr. and Mariano C. del Castillo, concurring. *Rollo*, pp. 26-32.

[2] Penned by Associate Justice Martin S. Villarama, Jr. (Acting Chairperson for the Division) with Associate Justices Mariano C. del Castillo and Danilo B. Pine, concurring. *Id*. at 43-44.

On 17 December 1997, a Complaint for Judicial Partition of the Estate of Alicia Marasigan was filed before the RTC by several of her heirs and private respondents herein, namely, Apolonio, Lilia, Octavio, Jr., Horacio, Benito, Jr., and Marissa, against Cesar, docketed as Special Civil Action No. P-77-97.

According to private respondents, Alicia owned in common with her siblings 13 parcels of land called Hacienda Sta. Rita in Pili and Minalabac, Camarines Sur, with an aggregate area of 4,960,963 square meters or 496 hectares, and more particularly described as follows:

ORIGINAL CERTIFICATE OF TITLE NO. 626

"A parcel of land denominated as Lot 516-B of the Subdivision Survey Plan Csd-05-001020, situated at Sagurong, Pili, Camarines Sur, bounded on the NE., by PNR; on the SE., by Bgy. Road; on the SW., by Lot 2870; and on the NW., by Lot 512, containing an area of EIGHT THOUSAND SEVEN HUNDRED TWELVE (8,712) SQUARE METERS, more or less, declared under A.R.P. No. 014 166 and assessed at ₱12, 860.00."

ORIGINAL CERTIFICATE OF TITLE NO. 627

"A parcel of land denominated as Lot 4237, Cad-291, Pili Cadastre, Plan Cen-05-000006, situated at Saguron, Pili, Camarines Sur, bounded on the N., by Irr. ditch beyond Lot 445; on the E., by Lots 517 and 518; on the S., by Creek, Lot 468, 467; and on the W., by Lot 2948 and Mun. of Minalabac, containing an area of EIGHT HUNDRED SIXTY ONE THOUSAND ONE HUNDRED SIXTY THREE (861,163) SQUARE METERS, more or less, declared under A.R.P. No. 016 268 and assessed at ₱539,020.00."

ORIGINAL CERTIFICATE OF TITLE NO. 628

"A parcel of land denominated as Lot 2870 Cad. 291, Pili Cadastre Plan Swo-05000607, situated at Sagurong, Pili, Camarines Sur, bounded on the N., by Binasagan River; on the E., by Lots 512 and 516; on the S., by Barangay Road; and on the W., by Lot 469, containing an area of THIRTEEN THOUSAND FOUR HUNDRED SIXTY TWO (13,462) SQUARE METERS, mote (sic) or less, declared under A.R.P. No. 014 130 and assessed at ₱15,180.00."

ORIGINAL CERTIFICATE OF TITLE NO. 629

"A parcel of land denominated as Lot 517-B of the Subdivision Survey Plan Csd-05-001020, situated at Sagurong, Pili, Camarines Sur, bounded on the NE., by PNR; on the SE., by Lot 519; on the SW., by Lots 2025 and 2942; and on the NW., by Brgy. Road, containing an area of THIRTEEN THOUSAND SEVEN HUNDRED SIXTY FIVE (13,765) SQUARE METERS, more or less, declared under A.R.P. No. 014 167 and assessed at ₱20,310.00."

ORIGINAL CERTIFICATE OF TITLE NO. 652

"A parcel of land denominated as Lot 4207-B of the subdivision survey Plan Csd-05-011349-D, situated at Sagurong (San Jose), Pili, Camarines Sur, bounded on the NE., by Lot 4207-C, Lot 6157; on the SE., by Irr. ditch, Lot 2942; and on the NW., by Lot 4298 (3051-B), containing an area of FIFTY FOUR (54) SQUARE METERS, mote (sic) or less, declared under A.R.P. No. 014 384 and assessed at ₱40.00."

ORIGINAL CERTIFICATE OF TITLE NO. 653

"A parcel of land denominated as Lot 4207-A of the subdivision survey Plan Csd-05-011349-D, situated at Sagurong (San Jose), Pili, Camarines Sur, bounded on the NE., by Lot 4205 (I0T 443-A Csd-05-001019); on the SE., and SW., by Irr. ditch (Lot 2942); on the W., by Lot 4207-C Lot 6157; and on the NW., by Lot 4208 (Lot 3051-B, Csd-05-001019), containing an area of TWENTY SEVEN THOUSAND THREE HUNDRED THIRTY SEVEN (27,33) (sic) SQUARE METERS, more or less, declared under A.R.P. No. 014 383 and assessed at ₱20,150.00."

A.R.P. NO. 014 385

"A parcel of land denominated as Lot 4207-C Lot 6157 of the subdivision survey Plan Csd-05-001019, situated at Sagurong (San Jose), Pili, Camarines Sur, bounded on the NE., by Lot 4207-A Lot 6155; on the SE., by Lot 4207-A Lot 6155; on the SW., by Lot 4207-B Lot 6156 and Irr, ditch; and on the NW., by Lot 4208 (3051-B), containing an area of THREE HUNDRED SIXTY ONE (361) SQUARE METERS, more or less, declared under A.R.P. No. 014 385 and assessed at ₱270.00."

ORIGINAL CERTIFICATE OF TITLE NO. 654

"A parcel of land denominated as Lot 443-A of the subdivision survey Plan Csd-05-001019, situated at Sagurong (San Jose), Pili, Camarines Sur, bounded on the NE., by Lots 474, 4019, 4018, 4027, creek; on the SE., by Hrs. of Benito Marasigan; and on the NW., by Lot 443-

B, Ireneo Llorin; containing an area of TWO HUNDRED FORTY FOUR THOUSAND EIGHT HUNDRED FIFTY EIGHT (244,858) SQUARE METERS, more or less, declared under A.R.P. No. 014 382 and assessed at ₱195,400.00."

ORIGINAL CERTIFICATE OF TITLE NO. 655

"A parcel of land denominated as Lot 2942-A of the subdivision survey Plan Csd-05-010854-D, situated at Sagurong (San Jose/San Agustin), Pili, Camarines Sur, bounded on the N., by Creek; on the NE., by Lot 3049; on the SE., by Creek; and on the W., by Lots 3184, 3183, 2942-13, 3183, 3060 and 3177; containing an area of FOUR HUNDRED SIXTY SIX THOUSAND SIX HUNDRED TWENTY TWO (466,622) SQUARE METERS, more or less, declared under A.R.P. No. 014 386 and assessed at ₱287,160.00."

ORIGINAL CERTIFICATE OF TITLE NO. 656

"A parcel of land denominated as Lot 2 Plan Cen-05-000007, situated at San Jose, Pili, Camarines Sur, bounded on the N., by Lots 509 and 508, Binasagan River; on the E., by Lots 523, 521 and 520; on the S., by Lot 522; and on the W., by Phil. Nat'l. Railways; containing an area of ONE HUNDRED FIVE THOUSAND TWO HUNDRED TWELVE (105,212) SQUARE METERS, more or less, declared under A.R.P. No. 016 939 and assessed at ₱524,220.00."

ORIGINAL CERTIFICATE OF TITLE NO. 657

"A parcel of land denominated as Lot 1, Plan Cen-05-000007, situated at San Jose, Pili, Camarines Sur, bounded on the N., by Lots 525, 526, 527; on the E., by Lots 528-A, 529, 530, 531, 532 and Nat'l. Road; on the S., by Lots 533 and 522 pt.; and on the W., by Lots 521, 523; containing an area of FIFTY SIX THOUSAND SIX HUNDRED FIFTY TWO (56,652) SQUARE METERS, more or less, declared under A.R.P. No. 016 993 and assessed at ₱292,090.00"

TRANSFER CERTIFICATE OF TITLE NO. 16841

"A parcel of land denominated as Lots 1 and 2, Plan II-10759, situated at Manapao, Minalabac, Camarines Sur, bounded on the N., by Lots 3061, 3059, 4119, 3178, 3185, 3186, 3187, 3188, Borabodan Creek, 4350, 4401; and on the W., by Lots 4380, 3030, 3057, 3286, 3053, 3056; containing an area of TWO MILLION NINE HUNDRED TWENTY TWO THOUSAND FIFTY NINE (2,922,059) SQUARE METERS, more or less, declared under A.R.P. No. 014 0372 and assessed at ₱888,200.00."

TRANSFER CERTIFICATE OF TITLE NO. 16842

"A parcel of land denominated as Lot 443-A of Plan Psu-62335, situated at Manapao, Minalaban, Camarines Sur (San Jose, Pili, Cam. Sur); bounded on the NE., by Shannon Richmond and Eugenio Dato; on the E., by Eugenio Dato; on the S., by Eugenio Dato and Creek; and on the SW and NW., by Shannon Richmond; containing an area of TWO HUNDRED FORTY THOUSAND SEVEN HUNDRED SIX (240,706) SQUARE METERS, more or less, declared under A.R.P. No. 014 245 and assessed at ₱146,830.00."[3]

Alicia left behind her 2/21 shares in the afore-described 13 parcels of land.

In answer to the private respondents' Complaint, Cesar enumerated Alicia's several other properties and assets which he also wanted included in the action for partition, to wit:

1. 1/8 share in the parcel of land covered by TCT No. 10947 located at Poblacion, San Juan, Batangas, containing an area of 4,827 square meters, more or less;
2. 1/8 share in the parcel of land with improvements thereon (cockpit arena) located in Poblacion, San Juan, Batangas covered by TCT No. 0-3255;
3. A parcel of commercial land under property Index No. 024-21-001-25-005 situated in Poblacion, San Juan Batangas containing an area of 540 square meters, more or less;
4. A parcel of land situated in Yabo, Sipocot, Camarines Sur containing an area of 2,000 hectares and covered by Tax Declaration No. 7546;
5. A parcel of land located at Brgy. Yabo, Sipocot, Camarines Sur with an area of 21,000 square meters, more or less, covered by Tax Declaration No. 6622;
6. A parcel of land located at Brgy. Yabo, Sipocot, Camarines Sur with an area of 2,6750 hectares under Tax Declaration No. 5352;

[3] Records, pp. 3-5.

7. A parcel of land located at Barrio Yabo, Sipocot, Camarines Sur with an area of 2,3750 hectares and covered by Tax Declaration No. 3653, and

8. Shares of Stock in Bolbok Rural Bank, Inc., a family owned rural bank consisting of 3,230 shares at ₱100.00 per share.[4]

Cesar's request for inclusion was contested by private respondents on the ground that the properties he enumerated had already been previously partitioned and distributed to the appropriate parties.[5]

On 4 February 2000, the RTC decided in favor of private respondents and issued an Order of Partition of the Estate of Alicia Marasigan, decreeing that:

As regards to [sic] the real properties located in Hacienda Sta. Rita in the municipalities of Pili and Minilabac, Camarines Sur as described in par. 3 of the complaint, the actual area representing the 2/21 pro-indiviso share having been determined consisting of 422,422.65 sq. meters, more or less (Exhibit 0-2) therefore, the ***share of each heir of the late Alicia Marasigan is 1/7 or equivalent to 67,496.09 square meters each*** (Exh. 0-3).

Wherefore, in view of the foregoing, decision is hereby rendered.

1. Ordering the partition of the estate of Alicia Marasigan in Hacienda Sta. Rita located in the municipalities of Pili and Minalabac, Camarines Sur consisting of 422,422.65 sq. meters among her surviving brothers and sisters namely: APOLONIO, Marasigan and children of Horacio Marasigan who will inherit per stirpes and Octavio Marasigan, Jr., who will inherit by right of representation of his deceased father, Octavio Marasigan, Sr.

2. Declaring the partition of the San Juan, Batangas properties made by the heirs of Alicia Marasigan as contained in the minutes of the Board Meeting of the Rural Bank of Bolbok valid and binding among them.

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[4] *Id*. at 261-262.

[5] Also, the RTC ordered the cancellation of the adverse claim of Cesar Marasigan annotated in the certificates of title covered in the complaint.

3. Ordering the partition of the real properties located in San Juan, Batangas as shown and reflected in Exhibits 1 to 10 inclusive presented by defendant, in the same sharing and proportion as provided in paragraph one above-cited in this dispositive portion.

4. No pronouncement as to costs.[6]

As the parties could not agree on how they shall physically partition among themselves Alicia's estate, private respondents filed a Motion to Appoint Commissioners[7] following the procedure outlined in Sections 4, 5, 6 and 7 of Rule 69 of the Rules of Court, citing, among other bases for their motion:

That unfortunately, the parties could not agree to make the partition among themselves which should have been submitted for the confirmation of the Honorable Court more so because no physical division could be had on the 2/21 pro-indiviso shares of the decedent [Alicia] due to different locations, contours and conditions;

The RTC granted the Motion and appointed Myrna V. Badiong, Assistant Provincial Assessor of Camarines Sur, as Chairman of the Board of Commissioners[8] Private respondents nominated Sandie B. Dacara as the second commissioner. Cesar failed to nominate a third commissioner despite due notice. Upon lapse of the period given, only two commissioners were appointed.

On 26 October 2000, the two Commissioners conducted an ocular inspection of Hacienda Sta. Rita, together with the Local Assessment Operations Officer IV of the Provincial Assessor's Office, the Barangay Agrarian Reform Committee (BARC) Chairman, and the Marasigans' caretaker. However, Cesar contended that he did not receive any notice from the Commissioners to attend the ocular inspection and he was, thus, not present on said occasion.

The Commissioners' Report[9] was released on 17 November 2000 stating the following findings and recommendations:

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[6] *Rollo*, p. 161.

[7] Motion dated 25 April 2000, CA *rollo*, p. 24.

[8] Order dated 4 May 2000; *id*. at 25.

[9] *Id*. at 26-30.

The undersigned Commissioners admit the 472,472.65 (47.2472.65) square meters representing the 2/21 pro-indiviso share of the deceased Alicia Marasigan and the 1/7 share of each of the heirs of Alicia N. Marasigan equivalent to 67,496.09 square meters or 6.7496.09 hectares determined by Geodetic Engineer Roberto R. Revilla in his Compliance with the Order of the Honorable Court dated November 18, 1998.

Considering that the physical division of the 2/21 pro-indiviso share of the decedent, Alicia Marasigan cannot be done because of the different locations and conditions of the properties, undersigned Commissioners hereby recommend that the heirs may assign their 1/7 share to one of the parties willing to buy the same (Sec. 5, Rule 69 of the Rules of Court) provided he pays to the heir[s] willing to assign his/her 1/7 share such amounts the Commissioners have recommended and duly approved by the Honorable Court.

In consideration of such findings and after a careful and thorough deliberations by the undersigned on the subject matter, considering the subject properties' classification and actual predominant use, desirability and demand and together with the benefits that may be derived therefrom by the landowners, we have decided to recommend as it is hereby recommended that the price of the 1/7 share of each of the heir[s] is ₱700,000.00 per hectare, thus:

₱700,000.00 x 6.7496.09 hectares = ₱4,724,726.30 or in words:

FOUR MILLION SEVEN HUNDRED TWENTY FOUR THOUSAND SEVEN HUNDRED TWENTY SIX AND 30/100 PESOS FOR THE 1/7 SHARE (6.7496.09 HECTARES) OF EACH OF THE HEIRS.[10]

Cesar opposed the foregoing findings and prayed for the disapproval of the Commissioners' Report. In his Comment/Opposition to the Commissioners' Report, he maintained that:

He does not expect that he would be forced, to buy his co-owner's share or to sell his share instead. Had he known that it would be the recourse he would have appealed the judgment *[with petitioners referring to the RTC Order of Partition]*. But the findings of facts in the Decision as well [as] dispositive do not show that any valid grounds for exception to partition is even present in the instant case.[11]

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[10] *Id*. at 29-30.

[11] 3 February 2001 Comment/Opposition filed by petitioners, then defendants, *versus* the Commissioner's Report. *Id*. at 32-36.

Cesar alleged that the estate is not indivisible just because of the different locations and conditions of the parcels of land constituting the same. Section 5, Rule 69 of the Rules of Court can only be availed of if the partition or division of the real properties involved would be prejudicial to the interest of any of the parties. He asserted that despite the segregation of his share, the remaining parcels of land would still be serviceable for the planting of rice, corn, and sugarcane, thus evidencing that no prejudice would be caused to the interests of his co-heirs.

Countering Cesar's arguments, private respondents contended that physical division is impossible because Alicia's estate is equivalent to 2/21 shares in Hacienda Sta. Rita, which is composed of 13 parcels under different titles and tax declarations, situated in different *barangays* and municipalities, and covers an area of 496 hectares.

After a serious consideration of the matters raised by the parties, the RTC issued an Order dated 22 June 2001 approving *in toto* the recommendations embodied in the Commissioners' Report, particularly, the *recommendation that the property be assigned to one of the heirs at ₱700,000.00 per hectare or a total amount of* ***₱4,724,726.00***,[12] after finding the same to be in accordance with the Rules of Court and the New Civil Code. Pertinent portions of the Order are reproduced below:

> WHEREFORE, in view of all the foregoing, the Commissioners Report dated November 17, 2000 is hereby approved *in toto*, more specifically its recommendation to assign the property to any one of the heirs interested at the price of ₱700,000.00 per hectare or in the total amount of ₱4,724,726.00 per share.
>
> Regarding the properties of deceased Alicia Marasigan located at San Juan, Batangas, the herein Commissioners, Mrs. Myrna V. Badiong and Engr. Sandie B. Dacara are hereby directed to proceed with utmost dispatch to San Juan, Batangas and inspect said properties (Exhibits 1 to 10 inclusive) and thereafter to submit a Supplemental Report as to its partition or other disposition with notice

[12] *Id*. at 59.

to all parties and their counsels all at the expense of the estate, within a period of thirty (30) days from receipt hereof.

Dissatisfied, Cesar filed a Motion for Reconsideration,[13] which was denied by the RTC for lack of merit.[14]

In the meantime, Cesar died on 25 October 2001. He was substituted by his heirs and herein petitioners, namely, Luz Regina, Cesar, Jr., Benito, Santiago, Renato, Jose, Geraldo, Orlando, Peter, Paul, Mauricio, Rommel, Michael, Gabriel, and Maria Luz, all surnamed Marasigan.

Upon the denial by the RTC of Cesar's Motion for Reconsideration, petitioners elevated their case to the Court of Appeals *via* a Petition for *Certiorari* and Prohibition under Rule 65 of the Rules of Court, docketed as Special Civil Action No. 67529.[15] They claimed that the RTC judge acted with grave abuse of discretion amounting to lack or excess of jurisdiction in approving the Commissioners' Report although the facts would clearly indicate the following:

(a) The procedure taken by the Commissioners violated the procedure for partition provided in Section 4, Rule 69 of the 1997 Rules of Procedure because there was ***no notice sent to them for the viewing and examination of the properties of the estate***; neither were they heard as to their preference in the portion of the estate, thus depriving them of due process;

(b) The ground used by the Commissioners resulting in their recommendation to assign the property is not one of those grounds provided under the Rules

(c) Article 492 of the New Civil Code is inapplicable

(d) Assignment of the real properties to one of the parties will not end the co-ownership.

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[13] *Id*. at 60-67.

[14] 10 October 2001; *id*. at 94-95.

[15] *Rollo*, pp. 45-55.

Moreover, petitioners accused the RTC of committing grave abuse of discretion in solely relying on the testimony of Apolonio to the effect that physical division is impractical because, while other portions of the land are suitable for agriculture, the others are not, citing the different contours of the land and unavailability of water supply in some parts.

The Court of Appeals dismissed petitioners' Petition for *Certiorari* and Prohibition in a Decision[16] promulgated on 31 July 2002, and ruled that the RTC acted within its authority in issuing the Order of 22 June 2001. The Court of Appeals found that petitioners failed to discharge the burden of proving that the proceedings before the Board of Commissioners were unfair and prejudicial. It likewise found that the petitioners were not denied due process considering that they were afforded the opportunity to be heard during the hearing for approval of the Commissioners' Report on 18 January 2001. According to the appellate court, whether or not the physical division of the estate will cause prejudice to the interests of the parties is an issue addressed to the discretion of the Commissioners. It further held that it would be absurd to believe that the prejudice referred to in Section 5, Rule 69 of the Rules of Court does not embrace physical impossibility and impracticality. It concurred in the finding of the RTC that:

> It is not difficult to believe that a physical partition/division of the 2/21 pro-indiviso shares of the decedent Alicia Marasigan contained in and spread throughout thirteen (13) parcels of the Hacienda Sta. Rita with a total area of 946 (sic) hectares would be quite impossible if totally impractical. The said parcels are of different measurements in terms of areas and shapes located in different barrages of the Municipalities of Pili and Minalabac, Camarines Sur.[17]

The Court of Appeals also noted that whether or not the RTC correctly applied Section 5, Rule 69 of the Rules of Court and Article 492 of the New Civil Code, would involve an error of judgment, which cannot be reviewed on *certiorari*. Finally, the

[16] *Id*. at 26-32.

[17] *Id*. at 30.

Court of Appeals found unmeritorious petitioners' argument that the assignment of the estate to one of the parties does not end the co-ownership, considering that it questions the 4 February 2000[18] Decision of the RTC which had already become final and executory.

Petitioners filed a Motion for Reconsideration[19] of the foregoing Decision but the same was denied by the Court of Appeals in a Resolution dated 13 November 2002. Still aggrieved, petitioners filed on 31 December 2002 this Petition for Review under Rule 45 of the Revised Rules of Court, docketed as G.R. No. 156078.

Pending resolution of the instant Petition by this Court, the RTC granted private respondents' Urgent Motion for Execution on 26 December 2002. The RTC ordered the sale of petitioners' 1/7 pro-indiviso share in Alicia's estate upon the urgent motion of private respondents dated 27 September 2002 for the partial execution of the judgment of the Court approving the Commissioners' report pending *certiorari*.[20]

Petitioners' share in Alicia's estate was sold in a public auction on 26 February 2003.[21] Based on the Commissioners' Report on the Auction Sale, there were two bidders, Apolonio Marasigan and Amado Lazaro. Apolonio, with a bid of ₱701,000.00 per hectare, won over Amado Lazaro, whose bid was ₱700,000.00 per hectare. Petitioners' 1/7 share as Cesar's heirs in Alicia's estate was sold in the public auction for ***₱3,777,689.00***.

This amount is lower than the ***₱4,724,726.30*** price of the 1/7 share in Alicia's estate as earlier determined by the Commissioners due allegedly to the acquisition by the Department of Agrarian Reform (DAR) of a portion of Hacienda Sta. Rita located in Minilabac, Camarines Sur which was placed under

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[18] This was the Decision cited in the Court of Appeals Decision, although it may be referring to the 22 June 2003 Decision.

[19] *Rollo*, pp. 33-36.

[20] *Id*. at 103-105.

[21] Commissioners' Report dated 3 March 2003; *id*. at 173.

Republic Act No. 6657, or the Comprehensive Agrarian Reform Law, with 100.00 hectares thereof compulsorily acquired.

On 24 March 2003, petitioners filed with the RTC a Motion to Declare Failure of Bidding and to Annul Public Auction Sale.

On 5 May 2003, however, the RTC released an Omnibus Order[22] ruling, among other things, that the objection of petitioners as to the difference of the value of their 1/7 share as determined by the Commissioners *vis-à-vis* the winning bid was no longer an issue since Apolonio Marasigan indicated his willingness to pay for the deficiency.

Following the public auction and sale of their 1/7 share in the property,[23] petitioners filed a Notice of Appeal[24] with the RTC on 26 May 2003 indicating that they were appealing the 5 May 2003 Omnibus Order of the RTC[25] to the Court of Appeals. Thereafter, or on 9 June 2003, petitioners filed a Record on Appeal[26] pursuant to Section 3, Rule 41 of the Rules of Court, praying that it be approved and transmitted to the Court of Appeals.[27]

On 2 July 2003, the RTC issued an Order denying due course to petitioners' Notice of Appeal on the ground that the proper remedy is not appeal, but *certiorari*. Petitioners then filed on 27 August 2003 another Petition before the Court of Appeals for *Certiorari* and *Mandamus*,[28] docketed as CA-G.R. SP No. 78912, praying that the RTC be directed to approve their Notice of Appeal and Record on Appeal, and to forward the same to the appellate court.

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[22] *Id*. at 186-188.

[23] Copies of the same were attached as Annexes A and B of petitioners' Reply to the Comment; 28 July 2003; *id*. at 119-123.

[24] *Id*. at 124-125.

[25] Issued by Judge Nilo Malanyaon of the RTC Branch 31, Pili, Camarines Sur on 5 May 2003; *id*. at 186-188.

[26] *Id*. at 126-153.

[27] The RTC, however, issued a Certificate of Finality of the Sale on 17 June 2003.

[28] *Rollo* of CA-G.R. SP No. 78912, pp. 2-8.

In a Resolution[29] dated 10 October 2003, the Court of Appeals dismissed CA-G.R. SP No. 78912 outright on the ground that the verification and certificate of non-forum shopping of the petition was signed by only Cesar Marasigan, Jr., without any accompanying document to prove his authority to sign on behalf of the other petitioners. Petitioners filed a Motion for Reconsideration but it was denied by the Court of Appeals in a Resolution[30] dated 12 July 2004.[31]

Cesar G. Marasigan, Jr., in a Petition for *Certiorari* filed with this Court on 4 September 2004 and docketed as G.R. No. 164970, prayed for the reversal and setting aside of the Court of Appeals Resolution dated 10 October 2003 dismissing CA-G.R. SP No. 78912, and Resolution dated 12 July 2004 denying the Motion for Reconsideration thereof. This Court, however, issued a Resolution on 13 October 2004 denying the petition for failure of the petitioner to show that the Court of Appeals committed a reversible error. The same has become final and executory.

Going back to the Petition at bar, petitioners raise before this Court the following assignment of errors:

I. THE COURT *A QUO* HAS DECIDED A QUESTION OF SUBSTANCE NOT THEREFORE DETERMINED BY THE SUPREME COURT IN FINDING THAT THERE IS NO NEED FOR DUE NOTICE TO THE PARTIES TO ATTEND THE VIEWING AND EXAMINATION OF THE REAL ESTATE SUBJECT OF PARTITION WHEN THE COMMISSIONERS HAVE DECIDED NOT TO PARTITION THE PROPERTY AND SUCH NOTICE UNDER SECTION 4 OF RULE 69 IS INDISPENSABLE ONLY WHEN THEIR DECISION IS TO PARTITION.

II. THE DECISION OF THE COURT OF APPEALS IS NOT IN ACCORDANCE WITH LAW PARTICULARLY WITH

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[29] Penned by Associate Justice Elvi John S. Asuncion with Associate Justices Godardo A. Jacinto and Lucas P. Bersamin, concurring.

[30] *Id*.

[31] Petitioners' Memorandum in the instant case was filed on 26 December 2003.

ARTICLES 494 AND 495 OF THE NEW CIVIL CODE AND SECTIONS 5 RULE 69 OF THE RULES.

III. THAT THE FINDINGS OF THE COURT OF APPEALS OF PHYSICAL IMPOSSIBILITY AND IMPRACTICALITY IF EMBRACED IN 'PREJUDICE' REFERRED IN SECTION 5, RULE 69 OF THE RULES SHALL MAKE SAID RULE VIOLATIVE OF THE CONSTITUTIONAL LIMITATIONS ON THE RULE MAKING POWER OF THE SUPREME COURT THAT ITS RULES SHALL NOT INCREASE, DECREASE OR MODIFY SUBSTANTIVE RIGHTS.[32]

In their Memorandum, however, petitioners submitted for resolution the following issues.

I. RESPONDENTS HAVE NO CAUSE OF ACTION FOR PARTITION BECAUSE THE SUBJECT MATTER OF THE CASE CONSISTS OF UNDIVIDED SHARES WHICH CANNOT BE PARTITIONED.

II. THE REGIONAL TRIAL COURT HAS NO JURISDICTION TO PARTITION UNDIVIDED OR UNIDENTIFIED LAND AND HAS NOT ACQUIRED JURISDICTION OVER 496 HECTARES OF UNDIVIDED LAND WHICH SHOULD BE THE PROPER SUBJECT OF PARTITION.

III. THE JUDGMENT OF PARTITION AND ALL SUBSEQUENT PROCEEDINGS ARE NULL AND VOID *AB INITIO*, INCLUDING THE PUBLIC AUCTION SALE OF PETITIONERS' SHARES WHICH HAD NOT RENDERED THIS PETITION MOOT.

IV. EVEN ASSUMING *ARGUENDO* THAT LACK OF CAUSE OF ACTION AND LACK OF JURISDICTION, AS DISCUSSED, CAN BE IGNORED, THE PROCEEDINGS BELOW ARE TAINTED WITH SERIOUS IRREGULARITIES THAT CALL FOR THE EXERCISE OF THE SUPERVISORY POWERS OF THIS HONORABLE COURT.

V. *CERTIORARI* AS A SPECIAL CIVIL ACTION UNDER RULE 65 AND APPEAL BY *CERTIORARI* UNDER RULE 45, BOTH OF THE 1997 RULES OF CIVIL PROCEDURE, WERE EMPLOYED AS PROPER REMEDIES IN THIS CASE.[33]

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[32] *Rollo,* pp. 16-22.

[33] *Id*. at 236-237.

This Court significantly notes that the first three issues,[34] alleging lack of jurisdiction and cause of action, are raised by petitioners for the first time in their Memorandum. No amount of interpretation or argumentation can place them within the scope of the assignment of errors they raised in their Petition.

The parties were duly informed by the Court in its Resolution dated 17 September 2003 that ***no new issues may be raised by a party in his/its Memorandum and the issues raised in his/its pleadings but not included in the Memorandum shall be deemed waived or abandoned.*** The raising of additional issues in a memorandum before the Supreme Court is irregular, because said memorandum is supposed to be in support merely of the position taken by the party concerned in his petition, and the raising of new issues amounts to the filing of a petition beyond the reglementary period.[35] The purpose of this rule is to provide all parties to a case a fair opportunity to be heard. No new points of law, theories, issues or arguments may be raised by a party in the Memorandum for the reason that to permit these would be offensive to the basic rules of fair play, justice and due process.[36]

Petitioners failed to heed the Court's prohibition on the raising of new issues in the Memorandum.

Moreover, Section 1 of Rule 9 of the Rules of Court provides that:

SECTION 1. *Defenses and objections not pleaded.* – Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. However, when it appears from the pleadings or the evidence on record that the court has not jurisdiction over the subject matter, that there is another action pending between the same parties for the same cause, or that the action is barred by

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[34] This Court, however, has taken note that the public bidding and sale occurred after the petitioners filed the instant petition.

[35] *Manila Railroad Company v. Perez*, 121 Phil. 1289, 1294 (1965).

[36] *Republic of the Philippines v. Kalaw*, G.R. No. 155138, 8 June 2004, 431 SCRA 401, 406; *Spouses Dela Cruz v. Joaquin*, G.R. No.162788, 28 July 2005, 464 SCRA 576, 582.

a prior judgment or by statute of limitations, the court shall dismiss the claim.

First, it bears to point out that Cesar, petitioners' predecessor, did not file any motion to dismiss, and his answer before the RTC did not bear the defenses/objections of lack of jurisdiction or cause of action on these grounds; consequently, these must be considered waived. The exception that the court may still dismiss a case for lack of jurisdiction over the subject matter, although the same is not pleaded, but is apparent in the pleadings or evidence on record, does not find application to the present Petition. Second, petitioners' arguments[37] on the lack of jurisdiction of the RTC over the case more appropriately pertain to venue, rather than jurisdiction over the subject matter, and are, moreover, not apparent from the pleadings and evidence on record. Third, the property subject of partition is only the 47.2 hectare ***pro-indiviso*** area representing the estate of Alicia. It does not include the entire 496 hectares of land comprising Hacienda Sta. Rita.

Even petitioners' argument that non-payment of appropriate docket fees by private respondents deprived the RTC of jurisdiction to partition the entire Hacienda Sta. Rita[38] deserves

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[37] Paragraphs 37-38; Petitioners' Memorandum, page 20; *rollo*, p. 254.

The subject matter of the complaint in this case is ostensibly the partition of an aliquot share consisting of 47.2 hectares of *pro indiviso* land in the Estate of the late Alicia Marasigan. In order, however, to be able to partition the estate of Alicia, it should include the much larger area of 496 hectares located not only in Pili over which Branch 31 of the RTC of Pili, Camarines Sur has jurisdiction, but also in Minalabac, Camarines Sur, over which Branches 19 to 28 of the RTC of Minilabac have jurisdiction.

It may be conceded that Branch 31 could also have jurisdiction over those properties within the jurisdiction of Branches 19 to 28; still, the trial court has not properly acquired jurisdiction over the entire 496 hectares of land because respondents have not prayed for or paid the appropriate docket fees for it. The action for partition should cover not only the Estate of Alicia Marasigan, but also the larger estate of 496 hectares. Thus, the Regional Trial Court has no jurisdiction over the partition case filed.

[38] On page 20 of petitioners' Memorandum, they argue:

scant consideration. In *National Steel Corporation v. Court of Appeals*,[39] the Court ruled:

> x x x while the lack of jurisdiction of a court may be raised at any stage of an action, nevertheless, the party raising such question may be estopped if he has actively taken part in the very proceedings which he questions and he only objects to the court's jurisdiction because the judgment or the order subsequently rendered is adverse to him.

Irrefragably, petitioners raised the issues of jurisdiction for lack of payment of appropriate docket fees and lack of cause of action belatedly in their Memorandum before this Court. Cesar and petitioners were noticeably mum about these in the proceedings before. In fact, Cesar actively participated in the proceedings conducted before the RTC by seeking affirmative reliefs therefrom, such as the inclusion of more properties in the partition. Hence, petitioners are already estopped from assailing the jurisdiction of the RTC on this ground.

It is conceded that this Court adheres to the policy that "where the court itself clearly has no jurisdiction over the subject matter or the nature of the action, the invocation of this defense may de done at any time."[40] While it is the general rule that neither waiver nor estoppel shall apply to confer jurisdiction upon a court, the Court may rule otherwise under meritorious and exceptional circumstances. One such exception is ***Tijam v.***

The specific prayer of the complaint is for the partition of 2/2 *pro indiviso* share in Hacienda Sta. Rita, and not 496 hectares of land, which should be the proper subject of partition.

The general prayer cannot include the partition of 496 hectares which is not sought; but even if it can refer to that large area, the court has not acquired jurisdiction over the case for non-payment of the appropriate docket fees.

If this case will be allowed to continue, it can only be for the partition of 496 hectares of land and only after payment of the appropriate docket fees.

[39] G.R. No. 123215, 2 February 1999, 302 SCRA 522, 532.

[40] *Asset Privatization Trust v. Court of Appeals*, G.R. No. 121171, 29 December 1998, 300 SCRA 579, 599.

Sibonghanoy,[41] which finds application in this case. This Court held in ***Tijam*** that "after voluntarily submitting a cause and encountering an adverse decision on the merits, it is too late for the loser to question the jurisdiction or power of the court."

This Court further notes that while petitioners filed their last pleading in this case, their Memorandum, on 26 December 2003, they failed to mention therein that the Court of Appeals had already dismissed CA-G.R. SP No. 78912.[42] To recall, CA-G.R. No. 78912 is a Petition for *Certiorari* and *Mandamus* involving the RTC Order dated 2 July 2003, which denied petitioners' Notice of Appeal. Petitioners intended to appeal the RTC Omnibus Order dated 5 May 2003 sustaining the public auction and sale of petitioners' share in Alicia's estate. Petitioners' failure to provide this Court with information on the developments in CA-G.R. SP No. 78912 is not only in violation of the rules on non-forum shopping, but is also grossly misleading, because they are raising in their Memorandum in the present case the same issues concerning the public auction and sale of their share in Alicia's estate. The purpose of the rule against forum shopping is to promote and facilitate the orderly administration of justice.

Forum shopping "occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict." In our jurisdiction, it has taken the form of filing multiple petitions or complaints involving the same issues before two or more tribunals or agencies in the hope that one or the other court would make a favorable disposition. There is also forum shopping when, because of an adverse decision in one forum, a party seeks a favorable opinion (other than by appeal or *certiorari*) in another. The rationale against forum shopping is that a party should not be allowed to pursue simultaneous remedies in two different fora. Filing multiple petitions or complaints constitutes abuse of court processes, which tends to degrade the administration

[41] 131 Phil. 556, 564 (1968).

[42] In the Motion for Reconsideration filed subsequent thereto, petitioners admit receiving said Resolution of the Court of Appeals dated 10 October 2003 on 24 October 2003.

of justice, wreaks havoc upon orderly judicial procedure, and adds to the congestion of the heavily burdened dockets of the courts. Thus, the rule proscribing forum shopping seeks to promote candor and transparency among lawyers and their clients in the pursuit of their cases before the courts to promote the orderly administration of justice, prevent undue inconvenience upon the other party, and save the precious time of the courts. It also aims to prevent the embarrassing situation of two or more courts or agencies rendering conflicting resolutions or decisions upon the same issue.[43]

Petitioners have indeed managed to muddle the issues in the instant case by raising issues for the first time in their Memorandum, as well as including issues that were already pending before another tribunal and have eventually been decided with finality, for which reason petitioners are herein admonished by this Court.

The Court, nonetheless, manages to strip the issues in this Petition down to the singular issue of whether or not the Court of Appeals erred in affirming *in toto* the RTC Order adopting the Commissioners' recommendation on the manner of partition of the estate of Alicia Marasigan.

After an exhaustive study of the merits of the case and the pleadings submitted by the parties, this Court is convinced that the Court of Appeals did not err in affirming the Order of the RTC which approved the Commissioners' recommendations as to the manner of implementing the Order of Partition of Alicia's estate. There is no reason to reverse the Court of Appeal's dismissal of petitioners' Petition for *Certiorari* and Prohibition and ruling that the RTC acted well-within its jurisdiction in issuing the assailed Order. Nowhere is it shown that the RTC committed such patent, gross and prejudicial errors of law or fact, or a capricious disregard of settled law and jurisprudence, as to amount to a grave abuse of discretion or lack of jurisdiction on its part, in adopting and confirming the recommendations submitted by the Commissioners, and which would have warranted the issuance of a writ of *certiorari*.

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[43] *Wee v. Galvez*, G.R. No. 147394, 11 August 2004, 436 SCRA 96, 108-109.

This petition originated from an original action for partition. It is governed by Rule 69 of the Rules of Court, and can be availed of under the following circumstances:

> Section 1. Complaint in action for partition of real estate. A person having the right to compel the partition of real estate may do so as provided in this Rule, setting forth in his complaint the nature and extent of his title and an adequate description of the real estate of which partition is demanded and joining as defendants all other persons interested in the property.

In this jurisdiction, an action for partition is comprised of two phases: ***first***, the trial court, after determining that a co-ownership in fact exists and that partition is proper, issues an order for partition; and, ***second***, the trial court promulgates a decision confirming the sketch and subdivision of the properties submitted by the parties (if the parties reach an agreement) or by the appointed commissioners (if the parties fail to agree), as the case may be.[44]

The delineations of these two phases have already been thoroughly discussed by this Court in several cases where it explained:

> The first phase of a partition and/or accounting suit is taken up with the determination of whether or not a co-ownership in fact exists, (*i.e.*, not otherwise legally proscribed) and may be made by voluntary agreement of all the parties interested in the property. This phase may end with a declaration that plaintiff is not entitled to have a partition either because a co-ownership does not exist, or partition is legally prohibited. It may end, upon the other hand, with an adjudgment that a co-ownership does in truth exist, partition is proper in the premises and an accounting of rents and profits received by the defendant from the real estate in question is in order. In the latter case, the parties may, if they are able to agree, make partition among themselves by proper instruments of conveyance, and the court shall confirm the partition so agreed upon. In either case –

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[44] *Sepulveda, Sr. v. Pelaez*, G.R. No. 152195, 31 January 2005, 450 SCRA 302, 312, citing *Vda. de Daffon v. Court of Appeals*, 436 Phil. 233, 241 (2002); *Maglucot-aw v. Maglucot*, 385 Phil. 720, 730-731 (2000).

i.e., either the action is dismissed or partition and/or accounting is decreed – the order is a final one, and may be appealed by any party aggrieved thereby.

The second phase commences when it appears that "the parties are unable to agree upon the partition" directed by the court. In that event, partition shall be done for the parties by the court with the assistance of not more than three (3) commissioners. This second stage may well also deal with the rendition of the accounting itself and its approval by the court after the parties have been accorded opportunity to be heard thereon, and an award for the recovery by the party or parties thereto entitled of their just share in the rents and profits of the real estate in question. Such an order is, to be sure, final and appealable.[45]

Trouble arose in the instant petition in the second phase.

Petitioners postulate that the Court of Appeals erred in holding that notice to the heirs regarding the examination and viewing of the estate is no longer necessary given the circumstances. They aver that, in effect, the Court of Appeals was saying that such notice is only necessary when the Commissioners actually distribute the properties, but is not mandatory when the Commissioners recommend the assignment of the properties to any of the heirs. Petitioners contend that this is prejudicial to their right to due process since they are deprived of the opportunity to be heard on the valuation of their share in the estate.

Petitioners' opposition is anchored on Section 4 of Rule 69 of the Rules of Court, which reads:

Section 4. *Oath and duties of commissioners*. Before making such partition, the commissioners shall take and subscribe an oath that they will faithfully perform their duties as commissioners, which oath shall be filed in court with the other proceedings in the case. ***In making the partition, the commissioners shall view and examine the real estate, after due notice to the parties to attend at such view and examination, and shall hear the parties as to their preference in the portion of the property to be set apart to them***

[45] *Maglucot-aw* v. *Maglucot*, *id.* at 730-731.

and the comparative value thereof, and shall set apart the same to the parties in lots or parcels as will be most advantageous and equitable, having due regard to the improvements, situation and quality of the different parts thereof.

Petitioners insist that the above provision is explicit and does not allow any qualification, contending that it does not require that the lack of notice must first be proven to have caused prejudice to the interest of a party before the latter may object to the Commissioners' viewing and examination of the real properties on the basis thereof. They maintain that they were prejudiced by the mere lack of notice.

We, on the other hand, find that the scales of justice have remained equal throughout the proceedings before the RTC and the Commissioners. This Court, in the performance of its constitutionally mandated duty 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, is duty-bound to ensure that due process is afforded to all the parties to a case.

As the Court of Appeals declared, due process is not a mantra, the mere invocation of which shall warrant a reversal of a decision. Well-settled is the rule that the essence of due process is the opportunity to be heard. In *Legarda v. Court of Appeals*,[46] the Court held that as long as parties to a case were given the opportunity to defend their interest in due course, they cannot be said to have been denied due process of the law. Neither do the records show any indicia that the preference of petitioners for the physical subdivision of the property was not taken into consideration by the Commissioners.

Petitioners' persistent assertion that their rights were prejudiced by the lack of notice is not enough. Black's Law

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[46] G.R. No. 94457, 16 October 1997, 280 SCRA 642, 657.

Dictionary defines the word ***prejudice*** as damage or detriment to one's legal rights or claims. Prejudice means injury or damage.[47] No competent proof was adduced by petitioners to prove their allegation. Mere allegations cannot be the basis of a finding of prejudice. He who alleges a fact has the burden of proving it and a mere allegation is not evidence.[48]

It should not be forgotten that the purpose of the rules of procedure is to secure for the parties a just, speedy and inexpensive determination of every action or proceeding.[49] The ultimate purpose of the rules of procedure is to attain, not defeat, substantial justice.[50]

Records reveal that the parties were given sufficient opportunity to raise their concerns. From the time the action for partition was filed by private respondents, all the parties, including the late Cesar, petitioners' predecessor, were given a fair opportunity to be heard. Since the parties were unable to agree on how the properties shall be divided, Commissioners were appointed by the Court pursuant to Section 3 of Rule 69 of the Rules of Court.

> Section 3. Commissioners to make partition when parties fail to agree. — If the parties are unable to agree upon the partition, the court shall appoint not more than three (3) competent and disinterested persons as commissioners to make the partition, commanding them to set off to the plaintiff and to each party in interest such part and proportion of the property as the court shall direct.

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[47] *Fuentes, Jr. v. Office of the Ombudsman*, G.R. 164865, 11 November 2005, 474 SCRA 779, 795.

[48] *Noceda v. Court of Appeals*, G.R. No. 119730, 2 September 1999, 313 SCRA 504, 520; *Asia Traders Insurance Corporation v. Court of Appeals*, 467 Phil. 531, 539 (2004); *Apex Mining Co., Inc. v. Southeast Mindanao Gold Mining Corporation*, G.R. No. 152613, 23 June 2006, 492 SCRA 355, 379.

[49] *Commissioner of Internal Revenue v. A. Soriano Corporation,* G.R. No. 113703, 31 January 1997, 267 SCRA 313, 319.

[50] *Gabionza v. Court of Appeals*, G.R. No. 112547, 18 July 1994, 234 SCRA 192, 198.

While the lack of notice to Cesar of the viewing and examination by the Commissioners of the real properties comprising Alicia's estate is a procedural infirmity, it did not violate any of his substantive rights nor did it deprive him of due process. It is a matter of record, and petitioners cannot deny, that Cesar was able to file his Comment/Opposition to the Commissioners' Report. And after the RTC adopted and confirmed the Commissioners' recommendations in its Order dated 22 June 2001, Cesar was able to file a Motion for Reconsideration of the said Order. He had sufficient opportunity to present before the RTC whatever objections or oppositions he may have had to the Commissioners' Report, including the valuation of his share in Alicia's estate.

Petitioners also allege that the ruling of the Court of Appeals — that physical impossibility and impracticality are embraced by the word "prejudice," referred to in Section 5 of Rule 69 of the Rules of Court — violates the constitutional limitation on the rule-making power of the Supreme Court, according to which, the Rules of Court shall not increase, decrease or modify substantive rights.

According to petitioners, Section 5 of Rule 69 of the Rules of Court, which provides:

> Section 5. Assignment or sale of real estate by commissioners. – When it is made to appear to the commissioners that the real estate, or a portion thereof, ***cannot be divided without prejudice*** to the interests of the parties, the court may order it ***assigned*** to one of the parties willing to take the same, provided he pays to the other parties such amounts as the commissioners deem equitable, unless one of the interested parties asks that the property be sold instead of being so assigned, in which case the court shall order the commissioners to sell the real estate at public sale under such conditions and within such time as the court may determine.

should be read in conjunction with Articles 494 and 495 of the New Civil which provide for the following substantive rights:

> Article 494. No co-owner shall be obliged to remain in the co-ownership. Each co-owner may demand at any time the partition of the thing owned in common, insofar as his share is concerned.

Nevertheless, an agreement to keep the thing undivided for a certain period of time, not exceeding ten years, shall be valid. This term may be extended by a new agreement.

A donor or testator may prohibit partition for a period which shall not exceed twenty years.

Neither shall there be any partition when it is prohibited by law.

No prescription shall run in favor of a co-owner or co-heir against his co-owners or co-heirs so long as he expressly or impliedly recognizes the co-ownership.

Article 495. Notwithstanding the provisions of the preceding article, the co-owners cannot demand a physical division of the thing owned in common, when to do so would render unserviceable for the use for which it is intended. But the co-ownership may be terminated in accordance with Article 498.

Article 498 of the New Civil Code, referred to by Article 495 of the same Code, states:

Article 498. Whenever the thing is essentially indivisible and the co-owners cannot agree that it be allotted to one of them who shall indemnify the others, it shall be sold and its proceeds distributed.

Evidently, the afore-quoted Civil Code provisions and the Rules of Court must be interpreted so as to give effect to the very purpose thereof, which is to put to an end to co-ownership in a manner most beneficial and fair to all the co-owners.

As to whether a particular property may be divided without prejudice to the interests of the parties is a question of fact. To answer it, the court must take into consideration the type, condition, location, and use of the subject property. In appropriate cases such as the one at bar, the court may delegate the determination of the same to the Commissioners.

The Commissioners found, after a viewing and examination of Alicia's estate, that the same cannot be divided without causing prejudice to the interests of the parties. This finding is further supported by the testimony of Apolonio Marasigan that the estate cannot be divided into smaller portions, since only certain portions of the land are suitable to agriculture, while others are

not, due to the contours of the land and unavailability of water supply.

The impracticality of physically dividing Alicia's estate becomes more apparent, considering that Hacienda Sta. Rita is composed of parcels and snippets of land located in two different municipalities, Pili and Minalabac, Camarines Sur. The actual area representing Alicia's 2/21 *pro-indiviso* shares in Hacienda Sta. Rita is 422,422.65 square meters, more or less. Each of Alicia's heirs is entitled to 1/7 share in her estate equivalent to 67,496.09 square meters or roughly seven hectares.[51] Cesar and his heirs are entitled only to his 1/7 share in the yet unidentified, unsegregated 2/21 *pro-indiviso* shares of Alicia in each of the 13 parcels of land that comprises Hacienda Sta. Rita. Dividing the parcels of land even further, each portion allotted to Alicia's heirs, with a significantly reduced land area and widely scattered in two municipalities, would irrefragably diminish the value and use of each portion, as compared to keeping the entire estate intact.

The correctness of the finding of the RTC and the Commissioners that dividing Alicia's estate would be prejudicial to the parties cannot be passed upon by the Court of Appeals in a petition for *certiorari.* Factual questions are not within the province of a petition for *certiorari*. There is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. As to whether the court *a quo* decided the question wrongly is immaterial in a petition for *certiorari*. It is a legal presumption that findings of fact of a trial court carry great weight and are entitled to respect on appeal, absent any strong and cogent reason to the contrary, since it is in a better position to decide the question of credibility of witnesses.[52]

The writ of *certiorari* issues for the correction of errors of jurisdiction only or grave abuse of discretion amounting to lack or excess of jurisdiction. The writ of *certiorari* cannot be legally

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[51] CA *Rollo*, p. 23.

[52] *People v. Bernal*, G.R. No. 113685, 19 June 1997, 274 SCRA 197, 207.

used for any other purpose.[53] At most, the petition pertains to an error of judgment, and not of jurisdiction, for clearly under Section 5 of Rule 69, the question of whether a party's interest shall be prejudiced by the division of the real property is left to the determination and discretion of the Commissioners.

Hence, it is totally unnecessary for this Court to address the issue raised by petitioners concerning the alleged unconstitutionality of Section 5, Rule 69 of the Rules of Court for having been issued beyond the constitutional limitation on the rule-making power of this Court. Basic is the principle that a constitutional issue may only be passed upon if essential to the decision of a case or controversy.[54] A purported constitutional issue raised by petitioners may only be resolved if essential to the decision of a case and controversy. Even if all the requisites for judicial review are present, this Court will not entertain a constitutional question unless it is the very *lis mota*[55] of the case or if the case can be disposed of on some other grounds, such as the application of a statute or general law. The present problem of partition by co-heirs/co-owners can be resolved without elevating their case to one of constitutionality.

In the absence of evidence to the contrary, this Court can only presume that the proceedings in Special Civil Action No. P-77-97 before the RTC, including the recommendation made by the Commissioners, were fairly and regularly conducted, meaning that both the RTC and the appointed Commissioners had carefully reviewed, studied, and weighed the claims of all the parties.

Petitioners' argument that the assignment of the property will not terminate the co-ownership is specious, considering

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[53] *Flores v. Court of Appeals*, 328 Phil. 992, 1024 (1996).

[54] *Estrada v. Desierto*, G.R. No. 156160, 9 December 2004, 445 SCRA 655, 666.

[55] *Griffith v. Court of Appeals*, 428 Phil. 878, 888 (2002), citing *Hontiveros v. Regional Trial Court*, Br. 25, Iloilo City, G.R. No. 125465, 29 June 1999, 309 SCRA 340, 354.

that partition, in general, is the separation, division, and ASSIGNMENT of a thing held in common by those to whom it may belong.[56]

Inasmuch as the parties continued to manifest their desire to terminate their co-ownership, but the co-heirs/co-owners could not agree on which properties would be allotted to each of them, this Court finds that the Court of Appeals was correct in ruling that the RTC did not act with grave abuse of discretion amounting to lack or excess of jurisdiction when it approved the Commissioners' recommendation that the co-heirs/co-owners assign their shares to one of them in exchange for proper compensation.

This Court has consistently held that one of the purposes for which courts are organized is to put an end to controversy in the determination of the respective rights of the contending parties. With the full knowledge that courts are not infallible, the litigants submit their respective claims for judgment, and they have a right at some time or another to have final judgment on which they can rely over a final disposition of the issue or issues submitted, and to know that there is an end to the litigation;[57] otherwise, there would be no end to legal processes.[58]

Finally, petitioners raise before this Court the issue that the public auction sale of their shares is null and void; at the same time they allege deficiency in the bid price for their 1/7 share in Alicia's estate *vis-à-vis* the valuation of the same by the Commissioners.[59] This Court is already barred from ruling on the validity of the public auction sale. This Court's ruling dated 13 October 2004 in G.R. No. 164970 denying their petition for

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[56] *Noceda v. Court of Appeals*, G.R. No. 119730, 2 September 1999, 313 SCRA 504, 517; *Cruz v. Court of Appeals*, G.R. No. 122904, 15 April 2005, 456 SCRA 165, 171.

[57] *Miranda v. Court of Appeals*, 163 Phil. 285, 316-317 (1976).

[58] *Fabular v. Court of Appeals*, 204 Phil. 654, 657 (1982).

[59] Omnibus Order in Special Civil Action No. P-'99-'97 dated 5 May 2003; *rollo*, p. 187.

certiorari lays to rest petitioners' questioning of the Court of Appeals' Resolution dismissing their appeal therein of the issue of the validity of the public sale of their share in Alicia's estate. Such decision or order can no longer be disturbed or reopened no matter how erroneous it may have been.[60]

Indeed, while it is understandable for petitioners to protect their rights to their portions of the estate, the correlative rights of the other co-owners/co-heirs must also be taken into consideration to balance the scales of justice. And, by finding the course of action, within the boundaries of law and jurisprudence, that is most beneficial and equitable for all of the parties, the courts' duty has been satisfactorily fulfilled.

Thus, contrary to petitioners' averments, this Court finds that the Court of Appeals did not err in ruling that the RTC did not commit grave abuse of discretion amounting to lack or excess of jurisdiction in adopting and confirming the recommendations of the Commissioners.

WHEREFORE, premises considered, the Petition for Review on *Certiorari* is hereby *DENIED* for lack of merit, and the assailed Decision dated 31 July 2002 of the Court of Appeals in docket no. CA-G.R. SP No. 67529 is hereby *AFFIRMED*. Costs against petitioners.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Nachura, and *Reyes, JJ.,* concur.

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[60] *Lapulapu Development and Housing Corporation v. Group Management Corporation,* 437 Phil. 297, 313 (2002).

THIRD DIVISION

[G.R. No. 160339. March 14, 2008]

OSCAR P. GARCIA and ALEX V. MORALES, *petitioners, vs.* **MALAYAN INSURANCE CO., INC. and NATIONAL LABOR RELATIONS COMMISSION,*** *respondents.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW ON *CERTIORARI* TO THE SUPREME COURT UNDER RULE 45; ONLY ERRORS OF LAW ARE REVIEWABLE BY THE COURT THERE UNDER; EXCEPTIONS — Resolution of the foregoing issues entails an inquiry into the facts, a re-evaluation of the credibility of the witnesses and a recalibration of the evidence presented. Ordinarily, the Court does not undertake these functions, for it defers to the expertise of the CA, NLRC and LA, and accords great weight to their factual findings, especially when these are unanimous. Thus, only their errors of law are reviewable by the Court in a petition for review on *certiorari* under Rule 45. However, under extraordinary circumstances, the Court delves into the factual assessment of the forums below when it is shown that (1) the findings are not supported by evidence; (2) when the inference made is manifestly mistaken, absurd, or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of fact are conflicting; (6) when in making its findings, the CA went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's reply briefs are not disputed by the respondent; and (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the

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* The present petition impleaded the Court of Appeals as respondent. Pursuant to Section 4, Rule 45 of the Rules of Court, the name of the Court of Appeals is deleted from the title.

evidence on record. To determine whether any of these extraordinary circumstances obtains in the present case, a preliminary assessment of the evidence upon which the CA, NLRC and LA based their factual findings cannot be avoided.

2. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; SERIOUS MISCONDUCT; CHARGE OF THEFT AND THE COVER-UP THEREOF IS SUPPORTED BY EVIDENCE. — The LA declared the dismissal of petitioners valid in view of substantial evidence that petitioner Garcia was involved in the theft of private respondent's confidential records and that petitioner Morales participated in the cover-up thereof. The NLRC sustained the findings of the LA. It held that the LA correctly relied on the affidavits of Umila and De Guzman whose detailed account of how petitioners committed serious misconduct was never refuted by the latter. The NLRC found these witnesses credible because they were not shown to hold any "grudge against [petitioners], much more because said witnesses are ordinary members of the union while those being charged are union officers, hence, with moral ascendancy over them." While the CA did not elaborate on its view, it bound itself by the concurrent factual findings of the LA and NLRC for it found them to be supported by evidence. Impugning the stand of the CA, petitioners argue that the affidavits of Umila and De Guzman have no probative value for neither had direct knowledge of the taking of private respondent's properties: first, Umila merely stated that on December 24, 1998, petitioner Garcia and another employee, Jun Bato, asked about these properties and that she told them that said properties were on top of her office table; and second, De Guzman merely described how these properties were recovered. Perusal of the affidavits in question does not bear out petitioners' claim. Umila also stated that when she confronted petitioner Garcia about the lost properties, the latter admitted having them in his possession. De Guzman's statement detailed the effort to bring said properties back into the premises of private respondent and to make it appear that these were merely misplaced. Thus, without going into the veracity of the statements in said affidavits, the Court cannot agree that no direct evidence was presented on the theft of the properties or the cover-up thereof.

3. ID.; ID.; ID.; PRIVATE RESPONDENT COMPANY'S ACTION IN DISMISSING PETITIONER *MORALES* MAY HAVE BEEN

ILLEGAL BUT DID NOT AMOUNT TO UNFAIR LABOR PRACTICE; THE ERROR IN THE ASSESSMENT OF THE AVAILABLE EVIDENCE CANNOT BE EQUATED WITH BAD FAITH AS THERE IS NO EVIDENCE THAT IT WAS ANIMATED BY MALICE OR ILL-MOTIVE. — However, it is noted that while the participation of petitioner Garcia in said theft and cover-up is detailed in said affidavit, the same cannot be said of the connection of Morales to said incidents. To recall, petitioner Morales was dismissed for conspiring in the cover-up of the theft. However, it appears that the only evidence of petitioner Morales's involvement in the cover-up is the statement of De Guzman that it was said petitioner who instructed him to get a parcel from a third person. The statement of De Guzman on this particular matter is reproduced below: 3. *Noon Disyembre 29, 1999 bandang alas-kuwatro kuwarenta y singko ng hapon (4:45 p.m.), ako ay kasalukuyang naghuhugas ng mga plato sa Comfort Room ng 5th floor ng ETY Building nang ako ay lapitan ni Alex Morales ng Risk Analysis Department at inutusang pumunta sa Farmacia Rubi, dito rin sa Quintin Paredes, Binondo para kunin ang isang bagay sa lalaking may bigote.* By no means can it be extrapolated from the foregoing statement that petitioner Morales knew the contents of the parcel — whether or not these were the stolen company properties — or the purpose for getting the parcel from a third party. In fact, the succeeding paragraphs in the statement disclose that it was that third party who instructed De Guzman to call petitioner Garcia, who, in turn, disclosed the nature of the contents of the parcel and gave out instruction on what steps to take to bring said parcel back into the office building and to make it appear that it was just misplaced. Nowhere does it appear that petitioner Morales had knowledge of what was to happen or had participation in it. It is difficult then to connect petitioner Morales to the theft or the attempt to cover it up merely on the basis of his having instructed De Guzman to get a parcel from another person. Therefore, on the specific culpability of petitioner Morales, the Court finds the affidavit of De Guzman so lacking in crucial detail that the same cannot serve as basis for the finding that said petitioner conspired in the theft of private respondent's properties or the cover up thereof. The Court reverses the factual findings of the CA, NLRC and LA, for the evidence on which their findings were based was too tenuous to justify the termination of petitioner

Morales's employment. Nonetheless, no bad faith can be attributed to private respondent in dismissing petitioner Morales despite such scant evidence. Its error in the assessment of the available evidence cannot be equated with bad faith as there is no evidence that it was animated by malice or ill motive. Hence, its action in dismissing petitioner Morales may have been illegal, but did not amount to unfair labor practice.

4. ID.; ID.; ID.; NO INDICATION THAT THE COURT OF APPEALS MISAPPRECIATED THE EVIDENCE WHEN IT AFFIRMED THE FINDINGS OF THE NATIONAL LABOR RELATIONS COMMISSION AND THE LABOR ARBITER AGAINST PETITIONER *GARCIA*. — Moving on to the other issues pertaining to petitioner Garcia, he insists that, contrary to the observation of the CA, he controverted the affidavits presented by private respondent, not only by denying the averments therein, but also by presenting counter evidence consisting of an entry in the guard's logbook and the affidavit of the guard-on-duty, Joey Limbo. Petitioner explains that it took time for him to present these documents, because private respondent had tried to conceal them and was compelled to present the same before the LA only when he (petitioner Garcia) demanded to see them. The Court is not convinced that by said logbook entry and affidavit of Joey Limbo, petitioner Garcia effectively controverted the existing evidence against him. The logbook entry merely reports that De Guzman recovered the stolen properties from the fifth floor of the office building. The affidavit of Joey Limbo merely repeated the logbook entry. That these documents do not disclose any further detail is understandable, for as explained by De Guzman himself in his affidavit, he merely reported the recovery of the stolen properties to Joey Limbo and did not elaborate on the circumstances thereof, but when he was confronted by private respondent the following day, it was then that he divulged the details leading to the recovery of said properties. Verily, the Court finds no indication that the CA misappreciated the evidence when it affirmed the findings of the NLRC and LA against petitioner Garcia.

5. ID.; ID.; ID.; THE REQUIREMENTS OF DUE PROCESS WERE MORE THAN ADEQUATELY SATISFIED IN THE CASE AT BAR. — Petitioners complain that they were denied due process when they were not furnished a copy of the evidence against

them or the minutes of the investigation. It is oft repeated that in administrative proceedings, due process is served by the mere fact that each party is afforded an opportunity to air its side, not necessarily through verbal argumentation, but also through pleadings in which the parties may explain their side of the controversy. It is of record that petitioners were informed of the charges against them and were given the opportunity to present their defense, not just in the administrative investigation, but also in the proceedings before the LA and NLRC. The requirements of due process were more than adequately satisfied.

APPEARANCES OF COUNSEL

Allan S. Montaño for petitioners.
Angara Abello Concepcion Regala & Cruz for respondents.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.*:

This resolves the Petition for Review on *Certiorari* under Rule 45 of the Rules of Court of Oscar P. Garcia and Alex V. Morales (petitioners), assailing the March 13, 2003 Decision[1] of the Court of Appeals (CA), which upheld the validity of the termination of their employment; and the October 9, 2003 CA Resolution[2] which denied their motion for reconsideration.

The facts are of record.

Petitioners were employed as risk inspectors by Malayan Insurance Company, Inc. (private respondent). They were also officers of the Malayan Employees Association-FFW (MEA-FFW).

On December 29, 1999, private respondent issued to petitioner Garcia an Inter-Office Memorandum[3] giving him 24 hours to

[1] Penned by Associate Justice Eugenio S. Labitoria and concurred in by Associate Justices Renato C. Dacudao and Danilo B. Pine; *rollo*, p. 41.

[2] *Rollo*, p. 69.

[3] *Id*. at 252.

explain his involvement in the theft of company property, consisting of diskettes, logbooks and other documents of the Risk Analysis Section, and to return the same. Private respondent also issued to petitioner Morales a similar memorandum but with additional instruction for his preventive suspension for 30 days pending investigation.[4]

In their separate written explanations, petitioners denied their involvement in the theft and countered that the filing of the charges against them was a form of harassment against their union MEA-FFW, which was in a deadlock with respondent in the ongoing negotiations over the terms of their collective bargaining agreement.[5]

After the conduct of an informal administrative hearing,[6] private respondent notified petitioner Garcia, through a letter dated February 28, 2000, of the termination of his employment, thus:

> After a painstaking evaluation of the pieces of documentary and testimonial evidence presented, the Investigating Committee concluded that there is reason to believe that you participated in the theft of the subject Company properties when you:
>
> 1) Took possession of the subject diskettes and logbooks without any permission from the company;
> 2) Instigated the commission of the said unlawful act; and
> 3) Refused to deliver said Company properties upon demand by Management.
>
> The above acts constitute serious misconduct and a violation of the Company's Code of Ethics which, under Article 282 of the Labor Code, as amended, justify your dismissal from the Company. In view thereof, we regret to inform you that you are considered dismissed from your employment effective immediately.[7]

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[4] *Id*. at 256.

[5] *Id*. at 258-260.

[6] *Id*. at 263-265.

[7] *Rollo,* pp. 266-267.

Petitioner Morales was also served a similar notice of termination but on the following grounds:

> After a painstaking evaluation of the pieces of documentary and testimonial evidence presented, the Investigating Committee concluded that there is reason to believe that you participated in the theft of the subject Company properties when you:
>
> 1) Conspired with Mr. Garcia in attempting to cover-up the loss of the subject diskettes and logbook; and
>
> 2) Deliberately withheld information from the Company regarding the whereabouts of said Company properties.
>
> A review of your 201 File likewise revealed that you have been previously suspended for tampering receipts which you presented for reimbursement by the Company. You will therefore realize that when it comes to dishonesty, you are not a first offender.
>
> The above recent acts constitute serious misconduct and violation of the Company's Code of Ethics which, under Article 282 of the Labor Code, as amended, justify your dismissal from the Company. In view thereof, we regret to inform you that you are considered dismissed from your employment effective immediately.[8]

Petitioners filed before the Labor Arbiter (LA) a Complaint for illegal dismissal, illegal suspension, unfair labor practice, damages and attorney's fees.[9] The LA dismissed their Complaint in a Decision[10] dated November 20, 2000.

Petitioners appealed to the National Labor Relations Commission (NLRC), which issued a Resolution[11] dated November 29, 2001, affirming the November 20, 2000 LA Decision. The NLRC also denied petitioners' Motion for Reconsideration in a Resolution[12] dated February 28, 2002.

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[8] *Id*. at 268-269.

[9] CA *rollo*, p. 117.

[10] *Rollo,* p. 108.

[11] *Id. at* 149.

[12] CA *rollo*, p. 114.

Petitioners filed a Petition for *Certiorari* with the CA, which dismissed it in the March 13, 2003 Decision[13] assailed herein. Petitioners' Motion for Reconsideration was also denied by the CA in its October 9, 2003 Resolution.

Hence, the present petition, which raises the following issues:

I

The Honorable public respondent court seriously erred and committed grave abuse of discretion, amounting to lack and/or excess of jurisdiction, in denying the petition for *certiorari a quo* and, in effect, affirming the assailed resolutions of public respondent NLRC, dismissing the complaint for unfair labor practice, illegal suspension, illegal dismissal, damages and attorney's fees x x x.

II

While the public respondent court is totally correct in declaring that "factual findings of the NLRC, particularly when it coincide with those of the Labor Arbiter, are accorded respect, even finality," it erred, however in applying said doctrinal ruling in the instant case, x x x.

III

The public respondent court seriously erred in not finding that the public respondent NLRC and the Labor Arbiter *a quo* seriously erred and committed grave abuse of discretion in rendering the assailed resolution, as clearly private respondent company acted with bad faith in terminating the services of herein petitioners.

IV

The public respondent court committed grave abuse of discretion amounting to lack and/or excess of jurisdiction in denying petitioners' motion for reconsideration without resolving the legal issues raised.[14]

Resolution of the foregoing issues entails an inquiry into the facts, a re-evaluation of the credibility of the witnesses and a recalibration of the evidence presented. Ordinarily, the Court does not undertake these functions, for it defers to the expertise of the CA, NLRC and LA, and accords great weight to their factual

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[13] *Id*. at 294.

[14] Petition, *rollo*, pp. 20, 28, 31 and 34.

findings, especially when these are unanimous. Thus, only their errors of law are reviewable by the Court in a petition for review on *certiorari* under Rule 45.

However, under extraordinary circumstances, the Court delves into the factual assessment of the forums below when it is shown that (1) the findings are not supported by evidence; (2) when the inference made is manifestly mistaken, absurd, or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of fact are conflicting; (6) when in making its findings, the CA went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's reply briefs are not disputed by the respondent; and (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record.[15]

To determine whether any of these extraordinary circumstances obtains in the present case, a preliminary assessment of the evidence upon which the CA, NLRC and LA based their factual findings cannot be avoided.

The LA declared the dismissal of petitioners valid in view of substantial evidence that petitioner Garcia was involved in the theft of private respondent's confidential records and that petitioner Morales participated in the cover-up thereof:

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[15] *BMG Records (Phils.), Inc. v. Aparecio*, G.R. No. 153290, September 5, 2007, 532 SCRA 300, 309; *Asiatic Development Corporation v. Brogada*, G.R. No. 169136, July 14, 2006, 495 SCRA 166, 168; *Binay v. Odeña*, G.R. No. 163683, June 8, 2007, 524 SCRA 248, 257; *Civil Service Commission v. Ledesma*, G.R. No. 154521, September 30, 2005, 471 SCRA 589, 605-606; *Metropolitan Bank and Trust Company v. Barrientos*, G.R. No. 157028, January 31, 2006, 481 SCRA 311, 321; *Marival Trading, Inc. v. National Labor Relations Commission*, G.R. No. 169600, June 26, 2007, 525 SCRA 708, 721; *Metro Transit Organization v. Court of Appeals*, 440 Phil. 743, 754 (2002).

In the case at bar, this Office finds that there is substantial evidence to justify the dismissal of [petitioners]. The testimonies of [Jovita] Umila, [Philip] de Guzman and [Romeo] Corral are such "relevant evidence as a reasonable mind might accept as adequate to justify (the) conclusion" that [petitioners] are guilty of serious misconduct which is duly recognized under the law as valid cause for the dismissal of an employee. Their statements explain the questioned incident in its entirety from the inception of wrongdoing (Umila), to the denial of knowledge of the whereabouts of the subject lost records (Corral), to the subsequent admission of possession of the missing diskettes and logbooks (Umila), up to the attempt to cover-up their misconduct (De Guzman). [Petitioners] failed to adduce any evidence that would taint the credibility of said witnesses. It goes against the usual grain of logic and normal human conduct for a witness to testify against a co-Union member or co-employee, absent any clear evil or ill-motive on his/her part, thus demonstrating that said witness is moved only by the desire to tell the truth and clear his conscience. There being nothing to indicate that the witnesses were moved by dubious or improper motives to testify falsely, their testimonies should be accorded full faith and credit.

Tellingly, [petitioner] Garcia never denied, much less refuted, Umila's positive testimony that he (Garcia) admitted that he has in his possession the missing diskettes and logbooks. The same holds true as regards [petitioner] Morales who likewise never denied, much less refuted, De Guzman's first person testimony of his (Morales') complicity in the cover-up of the wrongdoing of [petitioner] Garcia.[16]

The NLRC sustained the findings of the LA. It held that the LA correctly relied on the affidavits of Umila and De Guzman whose detailed account of how petitioners committed serious misconduct was never refuted by the latter.[17] The NLRC found these witnesses credible because they were not shown to hold any "grudge against [petitioners], much more because said witnesses are ordinary members of the union while those being charged are union officers, hence, with moral ascendancy over them."[18]

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[16] LA Decision, *rollo*, pp. 117-118.

[17] NLRC Decision, *rollo*, p. 158.

[18] *Id.* at 157.

While the CA did not elaborate on its view, it bound itself by the concurrent factual findings of the LA and NLRC for it found them to be supported by evidence.[19]

Impugning the stand of the CA, petitioners argue that the affidavits of Umila and De Guzman have no probative value for neither had direct knowledge of the taking of private respondent's properties: first, Umila merely stated that on December 24, 1998, petitioner Garcia and another employee, Jun Bato, asked about these properties and that she told them that said properties were on top of her office table; and second, De Guzman merely described how these properties were recovered.[20]

Perusal of the affidavits in question does not bear out petitioners' claim. Umila also stated that when she confronted petitioner Garcia about the lost properties, the latter admitted having them in his possession.[21] De Guzman's statement detailed the effort to bring said properties back into the premises of private respondent and to make it appear that these were merely misplaced.[22] Thus, without going into the veracity of the statements in said affidavits, the Court cannot agree that no direct evidence was presented on the theft of the properties or the cover-up thereof.

However, it is noted that while the participation of petitioner Garcia in said theft and cover-up is detailed in said affidavit, the same cannot be said of the connection of Morales to said incidents. To recall, petitioner Morales was dismissed for conspiring in the cover-up of the theft. However, it appears that the only evidence of petitioner Morales's involvement in the cover-up is the statement of De Guzman that it was said petitioner who instructed him to get a parcel from a third person. The statement of De Guzman on this particular matter is reproduced below:

> 3. *Noon Disyembre 29, 1999 bandang alas-kuwatro kuwarenta y singko ng hapon (4:45 p.m.), ako ay kasalukuyang*

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[19] CA Decision, *id*. at 46-47.

[20] Petition, *id*. at 26-28.

[21] *Sinumpaang Salaysay*, *id*. at 246.

[22] *Id*. at 249-250.

naghuhugas ng mga plato sa Comfort Room ng 5th floor ng ETY Building nang ako ay lapitan ni Alex Morales ng Risk Analysis Department at inutusang pumunta sa Farmacia Rubi, dito rin sa Quintin Paredes, Binondo para kunin ang isang bagay sa lalaking may bigote.[23]

By no means can it be extrapolated from the foregoing statement that petitioner Morales knew the contents of the parcel — whether or not these were the stolen company properties — or the purpose for getting the parcel from a third party. In fact, the succeeding paragraphs in the statement disclose that it was that third party who instructed De Guzman to call petitioner Garcia, who, in turn, disclosed the nature of the contents of the parcel and gave out instruction on what steps to take to bring said parcel back into the office building and to make it appear that it was just misplaced. Nowhere does it appear that petitioner Morales had knowledge of what was to happen or had participation in it. It is difficult then to connect petitioner Morales to the theft or the attempt to cover it up merely on the basis of his having instructed De Guzman to get a parcel from another person.

Therefore, on the specific culpability of petitioner Morales, the Court finds the affidavit of De Guzman so lacking in crucial detail that the same cannot serve as basis for the finding that said petitioner conspired in the theft of private respondent's properties or the cover up thereof.[24] The Court reverses the factual findings of the CA, NLRC and LA, for the evidence on which their findings were based was too tenuous to justify the termination of petitioner Morales's employment.

Nonetheless, no bad faith can be attributed to private respondent in dismissing petitioner Morales despite such scant evidence. Its error in the assessment of the available evidence cannot be equated with bad faith as there is no evidence that it was animated by malice or ill motive. Hence, its action in dismissing petitioner Morales may have been illegal, but did not amount to unfair labor practice.

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[23] *Id*. at 249.

[24] *C.F. Sharp & Co., Inc. v. Zialcita*, G.R. No. 157619, July 17, 2006, 495 SCRA 387, 393.

Moving on to the other issues pertaining to petitioner Garcia, he insists that, contrary to the observation of the CA, he controverted the affidavits presented by private respondent, not only by denying the averments therein, but also by presenting counter evidence consisting of an entry in the guard's logbook and the affidavit of the guard-on-duty, Joey Limbo.[25] Petitioner explains that it took time for him to present these documents, because private respondent had tried to conceal them and was compelled to present the same before the LA[26] only when he (petitioner Garcia) demanded to see them.[27]

The Court is not convinced that by said logbook entry and affidavit of Joey Limbo, petitioner Garcia effectively controverted the existing evidence against him. The logbook entry merely reports that De Guzman recovered the stolen properties from the fifth floor of the office building.[28] The affidavit of Joey Limbo merely repeated the logbook entry.[29] That these documents do not disclose any further detail is understandable, for as explained by De Guzman himself in his affidavit, he merely reported the recovery of the stolen properties to Joey Limbo and did not elaborate on the circumstances thereof, but when he was confronted by private respondent the following day, it was then that he divulged the details leading to the recovery of said properties.[30]

Verily, the Court finds no indication that the CA misappreciated the evidence when it affirmed the findings of the NLRC and LA against petitioner Garcia.

Finally, petitioners complain that they were denied due process when they were not furnished a copy of the evidence against them or the minutes of the investigation.[31]

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[25] Petition, *rollo*, p. 23.

[26] Manifestation and Motion, CA *rollo*, p. 253.

[27] Rejoinder, *id*. at 232.

[28] *Id*. at 257.

[29] *Id*. at 256.

[30] *Sinumpaang Salaysay*, paragraphs 15 and 16, *rollo*, pp. 259-260.

[31] Petition, *id*. at 24.

It is oft repeated that in administrative proceedings, due process is served by the mere fact that each party is afforded an opportunity to air its side,[32] not necessarily through verbal argumentation, but also through pleadings in which the parties may explain their side of the controversy.[33] It is of record that petitioners were informed of the charges against them and were given the opportunity to present their defense, not just in the administrative investigation, but also in the proceedings before the LA and NLRC. The requirements of due process were more than adequately satisfied.

In fine, the Court sees no compelling reason to disturb the concurrent factual findings of the CA, NLRC and LA that petitioner Garcia was involved in the theft of respondent's properties and in the attempt to cover up said act for the same are supported by substantial evidence.

However, the Court finds scant evidence to connect petitioner Morales to the theft or its cover-up and therefore declares that the CA committed a grievous error in upholding his dismissal.

WHEREFORE, the petition is *PARTLY GRANTED*. The assailed March 13, 2003 Decision and October 9, 2003 Resolution of the Court of Appeals are *AFFIRMED* insofar as they sustained the dismissal of the complaint of petitioner Oscar Garcia; and *REVERSED* and *SET ASIDE* insofar as they sustained the dismissal of the complaint of petitioner Alex Morales. The complaint for the illegal dismissal of Alex Morales is *GRANTED*. His immediate reinstatement with backwages is ordered.

No costs.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Nachura, and *Reyes, JJ.,* concur.

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[32] *Nueva Ecija Electric Cooperative II v. National Labor Relations Commission*, G.R. No. 157603, June 23, 2005, 461 SCRA 169, 178; *Mayon Hotel & Restaurant v. Adana,* G.R. No. 157634, May 16, 2005, 458 SCRA 609, 629.

[33] *Sunrise Manning Agency, Inc. vs. National Labor Relations Commission*, G.R. No. 146703, November 18, 2004, 443 SCRA 35, 42.

THIRD DIVISION

[G.R. No. 161067. March 14, 2008]

DOMINADOR C. FERRER, JR., *petitioner, vs.* **SANDIGANBAYAN, HON. EDILBERTO G. SANDOVAL, HON. FRANCISCO H. VILLARUZ, JR., and HON. RODOLFO G. PALATTAO, as Members of the Sandiganbayan, Second Division, ANNA MARIA L. HARPER, ESPERANZA G. GATBONTON, and PEOPLE OF THE PHILIPPINES,** *respondents.*

SYLLABUS

1. POLITICAL LAW; ACCOUNTABILITY OF PUBLIC OFFICERS; DISMISSAL OF AN ADMINISTRATIVE CASE DOES NOT NECESSARILY BAR THE FILING OF A CRIMINAL PROSECUTION FOR THE SAME OR SIMILAR ACTS WHICH WERE THE SUBJECT OF THE ADMINISTRATIVE COMPLAINT. — In *Paredes, Jr. v. Sandiganbayan,* the Court denied a similar petition to dismiss a pending criminal case with the *Sandiganbayan* on the basis of the dismissal of the administrative case against the accused. The Court ratiocinated, thus: **Petitioners call attention to the fact that the administrative complaint against petitioner Honrada was dismissed.** They invoke our ruling in *Maceda v. Vasquez* that only this Court has the power to oversee court personnel's compliance with laws and take the appropriate administrative action against them for their failure to do so and that no other branch of the government may exercise this power without running afoul of the principle of separation of powers. **But one thing is administrative liability. Quite another thing is the criminal liability for the same act. Our determination of the administrative liability for falsification of public documents is in no way conclusive of his lack of criminal liability.** As we have held in *Tan v. Comelec*, **the dismissal of an administrative case does not necessarily bar the filing of a criminal prosecution for the same or similar acts which were the subject of the administrative complaint.** It is clear from *Paredes* that the criminal case against petitioner, already filed

and pending with the *Sandiganbayan*, may proceed despite the dismissal of the administrative case arising out of the same acts. The same rule applies even to those cases that have yet to be filed in court. In *Tan v. Commission on Elections,* it was held that an investigation by the Ombudsman of the criminal case for falsification and violation of the Anti-Graft and Corrupt Practices Act and an inquiry into the administrative charges by the Commission on Elections (COMELEC) are entirely independent proceedings, neither of which results in or concludes the other. The established rule is that an absolution from a criminal charge is not a bar to an administrative prosecution, or vice versa. The dismissal of an administrative case does not necessarily bar the filing of a criminal prosecution for the same or similar acts which were the subject of the administrative complaint.

2. ID.; ID.; ID.; TO SUSTAIN PETITIONER'S ARGUMENTS WILL BE TO REQUIRE THE SANDIGANBAYAN AND THE OMBUDSMAN TO MERELY ADOPT THE RESULTS OF THE ADMINISTRATIVE INVESTIGATIONS WHICH WOULD NOT ONLY DIMINISH THE POWERS AND DUTIES OF THE CONSTITUTIONAL OFFICES, BUT ALSO VIOLATE THE INDEPENDENT NATURE OF CRIMINAL AND ADMINISTRATIVE CASES AGAINST PUBLIC OFFICIALS. — To sustain petitioner's arguments will be to require the *Sandiganbayan* and the Ombudsman to merely adopt the results of administrative investigations which would not only diminish the powers and duties of these constitutional offices, but also violate the independent nature of criminal and administrative cases against public officials. This will also amount to untold delays in criminal proceedings before the *Sandiganbayan* and Ombudsman, as every criminal trial and investigation before these bodies will be made to await the results of pending administrative investigations. Such is not the intent of the framers of the Constitution and the laws governing public officers.

3. ID.; ID.; ID.; CASE OF *LARIN V. EXECUTIVE SECRETARY* IS NOT ON ALL FOURS WITH THE PRESENT CASE. — The present case differs from *Larin* because here, the administrative case was filed independently of the criminal case. The administrative case was not filed on the basis of a criminal conviction, as in fact, the administrative case was dismissed

without regard for the results of the criminal case. This is in contrast with *Larin,* where the administrative case was dismissed only after its basis, the criminal conviction, was overturned on appeal.

4. ID.; ID.; ID.; ADMINISTRATIVE LIABILITY IS SEPARATE AND DISTINCT FROM THE PENAL AND CIVIL LIABILITIES.— We cannot reverse *Larin* by ruling that petitioner's discharge from the administrative action should result in the dismissal of the criminal case. The argument cannot be sustained without violating settled principles. The rule is that administrative liability is separate and distinct from penal and civil liabilities. In *Larin,* no less than the Supreme Court acquitted the accused of charges of wrongdoing; in the case at bar, no court of justice has yet declared petitioner not guilty of committing illegal or irregular acts.

5. ID.; ID.; ID.; THE INDEPENDENT NATURE OF A CRIMINAL PROSECUTION DICTATES THAT THE SANDIGANBAYAN MUST DETERMINE PETITIONER'S LIABILITY WITHOUT ITS HAND BEING TIED BY WHAT TRANSPIRED IN THE ADMINISTRATIVE CASE. — The independent nature of a criminal prosecution dictates that the *Sandiganbayan* must determine petitioner's criminal liability without its hands being tied by what transpired in the administrative case. The court is duty-bound to exercise its independent judgment. It is not ousted of its jurisdiction by the ruling in the administrative proceeding. It is axiomatic that when the court obtains jurisdiction over a case, it continues to retain it until the case is terminated.

6. ID.; ID.; ID.; IN UTTER CONTEMPT OF THE COURT'S EFFORT TO EXPEDITE ALL JUDICIAL PROCEEDINGS, PETITIONER HAS FILED THE INSTANT PETITION WHICH MERELY RAISES ISSUES THAT HAVE LONG BEEN RESOLVED MERELY EXHAUSTING HIS AVAILABLE REMEDIES AND TRODDEN IN THE REALM OF ABUSING LEGAL PROCESSES. — The question on the effect of the administrative case on the criminal case before the *Sandiganbayan* was settled as early as the Resolution dated December 11, 2001. When petitioner questioned this ruling before the Supreme Court in G.R. No. 153592, he again raised the issue of forum-shopping, but his efforts failed because he filed his petition out of time.

With the dismissal of G.R. No. 153592, the Resolution of the *Sandiganbayan* dated December 11, 2001 has become final. Such finality was evident in the public respondent's Resolution dated July 2, 2003, which denied petitioner's Motion for the Re-determination of Probable Cause. In it, the public respondent aptly stated: The Court resolves to deny the motion for re-determination of probable cause, the **argument advanced therein having been passed upon and resolved by this Court in accused's motion to dismiss as well as motion for reconsideration and where the resolution of this Court was sustained by the Supreme Court**. Thus, the petition now before the Court, which raises the same issues, must necessarily fail. Petitioner's tactics to delay his arraignment and trial cannot be countenanced. In utter contempt of the Court's efforts to expedite all judicial proceedings, he has filed a petition which merely raises issues that have long been resolved with finality. By so doing, petitioner has gone beyond merely exhausting his available remedies and trodden in the realm of abusing legal processes.

APPEARANCES OF COUNSEL

Rose Beatriz Cruz-Angeles for private respondents.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.*:

Does a finding of lack of administrative liability of a respondent government official bar the filing of a criminal case against him for the same acts?

Before the Court is a Petition for *Certiorari* under Rule 65 of the Rules of Court, seeking to annul the Resolutions of the *Sandiganbayan*, Second Division (public respondent) dated July 2, 2003[1] and October 22, 2003[2] in Criminal Case No. 26546.

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[1] Penned by Justices Edilberto G. Sandoval, Francisco H. Villaruz and Diosdado M. Peralta; *rollo*, pp. 18-20.

[2] Penned by Associate Justice Edilberto G. Sandoval and concurred in by Associate Justices Francisco H. Villaruz, Jr. and Rodolfo G. Palattao, *id*. at 21.

The Resolution of July 2, 2003 denied the Motion for Re-determination of Probable Cause filed by accused Dominador G. Ferrer (petitioner), while the Resolution of October 22, 2003 denied petitioner's Motion for Reconsideration and/or Motion to Quash.

The following are the factual antecedents:

On January 29, 2001, an Information[3] for violation of Section 3 (e) of Republic Act (R.A.) No. 3019 was filed against petitioner, as follows:

> That on or about August 20, 1998 or for sometime prior or subsequent thereto, in Manila, Philippines, and within the jurisdiction of this Honorable Court, DOMINADOR C. FERRER, JR., being the Administrator of the Intramuros Administration (IA), Manila, while in the performance of his official and administrative functions as such, and acting with manifest partiality, evident bad faith and gross inexcusable negligence, did then and there, willfully, unlawfully and criminally give unwarranted benefits to Offshore Construction and Development Company, by causing the award of the Lease Contracts to said company, involving Baluarte de San Andres, Ravellin de Recolletos, and Baluarte de San Francisco de Dilao, Intramuros, Manila, without conducting any public bidding as required under Joint Circular No. 1 dated September 30, 1989 of the Department of Budget and Management, Department of Environment and Natural Resources and Department of Public Works and Highways, and by allowing the construction of new structures in said leased areas without any building permit or clearance required under the Intramuros Charter (P.D. 1616) and the National Building Code, to the damage and prejudice of public interest.
>
> CONTRARY TO LAW.
>
> Manila, Philippines, January 29, 2001.[4]

and assigned to the *Sandiganbayan*'s Second Division.

On April 4, 2001, petitioner filed a Motion for Reinvestigation, alleging that the Office of the Ombudsman disregarded certain

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[3] Docketed as Criminal Case No. 26546.

[4] *Rollo*, p. 22.

factual matters which, if considered, will negate the finding of probable cause.[5]

On July 13, 2001, public respondent issued a Resolution denying petitioner's Motion for Reinvestigation.[6] It held that petitioner's contentions are all evidentiary in nature and may be properly considered only in a full-blown trial.

On September 12, 2001, petitioner filed a Motion for Reconsideration.[7] Shortly thereafter, he filed a Supplemental Motion for Reconsideration, asserting that the complainants were guilty of forum shopping, due to the earlier dismissal of the administrative case against him.[8]

On December 11, 2001, public respondent issued a Resolution denying the Motion for Reconsideration.[9]

Petitioner filed a Motion for Leave to File a Second Motion for Reconsideration.[10] Again, he cited as his ground the alleged forum shopping of the private complainants.

On April 29, 2002, public respondent issued a Resolution denying the Motion for Leave to File a Second Motion for Reconsideration.[11] It held that there was no forum shopping since the administrative and criminal cases are two different actions, so neither resolution on the same would have the effect of *res judicata* on the other. The public respondent dismissed the second motion for reconsideration as a *pro forma* and prohibited motion.

Petitioner then filed a Petition for *Certiorari* with this Court, docketed as G.R. No. 153592, which assailed the Resolution

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[5] *Id*. at 126.

[6] *Id*. at 127-128.

[7] *Id*. at 128, 215.

[8] *Id*. at 130-131.

[9] *Id*. at 129-130, 215.

[10] *Rollo*, pp. 132, 215.

[11] *Id*. at 132-134, 166-168, 215-216.

of public respondent dated April 29, 2002 as having been issued with grave abuse of discretion amounting to lack of jurisdiction. On July 1, 2002, the Court dismissed the petition for having been filed out of time and for failure to pay the required docket fees.[12]

Petitioner filed a Motion for Reconsideration[13] which the Court denied with finality in its Resolution dated September 4, 2002.[14]

On May 19, 2003, before he can be arraigned, petitioner filed yet another motion with public respondent, this time a Motion for Re-determination of Probable Cause,[15] invoking the ruling of the Office of the President (OP), dated February 29, 2000,[16] which absolved petitioner of administrative liability. The OP reviewed the administrative case filed against petitioner with the Presidential Commission Against Graft and Corruption (PCAGC) and held that petitioner acted in good faith and within the scope of his authority.

On July 2, 2003, the *Sandiganbayan* issued herein assailed Resolution denying the Motion for Re-determination of Probable Cause, stating as follows:

> The Court resolves to deny the motion for re-determination of probable cause, the argument advanced therein having been passed upon and resolved by this Court in accused's motion to dismiss as well as motion for reconsideration and where the resolution of this Court was sustained by the Supreme Court.[17]

On August 4, 2003, upon his receipt of the Resolution, petitioner filed a Motion for Reconsideration and/or to Quash Information,[18]

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[12] *Id*. at 135, 216.

[13] *Id*.

[14] *Id*. at 216.

[15] *Rollo*, pp. 5, 24-41.

[16] *Id*. at 66-68.

[17] *Id*. at 19.

[18] *Id*. at 6, 44-62.

arguing that the Supreme Court's dismissal of his petition for *certiorari* was based on a mere technicality. He reiterated his argument that since he has been cleared of administrative liability, the criminal case that was pending against him should likewise be dismissed.

The public respondent denied the motion in the other assailed Resolution dated October 22, 2003, stating as follows:

> Finding no merit in the accused [sic] Motion for Reconsideration and/or Motion to Quash dated August 4, 2003 and considering the Opposition of the prosecution, the same is DENIED.
>
> Indeed, the dismissal of the administrative complaint does not negate the existing criminal case pending before the Court. Moreover the grounds and arguments raised thereat could be considered matter of defense that is more and properly to be considered during a full blown trial.
>
> WHEREFORE, the Motion for Reconsideration and/or Motion to Quash by the accused is denied for lack of merit.
>
> xxx xxx xxx
>
> SO ORDERED.[19]

Hence, the present Petition for *Certiorari*, seeking to annul the Resolutions of the *Sandiganbayan* for having been issued with grave abuse of discretion and in excess of and/or without jurisdiction.

Petitioner insists that the *Sandiganbayan* should have dismissed the criminal case filed against him, since the alleged wrongful acts complained of in the case are the same as those alleged in the administrative case against him which have been dismissed.

Both the public and private prosecutors contend that the issues raised by petitioner have already been raised and passed upon; and that the assailed Resolutions of the *Sandiganbayan* merely reiterate its earlier Resolutions denying petitioner's motion for reinvestigation and various motions for reconsideration

[19] *Rollo,* p. 21.

questioning the Ombudsman's finding of probable cause.[20] They claim that the issue became settled and final as early as the December 11, 2001 Resolution of the public respondent, which denied petitioner's motions for reinvestigation.[21] They further argue that this Court's denial of petitioner's earlier petition for *certiorari* (G.R. No. 153592) barred petitioner from filing the present petition.

The respondents cite jurisprudence, which states that the dismissal of an administrative case does not necessarily bar the filing of a criminal prosecution for the same or similar acts.[22]

The petition is devoid of merit.

In *Paredes, Jr. v. Sandiganbayan,*[23] the Court denied a similar petition to dismiss a pending criminal case with the *Sandiganbayan* on the basis of the dismissal of the administrative case against the accused. The Court ratiocinated, thus:

> **Petitioners call attention to the fact that the administrative complaint against petitioner Honrada was dismissed.** They invoke our ruling in *Maceda v. Vasquez* that only this Court has the power to oversee court personnel's compliance with laws and take the appropriate administrative action against them for their failure to do so and that no other branch of the government may exercise this power without running afoul of the principle of separation of powers.
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> **But one thing is administrative liability. Quite another thing is the criminal liability for the same act. Our determination of the administrative liability for falsification of public documents is in no way conclusive of his lack of criminal liability.** As we have held in *Tan v. Comelec*, **the dismissal of an administrative case does not necessarily bar the filing of a criminal prosecution for the same or similar acts which were the subject of the administrative complaint.**[24] (Emphasis supplied.)

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[20] *Rollo*, p. 126.

[21] *Id*. at 221.

[22] *Id*. at 136, 220.

[23] 322 Phil. 709 (1996).

[24] *Id*. at 730-731.

It is clear from *Paredes* that the criminal case against petitioner, already filed and pending with the *Sandiganbayan*, may proceed despite the dismissal of the administrative case arising out of the same acts.

The same rule applies even to those cases that have yet to be filed in court. In *Tan v. Commission on Elections,*[25] it was held that an investigation by the Ombudsman of the criminal case for falsification and violation of the Anti-Graft and Corrupt Practices Act and an inquiry into the administrative charges by the Commission on Elections (COMELEC) are entirely independent proceedings, neither of which results in or concludes the other. The established rule is that an absolution from a criminal charge is not a bar to an administrative prosecution, or vice versa.[26] The dismissal of an administrative case does not necessarily bar the filing of a criminal prosecution for the same or similar acts which were the subject of the administrative complaint.[27]

The Court finds no cogent reason to depart from these rules.

Petitioner argues that the criminal case against him requires a higher quantum of proof for conviction — that is, proof beyond reasonable doubt — than the administrative case, which needs only substantial evidence. He claims that from this circumstance, it follows that the dismissal of the administrative case should carry with it the dismissal of the criminal case.

This argument, however, has been addressed in jurisprudence. In *Valencia v. Sandiganbayan,*[28] the administrative case against the accused was dismissed by the Ombudsman on a finding that the contract of loan entered into was in pursuance of the police power of the accused as local chief executive,[29]

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[25] 237 Phil. 353 (1994).

[26] *Id.* at 359.

[27] *Paredes, Jr. v. Sandiganbayan, supra* note 23, at 731; *Tecson v. Sandiganbayan*, 376 Phil. 191, 199 (1999).

[28] G.R. No. 141336, June 29, 2004, 433 SCRA 88.

[29] *Id.* at 91

and that the accused had been re-elected to office.[30] The Ombudsman, however, still found probable cause to criminally charge the accused in court.[31] When the accused filed a petition with the Supreme Court to dismiss the criminal case before the *Sandiganbayan*, the Court denied the petition, thus:

In the final analysis, the conflicting findings of the Ombudsman boil down to issues of fact which, however, are not within our province to resolve. As has been oft-repeated, this Court is not a trier of facts. This is a matter best left to the Sandiganbayan.

Petitioners argue that the dismissal by the Ombudsman of the administrative case against them based on the same subject matter should operate to dismiss the criminal case because the quantum of proof in criminal cases is proof beyond reasonable doubt, while that in administrative cases is only substantial evidence. While that may be true, **it should likewise be stressed that the basis of administrative liability differs from criminal liability. The purpose of administrative proceedings is mainly to protect the public service, based on the time-honored principle that a public office is a public trust. On the other hand, the purpose of the criminal prosecution is the punishment of crime.**

Moreover, one of the grounds for the dismissal of the administrative case against petitioners is the fact that they were re-elected to office. Indeed, a re-elected local official may not be held administratively accountable for misconduct committed during his prior term of office. The rationale for this holding is that when the electorate put him back into office, it is presumed that it did so with full knowledge of his life and character, including his past misconduct. If, armed with such knowledge, it still re-elects him, then such re-election is considered a condonation of his past misdeeds.

However, the re-election of a public official extinguishes only the administrative, but not the criminal, liability incurred by him during his previous term of office x x x.

x x x x x x x x x

[30] *Id*. at 99.

[31] *Id*. at 98.

There is, thus, no reason for the Sandiganbayan to quash the Information against petitioners on the basis solely of the dismissal of the administrative complaint against them.[32]

To sustain petitioner's arguments will be to require the *Sandiganbayan* and the Ombudsman to merely adopt the results of administrative investigations which would not only diminish the powers and duties of these constitutional offices, but also violate the independent nature of criminal and administrative cases against public officials. This will also amount to untold delays in criminal proceedings before the *Sandiganbayan* and Ombudsman, as every criminal trial and investigation before these bodies will be made to await the results of pending administrative investigations. Such is not the intent of the framers of the Constitution and the laws governing public officers.

Petitioner cites *Larin v. Executive Secretary*[33] to support his arguments. That case, however, is not on all fours with the present case.

In *Larin*, the accused was first convicted by the *Sandiganbayan* for violation of the National Internal Revenue Code and Section 3 (e) of Republic Act No. 3019. On the basis of this conviction, an administrative case was filed against him. On appeal of the criminal conviction to the Supreme Court, however, he was acquitted upon a finding that the acts he had committed were neither illegal nor irregular. When the accused sought a similar dismissal of the administrative case, the Supreme Court sustained him and ruled that since the same acts for which he was administratively charged had been found neither illegal nor irregular, his acquittal in the criminal case should entail the dismissal of the administrative case.

The present case differs from *Larin* because here, the administrative case was filed independently of the criminal case. The administrative case was not filed on the basis of a criminal conviction, as in fact, the administrative case was dismissed without

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[32] *Id*. at 98-100.

[33] 345 Phil. 962 (1997).

regard for the results of the criminal case. This is in contrast with *Larin,* where the administrative case was dismissed only after its basis, the criminal conviction, was overturned on appeal.

We cannot reverse *Larin* by ruling that petitioner's discharge from the administrative action should result in the dismissal of the criminal case. The argument cannot be sustained without violating settled principles. The rule is that administrative liability is separate and distinct from penal and civil liabilities.[34] In *Larin,* no less than the Supreme Court acquitted the accused of charges of wrongdoing; in the case at bar, no court of justice has yet declared petitioner not guilty of committing illegal or irregular acts.

The independent nature of a criminal prosecution dictates that the *Sandiganbayan* must determine petitioner's criminal liability without its hands being tied by what transpired in the administrative case. The court is duty-bound to exercise its independent judgment.[35] It is not ousted of its jurisdiction by the ruling in the administrative proceeding. It is axiomatic that when the court obtains jurisdiction over a case, it continues to retain it until the case is terminated.[36]

Under the Rules of Court, petitioner's absolution from administrative liability is not even one of the grounds for a Motion to Quash.[37]

Moreover, petitioner lacked the right to file the instant petition. Petitioner already raised the issue of his discharge from administrative liability in his supplemental motion for reconsideration of the *Sandiganbayan*'s Resolution dated July 13, 2001.[38] When the motion was denied, he again alleged such fact in his motion for leave to file a second motion for reconsideration.[39] Both motions have already been denied by

[34] *Tecson v. Sandiganbayan, supra*, note 27.

[35] *Muñez v. Ariño,* 311 Phil 537, 548 (1995).

[36] *Denila v. Bellosillo,*159-A Phil. 354, 358 (1975).

[37] Rules of Court, Rule 117, Sec. 3.

[38] *Rollo,* pp. 127, 131.

[39] *Id.* at 132.

the *Sandiganbayan* in its Resolutions dated December 11, 2001[40] and April 29, 2002.[41] Petitioner's argument on private respondents' alleged forum shopping was not sustained by the *Sandiganbayan*, since administrative and criminal cases are two independent actions. It correctly held that neither action barred the filing of the other, and that both cases did not pray for a common relief or share the same parties.[42]

Thus, the question on the effect of the administrative case on the criminal case before the *Sandiganbayan* was settled as early as the Resolution dated December 11, 2001. When petitioner questioned this ruling before the Supreme Court in G.R. No. 153592, he again raised the issue of forum-shopping, but his efforts failed because he filed his petition out of time. With the dismissal of G.R. No. 153592, the Resolution of the *Sandiganbayan* dated December 11, 2001 has become final.

Such finality was evident in the public respondent's Resolution dated July 2, 2003,[43] which denied petitioner's Motion for the Re-determination of Probable Cause. In it, the public respondent aptly stated:

> The Court resolves to deny the motion for re-determination of probable cause, the **argument advanced therein having been passed upon and resolved by this Court in accused's motion to dismiss as well as motion for reconsideration and where the resolution of this Court was sustained by the Supreme Court**.[44] (Emphasis supplied)

Thus, the petition now before the Court, which raises the same issues, must necessarily fail.

Petitioner's tactics to delay his arraignment and trial cannot be countenanced. In utter contempt of the Court's efforts to

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[40] *Id*. at 129-130, 215.

[41] *Id*. at 166-168.

[42] *Id*. at 130-134. The *Sandiganbayan* stated that the administrative case was initiated by an anonymous complainant.

[43] *Id*. at 19.

[44] *Id*.

expedite all judicial proceedings, he has filed a petition which merely raises issues that have long been resolved with finality. By so doing, petitioner has gone beyond merely exhausting his available remedies and trodden in the realm of abusing legal processes.

WHEREFORE, premises considered, the petition is *DENIED*. The *Sandiganbayan* is ordered to proceed with the arraignment and trial of Criminal Case No. 26546. Petitioner and his counsel are *ADMONISHED* not to engage further in delaying tactics.

Costs against petitioner.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Nachura, and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 162772. March 14, 2008]

MERLIZA A. MUÑOZ, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW FROM THE REGIONAL TRIAL COURTS TO THE COURT OF APPEALS; EFFECT OF FAILURE TO COMPLY WITH REQUIREMENTS; FAILURE TO SERVE COPY OF THE PETITION ON THE ADVERSE PARTY OR SHOW PROOF OF SERVICE THEREOF IS A FATAL DEFECT, FOR WHICH THE PETITION CAN BE DISMISSED UNDER SECTION 3, RULE 42 OF THE RULES OF COURT. — Except in criminal cases in which the penalty imposed is *reclusion perpetua* of death, an appeal is not a matter of right but of sound judicial discretion. It may be availed of only in the manner provided

by law and the rules. Rule 42 prescribes the following requirements for the filing with the CA of a petition for review from a decision of the RTC. The timeliness of a petition depends not only on its seasonable filing but also on the prompt service of copy thereof on the adverse party and the RTC. Thus, the petition must be accompanied by proof of service as prescribed under Rule 13. Failure to serve copy of the petition on the adverse party or to show proof of service thereof is a fatal defect, for which the petition can be dismissed under Section 3, Rule 42, thus: Section 3. *Effect of failure to comply with requirements.* The failure of the petitioner to comply with any of the foregoing requirements regarding the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and the contents of and the documents which should accompany the petition shall be sufficient ground for the dismissal thereof.

2. ID.; CIVIL PROCEDURE; PLEADINGS; SERVICE OF; SERVICE ON THE ASSISTANT CITY PROSECUTOR, WHO WAS NO LONGER COUNSEL OF THE ADVERSE PARTY WHEN THE CASE WAS BROUGHT TO THE COURT OF APPEALS, NOR WAS SPECIFICALLY DEPUTIZED OR DESIGNATED BY THE SOLICITOR GENERAL TO REPRESENT HIM OR RECEIVE NOTICES FOR HIM, DOES NOT AMOUNT TO SERVICE ON THE ADVERSE PARTY. — In the present case, petitioner failed to serve copy of her petition on the Solicitor General as counsel of the adverse party, the People of the Philippines. Hence, the CA did not commit any reversible error in dismissing her petition. Petition did not even show substantial compliance with the requirement of service of pleading. Although she served copy of her Petition for Review on Assistant City Prosecutor Catalino C. Serrano, the latter was no longer counsel of the adverse party when the case brought to the CA, nor was he specifically deputized or designated by the Solicitor General to represent him or receive notices for him. Hence, service on the Assistant City Prosecutor did not amount to service on the Solicitor General.

3. ID.; ID.; ID.; ID.; PETITIONER FAILED TO CONVINCE THE COURT THAT THE SUBSTANTIAL GROUNDS CITED IN HER PETITION FAR TRANSCEND ITS TECHNICAL DEFICIENCIES AS WOULD JUSTIFY THE RESOLUTION ON ITS MERITS RATHER THAN FORM. — It is true that oftentimes

the Court applied the rules with flexibility in order that the merits of a case will be fully adjudicated upon, notwithstanding its technical imperfections. But what impels the Court to do so is neither a party's empty invocations of liberality nor its mechanical correction of the imperfections. Rather, only a clear showing of *prima facie* merit of the petition will persuade the Court to take the extraordinary effort of setting aside its rules to give way to the imperfect petition. After all, the rationale for liberality is to bring to light the merits of the petition, unobstructed by mere deficiencies in its form, such that if the petition has not an iota of merit in it, then there is nothing for the Court to bring to light at all. In the present case, while upon motion for reconsideration, petitioner supplied what were lacking in her petition for review filed with the CA, she utterly failed to convince the Court that the substantial grounds cited therein far ***transcend*** its technical deficiencies as would justify the resolution of her petition on its merits rather than form.

4. ID.; ID.; ID.; ID.; PETITIONER IS ALREADY BARRED FROM RAISING THE ISSUE OF LACK OF AUTHORITY OF THE COMPLAINANT TO FILE THE COMPLAINT. — The issue of whether a corporate officer may bring suit on behalf of his corporation for violation of B.P. Blg. 22 is not novel. In *Tam Wing Tak v. Makasiar,* the Court affirmed the dismissal of a criminal case for violation of B.P. Blg. 22 for lack of authority of the private complainant, thus: Second, it is not disputed in the instant case that Concord, a domestic corporation, was the payee of the bum check, not petitioner. Therefore, it is Concord, as payee of the bounced check, which is the injured party. Since petitioner was neither a payee nor a holder of the bad check, he had neither the personality to sue nor a cause of action against Vic Ang Siong. ***Under Section 36 of the Corporation Code, read in relation to Section 23, it is clear that where a corporation is an injured party, its power to sue is lodged with its board of directors or trustees. Note that petitioner failed to show any proof that he was authorized or deputized or granted specific powers by Concord's board of director to sue Victor And Siong for and on behalf of the firm. Clearly, petitioner as a minority stockholder and member of the board of directors had no such power or authority to sue on Concord's behalf.*** xxx We applied the same rule just recently to *Ilusorio v. Ilusorio,* which involved a criminal complaint for robbery and

qualified trespass. However, it bears emphasis that in both cases, the deficiency in the complaint was challenged by the accused at the preliminary investigation stage, or before he entered a plea upon arraignment. On the contrary, in the present case, petitioner questioned the authority of Elizaldy Co after arraignment and completion of the prosecution's presentation of evidence. Thus, she is barred from raising such objection under Section 9, Rule 117 of the Rules of Court, to wit: Section 9. *Failure to move to quash or to allege any ground therefore*.— The failure of the accused to assert any ground of a motion to quash before he pleads to the complaint or information, either because he did not file a motion to quash or failed to allege the same in said motion, shall be deemed a waiver of any objections except those based on the grounds provided for in paragraphs (a), (b), (g), and (i) of Section 3 of this Rule. The deficiency in the complaint/information arising from the lack of authority of Elizaldy Co was not jurisdictional. It did not detract from the unquestioned authority of the Assistant City Prosecutor to file the Information, nor impair the jurisdiction of the MTCC to act on the same.

5. ID.; ID.; ID.; THE PETITION FOR REVIEW OF PETITIONER WAS CORRECTLY DISMISSED BY THE COURT OF APPEALS FOR DEFICIENCY IN FORM AND FOR LACK OF SHOWING THAT HER APPEAL TO THE COURT OF APPEALS WAS MERITORIOUS. — Petitioner harps on the purported lack of notice to her of the dishonor of the RCBC check. This contention files in the face of documentary evidence consisting of the March 20, 2001 letter of petitioner to Sunwest where she expressly acknowledged receiving the March 14, 2001 notice of dishonor of the RCBC check. In fine, for deficiency in form and for lack of showing that her appeal to the CA was meritorious, the petition for review of petitioner was correctly dismissed by the CA.

APPEARANCES OF COUNSEL

Lucas C. Carpio, Jr. for petitioner.
The Solicitor General for public respondent.
Batocabe & Associates Law Offices for private respondent.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.*:

By way of a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court, Merliza A. Muñoz (petitioner) assails the November 19, 2003 Resolution[1] of the Court of Appeals (CA) sustaining her conviction for violation of *Batas Pambansa Bilang* 22 (B.P. Blg. 22); and the March 10, 2004 CA Resolution[2] denying her Motion for Reconsideration.

The antecedent facts are as stated by the trial courts.

Petitioner is the wife of Ludolfo P. Muñoz, Jr. (Ludolfo), owner and operator of L.P. Munoz Construction (Muñoz Construction). On August 3, 2000, Ludolfo took a loan of ₱500,000.00, at 5% interest, from Sunwest Construction and Development Corporation (Sunwest). Ludolfo issued to Sunwest a Development Bank of the Philippines (DBP) check, postdated September 3, 2000, for ₱500,000.00.[3]

On September 3, 2000, Ludolfo sought an extension of his loan by replacing the DBP check with Rizal Commercial Banking Corporation (RCBC) Check No. 0000057285 for ₱500,000.00, drawn by petitioner[4] and postdated December 3, 2000. Sunwest accepted the replacement check.[5]

On February 5, 2001 Sunwest deposited the RCBC check with the Bank of the Philippine Islands (BPI), Legaspi City,[6] which presented it to the drawee bank RCBC, but the latter dishonored the check for insufficiency of funds.[7] Thus, on

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[1] Penned by Associate Justice Mercedes Gozo-Dadole and concurred in by Associate Justices Eugenio S. Labitoria and Rosmari D. Carandang; *rollo*, p. 29.

[2] *Id*. at 31.

[3] MTCC Decision, *rollo*, p. 91; RTC Decision, *id*. at 99.

[4] *Id*. at 91.

[5] *Id*. at 55.

[6] *Id*.

[7] *Id*. at 56.

February 8, 2001, Sunwest sent by registered mail a letter addressed to Ludolfo, informing him of the dishonor of the RCBC check and demanding that he make good the check or pay the amount thereof within five days from receipt of said notice.[8] The letter was received on the same day by Eden Barnedo at the postal address "L.P. Muñoz, Jr. [sic] Construction, Fernando Avenue, Doña Maria Subd., Daraga, Albay."[9]

On March 14, 2001, Sunwest sent by registered mail another letter, this time addressed to petitioner, informing her of the dishonor of the RCBC check and demanding that she pay the said check within five days from receipt of the letter.[10] The letter was received on March 20, 2001 by Eden Barnedo at the postal address, "Fernando Avenue, Doña Maria Subd., Daraga, Albay."[11]

In her March 20, 2001 reply to Sunwest, petitioner explained that Sunwest and Muñoz Construction had mutual claims against each other: Muñoz Construction had a claim against Sunwest for ₱10,000,000.00, including a 15% advance payment, for two river control projects, while Sunwest had a claim against Muñoz Construction for ₱500,000.00. Given that the claim of Muñoz Construction was bigger than that of Sunwest, petitioner treated the first claim as having automatically offset, covered or paid the second claim as represented by the amount of the RCBC check. This explains why petitioner did "not give emphasis" anymore to the RCBC check, the amount of which she considered as having been already settled. Petitioner reminded Sunwest that it was made aware of the offsetting of the amount of the RCBC check as early as February 15, 2001.[12]

Upon a criminal complaint[13] filed by Elizaldy S. Co, Sunwest president, an Information[14] was filed by the City Prosecutor

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[8] *Id*. at 57.

[9] *Id*.

[10] *Rollo*, p. 58.

[11] *Id*.

[12] RTC Decision, *id*. at 99-100; MTCC Decision, *id*. at 92.

[13] *Id*. at 52.

[14] *Id*. at 60.

before the Municipal Trial Court in Cities (MTCC), Legaspi City, charging petitioner with violation of B.P. Blg. 22. Petitioner entered a plea of "Not Guilty."[15]

After trial, the MTCC rendered a Decision dated August 19, 2003,[16] finding petitioner guilty beyond reasonable doubt of the crime charged, and sentencing her to pay a fine of ₱200,000.00; to pay Sunwest ₱500,000.00, representing the amount of RCBC Check No. 0000057285, plus interest thereon at the rate of 12% per annum computed from April 23, 2001, the date of the filing of the information, until fully paid; and to pay the costs.[17]

On appeal by petitioner, the Regional Trial Court (RTC), Legaspi City, in a Decision dated October 16, 2003, affirmed the MTCC Decision *in toto*.[18]

Petitioner filed a Petition for Review with the CA but the latter dismissed it outright in the November 19, 2003 Resolution assailed herein, citing the following grounds:

> (a) Failure to attach or incorporate an Affidavit of Service as required under Section 13, Rule 13 in relation to Section 3, Rule 42 of the 1997 Rules of Civil Procedure, as amended; and
>
> (b) Failure to furnish copy of the petition and its annexes to the Office of the Solicitor General which is the counsel of the People of the Philippines.[19]

With the denial by the CA of her Motion for Reconsideration, petitioner is now before the Court raising the following issues:

Whether or not the Fifth Division of the Court of Appeals gravely erred in dismissing the petition for review filed by herein petitioner purely on technical grounds.

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[15] MTCC Decision, *id*. at 90.

[16] *Id*. at 90-97.

[17] *Rollo*, p 97.

[18] *Id*. at p. 103.

[19] *Id*. at p. 29.

Whether or not the court *a quo* gravely erred in convicting the petitioner notwithstanding the fact that the criminal complaint was filed by an unauthorized representative of the private complainant corporation.

Whether or not the court *a quo* gravely erred in convicting the petitioner notwithstanding the fact that the prosecution failed to prove the element of knowledge of insufficiency of funds in or credit with the drawee bank on the part of the petitioner.

Whether or not the court *a quo* gravely erred when it held the petitioner civilly liable notwithstanding the absence of authority of Elizaldy S. Co to file the instant case for and in behalf of the private complainant corporation.[20]

The Court finds no merit in the Petition.

Except in criminal cases in which the penalty imposed is *reclusion perpetua* or death, an appeal is not a matter of right but of sound judicial discretion. It may be availed of only in the manner provided by law and the rules.[21]

Rule 42 prescribes the following requirements for the filing with the CA of a petition for review from a decision of the RTC:

Section 1. *How appeal taken; time for filing*. A party desiring to appeal from a decision of the Regional Trial Court rendered in the exercise of its appellate jurisdiction may file a verified petition for review with the Court of Appeals, paying at the same time to the clerk of said Court the corresponding docket and other lawful fees, depositing the amount of ₱500.00 for costs, and furnishing the Regional Trial Court and the adverse party with a copy of the petition. The petition shall be ***filed and served within fifteen (15) days*** from notice of the decision sought to be reviewed or of the denial of petitioner's motion for new trial or reconsideration filed in due time after judgment. Upon proper motion and the payment of the full amount of the docket and other lawful fees and the deposit for costs before the expiration of the reglementary period, the Court of Appeals may grant an additional period of fifteen (15) days only within which to file the petition for review. No further extension shall be granted except for the most compelling reason and in no case to exceed fifteen (15) days. (Emphasis supplied.)

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[20] *Id*. at 12-13.

[21] *Tamayo v. Court of Appeals,* 467 Phil. 603, 607-608 (2004).

Clearly, therefore, the timeliness of a petition depends not only on its seasonable filing but also on the prompt service of copy thereof on the adverse party and the RTC. Thus, the petition must be accompanied by proof of service as prescribed under Rule 13, *viz*:

> Section 13. *Proof of service*. Proof of personal service shall consist of a written admission of the party served, or the official return of the server, or the affidavit of the party serving, containing a full statement of the date, place and manner of service. If the service is by ordinary mail, proof thereof shall consist of an affidavit of the person mailing of facts showing compliance with Section 7 of this Rule. If service is made by registered mail, proof shall be made by such affidavit and the registry receipt issued by the mailing office. The registry return card shall be filed immediately upon its receipt by the sender, or in lieu thereof the unclaimed letter together with the certified or sworn copy of the notice given by the postmaster to the addressee.

Failure to serve copy of the petition on the adverse party or to show proof of service thereof is a fatal defect,[22] for which the petition can be dismissed under Section 3, Rule 42, thus:

> Section 3. *Effect of failure to comply with requirements*. The failure of the petitioner to comply with any of the foregoing requirements regarding the payment of the docket and other lawful fees, the deposit for costs, proof of service of the petition, and the contents of and the documents which should accompany the petition shall be sufficient ground for the dismissal thereof.

In the present case, petitioner failed to serve copy of her petition on the Solicitor General as counsel of the adverse party, the People of the Philippines.[23] Hence, the CA did not commit any reversible error in dismissing her petition.[24]

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[22] *Ferrer v. Villanueva,* G.R. No. 155025, August 24, 2007, 531 SCRA 97, 102.

[23] Section 35 (1), Chapter 12, Title III, Book III of Executive Order No. 292, otherwise known as the 1987 Administrative Code.

[24] *Castillo v. Monzon,* G.R. No. 143418, January 22, 2001 Resolution; *Magcalas v. Reyes,* G.R. No. 136605, July 12, 1999 and April 7, 1999 Resolutions; *Franco v. Court of Appeals*, G.R. No. 136346, April 12, 1999 and January 20, 1999 Resolutions.

Petitioner did not even show substantial compliance with the requirement of service of pleading.[25] Although she served copy of her Petition for Review on Assistant City Prosecutor Catalino C. Serrano, the latter was no longer counsel of the adverse party when the case was brought to the CA, nor was he specifically deputized or designated by the Solicitor General to represent him or receive notices for him.[26] Hence, service on the Assistant City Prosecutor did not amount to service on the Solicitor General.[27]

However, petitioner argues that, rather than dismiss her petition, the CA should have advised her to correct the deficiency or taken the initiative of furnishing the Solicitor General with a copy of the petition and requiring the latter to comment on it.[28] Furthermore, petitioner appeals for liberality in the treatment of her appeal, so that it may be decided on the merits rather than on technicality.[29]

It is true that oftentimes the Court applied the rules with flexibility in order that the merits of a case will be fully adjudicated upon, not-withstanding its technical imperfections.[30] But what impels the Court to do so is neither a party's empty invocations of liberality nor its mechanical correction of the imperfections.[31] Rather, only a clear showing of *prima facie* merit of the petition will persuade the Court to take the extraordinary effort of setting aside its rules to give way to the imperfect petition.[32] After all, the rationale

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[25] *Austria v. Sta. Maria*, G.R. No. 165643, April 13, 2005. See also *Tagabi v. Tanque*, G.R. No. 144024, July 27, 2006.

[26] See *People of the Philippines v. Gabriel*, G.R. No. 147832, December 6, 2006, 510 SCRA 197, 201-202.

[27] *Republic of the Philippines v. Planes*, 430 Phil. 848, 866 (2002).

[28] Petition, *rollo,* p. 15.

[29] *Id*. at 16.

[30] *Wee v. Galvez*, G.R. No. 147394, August 11, 2004, 436 SCRA 96, 110; *Orbeta v. Sendiong*, G.R. No. 155236, July 8, 2005, 463 SCRA 180; *Donato v. Court of Appeals*, 462 Phil. 676, 692 (2003).

[31] *Clavecilla v. Quitain*, G.R. No. 147989, February 20, 2006, 482 SCRA 623, 634.

[32] *Makamanggagawa v. Associated Anglo American Tobacco Corporation*, G.R. No. 156613, February 18, 2008.

for liberality is to bring to light the merits of the petition, unobstructed by mere deficiencies in its form, such that if the petition has not an iota of merit in it, then there is nothing for the Court to bring to light at all.

In the present case, while upon motion for reconsideration, petitioner supplied what were lacking in her petition for review filed with the CA,[33] she utterly failed to convince the Court that the substantial grounds cited therein far ***transcend*** its technical deficiencies as would justify the resolution of her petition on its merits rather than form.

A cursory assessment of the arguments of petitioner is necessary.

First, petitioner insists that the criminal case filed against her, as well as the civil case that was deemed instituted with it, should have been dismissed for lack of authority of Elizaldy Co to file the same on behalf of Sunwest, the payee of the RCBC check.[34]

The issue of whether a corporate officer may bring suit on behalf of his corporation for violation of B.P. Blg. 22 is not novel. In *Tam Wing Tak v. Makasiar*,[35] the Court affirmed the dismissal of a criminal case for violation of B.P. Blg. 22 for lack of authority of the private complainant, thus:

> Second, it is not disputed in the instant case that Concord, a domestic corporation, was the payee of the bum check, not petitioner. Therefore, it is Concord, as payee of the bounced check, which is the injured party. Since petitioner was neither a payee nor a holder of the bad check, he had neither the personality to sue nor a cause of action against Vic Ang Siong. ***Under Section 36 of the Corporation Code, read in relation to Section 23, it is clear that where a corporation is an injured party, its power to sue is lodged with its board of directors or trustees. Note that petitioner failed to show any proof that he was authorized or deputized or granted specific***

[33] CA *rollo*, pp. 39-42.

[34] Petition, *rollo*, p. 17.

[35] 403 Phil. 391 (2001).

powers by Concord's board of director to sue Victor And Siong for and on behalf of the firm. Clearly, petitioner as a minority stockholder and member of the board of directors had no such power or authority to sue on Concord's behalf. x x x[36] (Emphasis supplied)

We applied the same rule just recently to Ilusorio v. Ilusorio,[37] which involved a criminal complaint for robbery and qualified trespass.

However, it bears emphasis that in both cases, the deficiency in the complaint was challenged by the accused at the preliminary investigation stage, or before he entered a plea upon arraignment. On the contrary, in the present case, petitioner questioned the authority of Elizaldy Co after arraignment and completion of the prosecution's presentation of evidence. Thus, she is barred from raising such objection under Section 9, Rule 117 of the Rules of Court, to wit:

> Section 9. *Failure to move to quash or to allege any ground therefor*. – The failure of the accused to assert any ground of a motion to quash before he pleads to the complaint or information, either because he did not file a motion to quash or failed to allege the same in said motion, shall be deemed a waiver of any objections except those based on the grounds provided for in paragraphs (a), (b), (g), and (i) of Section 3 of this Rule.

The deficiency in the complaint/information arising from the lack of authority of Elizaldy Co was not jurisdictional. It did not detract from the unquestioned authority of the Assistant City Prosecutor to file the Information, nor impair the jurisdiction of the MTCC to act on the same.[38]

Second, petitioner harps on the purported lack of notice to her of the dishonor of the RCBC check. This contention flies

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[36] *Id*. at 402-403.

[37] G.R. No. 171659, December 13, 2007.

[38] *Cf. People of the Philippines v. Garfin*, G.R. No. 153176, March 29, 2004, 426 SCRA 393; *Cruz v. Sandiganbayan,* G.R. No. 134493, August 16, 2005, 467 SCRA 52; *Romualdez v. Sandiganbayan,* 434 Phil. 670; *Cudia v. Court of Appeals,* 348 Phil. 190 (1998).

in the face of documentary evidence consisting of the March 20, 2001 letter of petitioner to Sunwest where she expressly acknowledged receiving the March 14, 2001 notice of dishonor of the RCBC check.[39]

In fine, for deficiency in form and for lack of showing that her appeal to the CA was meritorious, the petition for review of petitioner was correctly dismissed by the CA.

WHEREFORE, the petition is *DENIED*.

Costs against petitioner.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Nachura, and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 166006. March 14, 2008]

PLANTERS PRODUCTS, INC., *petitioner, vs.* **FERTIPHIL CORPORATION,** *respondent.*

SYLLABUS

1. POLITICAL LAW; JUDICIAL DEPARTMENT; REQUIREMENTS BEFORE A COURT MAY DECLARE A LAW UNCONSTITUTIONAL; CAPACITY TO SUE OR *LOCUS STANDI*; RESPONDENT HAS *LOCUS STANDI* BECAUSE IT SUFFERED DIRECT INJURY. — The doctrine of *locus standi* or the right of appearance in a court of justice has been adequately discussed by this Court in a catena of cases. Succinctly put, the doctrine requires a litigant to have a material interest in the outcome of a case. In private suits, *locus standi* requires a litigant to be a "real party in interest", which is defined

[39] *Supra* at 12

as "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit." In public suits, this Court recognizes the difficulty of applying the doctrine especially when plaintiff asserts a public right on behalf of the general public because of conflicting public policy issues. On one end, there is the right of the ordinary citizen to petition the courts to be freed from unlawful government intrusion and illegal official action. At the other end, there is the public policy precluding excessive judicial interference in official acts, which may unnecessarily hinder the delivery of basic public services. In this jurisdiction, We have adopted the "direct injury test" to determine *locus standi* in public suits. In *People v. Vera,* it was held that a person who impugns the validity of a statute must have "a personal and substantial interest in the case such that he has sustained, or will sustain direct injury as a result." The "direct injury test" in public suits is similar to the "real party in interest" rule for private suits under Section 2, Rule 3 of the 1997 Rules of Civil Procedure. Recognizing that a strict application of the "direct injury" test may hamper public interest, this Court relaxed the requirement in cases of "transcendental importance" or with "far reaching implications." Being a mere procedural technicality, it has also been held that *locus standi* may be waived in the public interest.

2. ID.; ID.; ID.; ID.; ID.; FACT OF PAYMENT OF LEVY IS SUFFICIENT INJURY FOR PURPOSES OF *LOCUST STANDI*; ENFORCEMENT OF LETTER OF INSTRUCTION (LOI) NO. 1465 COMPELLED RESPONDENT TO FACTOR THE LEVY IN ITS PRODUCT RENDERING THEIR FERTILIZER PRODUCTS MORE EXPENSIVE EVENTUALLY RESULTING NOT ONLY IN FEWER CLIENTS BUT ALSO IN ADOPTING CORPORATE STRATEGIES TO MEET THE DEMANDS OF LOI NO. 1465. — Whether or not the complaint for collection is characterized as a private or public suit, Fertiphil has *locus standi* to file it. Fertiphil suffered a direct injury from the enforcement of LOI No. 1465. It was required, and it did pay, the ₱10 levy imposed for every bag of fertilizer sold on the domestic market. It may be true that Fertiphil has passed some or all of the levy to the ultimate consumer, but that does not disqualify it from attacking the constitutionality of the LOI or from seeking a refund. As seller, it bore the ultimate burden of

paying the levy. It faced the possibility of severe sanctions for failure to pay the levy. The fact of payment is sufficient injury to Fertiphil. Moreover, Fertiphil suffered harm from the enforcement of the LOI because it was compelled to factor in its product the levy. The levy certainly rendered the fertilizer products of Fertiphil and other domestic sellers much more expensive. The harm to their business consists not only in fewer clients because of the increased price, but also in adopting alternative corporate strategies to meet the demands of LOI No. 1465. Fertiphil and other fertilizer sellers may have shouldered all or part of the levy just to be competitive in the market. The harm occasioned on the business of Fertiphil is sufficient injury for purposes of *locus standi.*

3. ID.; ID.; ID.; ID.; ID.; DOCTRINE OF STANDING IS A MERE PROCEDURAL TECHNICALITY WHICH MAY BE WAIVED. — Even assuming *arguendo* that there is no direct injury, We find that the liberal policy consistently adopted by this Court on *locus standi* must apply. The issues raised by Fertiphil are of paramount public importance. It involves not only the constitutionality of a tax law but, more importantly, the use of taxes for public purpose. Former President Marcos issued LOI No. 1465 with the intention of rehabilitating an ailing private company. This is clear from the text of the LOI. PPI is expressly named in the LOI as the direct beneficiary of the levy. Worse, the levy was made dependent and conditional upon PPI becoming financially viable. The LOI provided that "*the capital contribution shall be collected until adequate capital is raised to make PPI viable.*" The constitutionality of the levy is already in doubt on a plain reading of the statute. It is Our constitutional duty to squarely resolve the issue as the final arbiter of all justiciable controversies. The doctrine of standing, being a mere procedural technicality, should be waived, if at all, to adequately thresh out an important constitutional issue.

4. ID.; ID.; ID.; ID.; ID.; REGIONAL TRIAL COURTS MAY RESOLVE CONSTITUTIONAL ISSUES; THE CONSTITUTIONAL ISSUE WAS ADEQUATELY RAISED IN THE COMPLAINT; IT IS THE *LIS MOTA* OF THE CASE. — It is settled that the RTC has jurisdiction to resolve the constitutionality of a statute, presidential decree or an executive order. This is clear from Section 5, Article VIII of the 1987 Constitution. In *Mirasol v. Court of Appeals,* this Court

recognized the power of the RTC to resolve constitutional issues, thus: On the *first issue*. It is settled that Regional Trial Courts have the authority and jurisdiction to consider the constitutionality of a statute, presidential decree, or executive order. The Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation not only in this Court, but in all Regional Trial Courts. In the recent case of *Equi-Asia Placement, Inc. v. Department of Foreign Affairs,* this Court reiterated: There is no denying that regular courts have jurisdiction over cases involving the validity or constitutionality of a rule or regulation issued by administrative agencies. Such jurisdiction, however, is not limited to the Court of Appeals or to this Court alone for even the regional trial courts can take cognizance of actions assailing a specific rule or set of rules promulgated by administrative bodies. Indeed, the Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts. Judicial review of official acts on the ground of unconstitutionality may be sought or availed of through any of the actions cognizable by courts of justice, not necessarily in a suit for declaratory relief. Such review may be had in criminal actions, as in *People v. Ferrer* involving the constitutionality of the now defunct Anti-Subversion law, or in ordinary actions, as in *Krivenko v. Register of Deeds* involving the constitutionality of laws prohibiting aliens from acquiring public lands. The constitutional issue, however, (a) must be properly raised and presented in the case, and (b) its resolution is necessary to a determination of the case, *i.e.,* the issue of constitutionality must be the very *lis mota* presented. Contrary to PPI's claim, the constitutionality of LOI No. 1465 was properly and adequately raised in the complaint for collection filed with the RTC. The constitutionality of LOI No. 1465 is also the very *lis mota* of the complaint for collection. Fertiphil filed the complaint to compel PPI to refund the levies paid under the statute on the ground that the law imposing the levy is unconstitutional. The thesis is that an unconstitutional law is void. It has no legal effect. Being void, Fertiphil had no legal obligation to pay the levy. Necessarily, all levies duly paid pursuant to an unconstitutional law should

be refunded under the civil code principle against unjust enrichment. The refund is a mere consequence of the law being declared unconstitutional. The RTC surely cannot order PPI to refund Fertiphil if it does not declare the LOI unconstitutional. It is the unconstitutionality of the LOI which triggers the refund. The issue of constitutionality is the very *lis mota* of the complaint with the RTC.

5. ID.; STATE; INHERENT POWERS; TAXATION; THE ₱10 LEVY UNDER LETTER OF INSTRUCTION NO. 1465 IS AN EXERCISE OF THE POWER OF TAXATION. — Police power and the power of taxation are inherent powers of the State. These powers are distinct and have different tests for validity. Police power is the power of the State to enact legislation that may interfere with personal liberty or property in order to promote the general welfare, while the power of taxation is the power to levy taxes to be used for public purpose. The main purpose of police power is the regulation of a behavior or conduct, while taxation is revenue generation. The "lawful subjects" and "lawful means" tests are used to determine the validity of a law enacted under the police power. The power of taxation, on the other hand, is circumscribed by inherent and constitutional limitations. We agree with the RTC that the imposition of the levy was an exercise by the State of its taxation power. While it is true that the power of taxation can be used as an implement of police power, the primary purpose of the levy is revenue generation. If the purpose is primarily revenue, or if revenue is, at least, one of the real and substantial purposes, then the exaction is properly called a tax. In *Philippine Airlines, Inc. v. Edu,* it was held that the imposition of a vehicle registration fee is not an exercise by the State of its police power, but of its taxation power. The ₱10 levy under LOI No. 1465 is too excessive to serve a mere regulatory purpose. The levy, no doubt, was a big burden on the seller or the ultimate consumer. It increased the price of a bag of fertilizer by as much as five percent. A plain reading of the LOI also supports the conclusion that the levy was for revenue generation. The LOI expressly provided that the levy was imposed "*until adequate capital is raised to make PPI viable.*"

6. ID.; ID.; ID.; ID.; TAXES ARE EXACTED ONLY FOR A PUBLIC PURPOSE. — An inherent limitation on the power of taxation is public purpose. Taxes are exacted only for a public purpose. They cannot be used for purely private purposes or for the

exclusive benefit of private persons. The reason for this is simple. The power to tax exists for the general welfare; hence, implicit in its power is the limitation that it should be used only for a public purpose. It would be a robbery for the State to tax its citizens and use the funds generated for a private purpose. As an old United States case bluntly put it: "To lay with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is nonetheless a robbery because it is done under the forms of law and is called taxation." The term "public purpose" is not defined. It is an elastic concept that can be hammered to fit modern standards. Jurisprudence states that "public purpose" should be given a broad interpretation. It does not only pertain to those purposes which are traditionally viewed as essentially government functions, such as building roads and delivery of basic services, but also includes those purposes designed to promote social justice. Thus, public money may now be used for the relocation of illegal settlers, low-cost housing and urban or agrarian reform. While the categories of what may constitute a public purpose are continually expanding in light of the expansion of government functions, the inherent requirement that taxes can only be exacted for a public purpose still stands. Public purpose is the heart of a tax law. When a tax law is only a mask to exact funds from the public when its true intent is to give undue benefit and advantage to a private enterprise, that law will not satisfy the requirement of "public purpose."

7. ID.; ID.; ID.; ID.; THE ₱10 LEVY IS UNCONSTITUTIONAL BECAUSE IT WAS NOT FOR A PUBLIC PURPOSE; THE LEVY WAS IMPOSED TO GIVE UNDUE BENEFIT TO A PRIVATE CORPORATION. — The purpose of a law is evident from its text or inferable from other secondary sources. Here, We agree with the RTC and the CA that the levy imposed under LOI No. 1465 was not for a public purpose. *First,* the LOI expressly provided that the levy be imposed to benefit PPI, a private company. The purpose is explicit from Clause 3 of the law, thus: 3. The Administrator of the Fertilizer Pesticide Authority to include in its fertilizer pricing formula a capital contribution component of not less than ₱10 per bag. This capital contribution shall be collected until adequate capital is raised to make PPI viable. Such capital contribution shall be applied

by FPA to all domestic sales of fertilizers in the Philippines. It is a basic rule of statutory construction that the text of a statute should be given a literal meaning. In this case, the text of the LOI is plain that the levy was imposed in order to raise capital for PPI. The framers of the LOI did not even hide the insidious purpose of the law. They were cavalier enough to name PPI as the ultimate beneficiary of the taxes levied under the LOI. We find it utterly repulsive that a tax law would expressly name a private company as the ultimate beneficiary of the taxes to be levied from the public. This is a clear case of crony capitalism. *Second,* the LOI provides that the imposition of the ₱10 levy was conditional and dependent upon PPI becoming financially "viable." This suggests that the levy was actually imposed to benefit PPI. The LOI notably does not fix a maximum amount when PPI is deemed financially "viable." Worse, the liability of Fertiphil and other domestic sellers of fertilizer to pay the levy is made indefinite. They are required to continuously pay the levy until adequate capital is raised for PPI. *Third*, the RTC and the CA held that the levies paid under the LOI were directly remitted and deposited by FPA to Far East Bank and Trust Company, the depositary bank of PPI. This proves that PPI benefited from the LOI. It also proves that the main purpose of the law was to give undue benefit and advantage to PPI. *Fourth*, the levy was used to pay the corporate debts of PPI. A reading of the Letter of Understanding dated May 18, 1985 signed by then Prime Minister Cesar Virata reveals that PPI was in deep financial problem because of its huge corporate debts. There were pending petitions for rehabilitation against PPI before the Securities and Exchange Commission. The government guaranteed payment of PPI's debts to its foreign creditors. To fund the payment, President Marcos issued LOI No. 1465. It is clear from the Letter of Understanding that the levy was imposed precisely to pay the corporate debts of PPI. We cannot agree with PPI that the levy was imposed to ensure the stability of the fertilizer industry in the country. The letter of understanding and the plain text of the LOI clearly indicate that the levy was exacted for the benefit of a private corporation. All told, the RTC and the CA did not err in holding that the levy imposed under LOI No. 1465 was not for a public purpose. LOI No. 1465 failed to comply with the public purpose requirement for tax laws.

8. ID.; ID.; ID.; ID.; LETTER OF INSTRUCTION NO. 1695 IS STILL UNCONSTITUTIONAL EVEN IF IT IS ENACTED UNDER THE POLICE POWER OF THE STATE; THE LAW DOES NOT PROMOTE PUBLIC INTEREST. — Even if We consider LOI No. 1695 enacted under the police power of the State, it would still be invalid for failing to comply with the test of "lawful subjects" and "lawful means." Jurisprudence states the test as follows: (1) the interest of the public generally, as distinguished from those of particular class, requires its exercise; and (2) the means employed are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. For the same reasons as discussed, LOI No. 1695 is invalid because it did not promote public interest. The law was enacted to give undue advantage to a private corporation.

9. CIVIL LAW; HUMAN RELATIONS; DOCTRINE OF OPERATIVE FACT; AN UNCONSTITUTIONAL LAW IS VOID, IT IS, IN LEGAL CONTEMPLATION INOPERATIVE AS IF IT HAS NOT BEEN PASSED; DOCTRINE OF OPERATIVE FACT IS INAPPLICABLE WHEN A DECLARATION OF UNCONSTITUTIONALITY WILL IMPOSE AN UNDUE BURDEN ON THOSE WHO HAVE RELIED ON THE INVALID LAW; CASE AT BAR. — The general rule is that an unconstitutional law is void. It produces no rights, imposes no duties and affords no protection. It has no legal effect. It is, in legal contemplation, inoperative as it if has not been passed. Being void, Fertiphil is not required to pay the levy. All levies paid should be refunded in accordance with the general civil code principle against unjust enrichment. The doctrine is applicable when a declaration of unconstitutionality will impose an undue burden on those who have relied on the invalid law. Thus, it was applied to a criminal case when a declaration of unconstitutionality would put the accused in double jeopardy or would put in limbo the done by a municipality in rekliance upon a law creating it.

APPEARANCES OF COUNSEL

Malaya Sanchez Francisco Añover & Añover Law Offices for petitioner.

Madrid & Associates for respondent.

D E C I S I O N

REYES, R.T., *J.*:

THE Regional Trial Courts (RTC) have the authority and jurisdiction to consider the constitutionality of statutes, executive orders, presidential decrees and other issuances. The Constitution vests that power not only in the Supreme Court but in all Regional Trial Courts.

The principle is relevant in this petition for review on *certiorari* of the Decision[1] of the Court of Appeals (CA) affirming with modification that of the RTC in Makati City,[2] finding petitioner Planters Products, Inc. (PPI) liable to private respondent Fertiphil Corporation (Fertiphil) for the levies it paid under Letter of Instruction (LOI) No. 1465.

The Facts

Petitioner PPI and private respondent Fertiphil are private corporations incorporated under Philippine laws.[3] They are both engaged in the importation and distribution of fertilizers, pesticides and agricultural chemicals.

On June 3, 1985, then President Ferdinand Marcos, exercising his legislative powers, issued LOI No. 1465 which provided, among others, for the imposition of a capital recovery component (CRC) on the domestic sale of all grades of fertilizers in the Philippines.[4] The LOI provides:

> 3. The Administrator of the Fertilizer Pesticide Authority to include in its fertilizer pricing formula a capital contribution component of not less than ₱10 per bag. This capital

[1] *Rollo,* pp. 51-59. Penned by Associate Justice Conrado M. Vasquez, Jr., with Associate Justices Bienvenido L. Reyes and Arsenio L. Magpale, concurring.

[2] *Id*. at 75-77. Penned by Judge Teofilo L. Guadiz, Jr.

[3] *Id*. at 8.

[4] *Id*. at 75.

> contribution shall be collected until adequate capital is raised to make PPI viable. Such capital contribution shall be applied by FPA to all domestic sales of fertilizers in the Philippines.[5] (Underscoring supplied)

Pursuant to the LOI, Fertiphil paid ₱10 for every bag of fertilizer it sold in the domestic market to the Fertilizer and Pesticide Authority (FPA). FPA then remitted the amount collected to the Far East Bank and Trust Company, the depositary bank of PPI. Fertiphil paid ₱6,689,144 to FPA from July 8, 1985 to January 24, 1986.[6]

After the 1986 Edsa Revolution, FPA voluntarily stopped the imposition of the ₱10 levy. With the return of democracy, Fertiphil demanded from PPI a refund of the amounts it paid under LOI No. 1465, but PPI refused to accede to the demand.[7]

Fertiphil filed a complaint for collection and damages[8] against FPA and PPI with the RTC in Makati. It questioned the constitutionality of LOI No. 1465 for being unjust, unreasonable, oppressive, invalid and an unlawful imposition that amounted to a denial of due process of law.[9] Fertiphil alleged that the LOI solely favored PPI, a privately owned corporation, which used the proceeds to maintain its monopoly of the fertilizer industry.

In its Answer,[10] FPA, through the Solicitor General, countered that the issuance of LOI No. 1465 was a valid exercise of the police power of the State in ensuring the stability of the fertilizer industry in the country. It also averred that Fertiphil did not sustain any damage from the LOI because the burden imposed by the levy fell on the ultimate consumer, not the seller.

[5] *Id*. at 155.

[6] *Id*. at 76.

[7] *Id*.

[8] *Id*. at 195-202.

[9] *Id*. at 196.

[10] *Id*. at 66-73, 277.

RTC Disposition

On November 20, 1991, the RTC rendered judgment in favor of Fertiphil, disposing as follows:

> WHEREFORE, in view of the foregoing, the Court hereby renders judgment in favor of the plaintiff and against the defendant Planters Product, Inc., ordering the latter to pay the former:
>
> 1) the sum of ₱6,698,144.00 with interest at 12% from the time of judicial demand;
> 2) the sum of ₱100,000 as attorney's fees;
> 3) the cost of suit.
>
> SO ORDERED.[11]

Ruling that the imposition of the ₱10 CRC was an exercise of the State's inherent power of taxation, the RTC invalidated the levy for violating the basic principle that taxes can only be levied for public purpose, *viz.*:

> It is apparent that the imposition of ₱10 per fertilizer bag sold in the country by LOI 1465 is purportedly in the exercise of the power of taxation. It is a settled principle that the power of taxation by the state is plenary. Comprehensive and supreme, the principal check upon its abuse resting in the responsibility of the members of the legislature to their constituents. However, there are two kinds of limitations on the power of taxation: the inherent limitations and the constitutional limitations.
>
> One of the inherent limitations is that a tax may be levied only for public purposes:
>
> > The power to tax can be resorted to only for a constitutionally valid public purpose. By the same token, taxes may not be levied for purely private purposes, for building up of private fortunes, or for the redress of private wrongs. They cannot be levied for the improvement of private property, or for the benefit, and promotion of private enterprises, except where the aid is incident to the public benefit. It is well-settled principle of constitutional law that no general tax can be levied except for the purpose of raising money which is to be expended for public

[11] *Id.* at 77.

> use. Funds cannot be exacted under the guise of taxation to promote a purpose that is not of public interest. Without such limitation, the power to tax could be exercised or employed as an authority to destroy the economy of the people. A tax, however, is not held void on the ground of want of public interest unless the want of such interest is clear. (71 Am. Jur. pp. 371-372)

In the case at bar, the plaintiff paid the amount of ₱6,698,144.00 to the Fertilizer and Pesticide Authority pursuant to the ₱10 per bag of fertilizer sold imposition under LOI 1465 which, in turn, remitted the amount to the defendant Planters Products, Inc. thru the latter's depository bank, Far East Bank and Trust Co. Thus, by virtue of LOI 1465 the plaintiff, Fertiphil Corporation, which is a private domestic corporation, became poorer by the amount of ₱6,698,144.00 and the defendant, Planters Product, Inc., another private domestic corporation, became richer by the amount of ₱6,698,144.00.

Tested by the standards of constitutionality as set forth in the afore-quoted jurisprudence, it is quite evident that LOI 1465 insofar as it imposes the amount of ₱10 per fertilizer bag sold in the country and orders that the said amount should go to the defendant Planters Product, Inc. is unlawful because it violates the mandate that a tax can be levied only for a public purpose and not to benefit, aid and promote a private enterprise such as Planters Product, Inc.[12]

PPI moved for reconsideration but its motion was denied.[13] PPI then filed a notice of appeal with the RTC but it failed to pay the requisite appeal docket fee. In a separate but related proceeding, this Court[14] allowed the appeal of PPI and remanded the case to the CA for proper disposition.

CA Decision

On November 28, 2003, the CA handed down its decision affirming with modification that of the RTC, with the following *fallo*:

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[12] *Id*. at 76-77.

[13] *Id*. at 14.

[14] *Id*. at 83-93. G.R. No. 156278, entitled "*Planters Products, Inc. v. Fertiphil Corporation*."

IN VIEW OF ALL THE FOREGOING, the decision appealed from is hereby **AFFIRMED,** subject to the **MODIFICATION** that the award of attorney's fees is hereby **DELETED**.[15]

In affirming the RTC decision, the CA ruled that the *lis mota* of the complaint for collection was the constitutionality of LOI No. 1465, thus:

The question then is whether it was proper for the trial court to exercise its power to judicially determine the constitutionality of the subject statute in the instant case.

As a rule, where the controversy can be settled on other grounds, the courts will not resolve the constitutionality of a law (*Lim v. Pacquing*, 240 SCRA 649 [1995]). The policy of the courts is to avoid ruling on constitutional questions and to presume that the acts of political departments are valid, absent a clear and unmistakable showing to the contrary.

However, the courts are not precluded from exercising such power when the following requisites are obtaining in a controversy before it: First, there must be before the court an actual case calling for the exercise of judicial review. Second, the question must be ripe for adjudication. Third, the person challenging the validity of the act must have standing to challenge. Fourth, the question of constitutionality must have been raised at the earliest opportunity; and lastly, the issue of constitutionality must be the very *lis mota* of the case (*Integrated Bar of the Philippines v. Zamora,* 338 SCRA 81 [2000]).

Indisputably, the present case was primarily instituted for collection and damages. However, a perusal of the complaint also reveals that the instant action is founded on the claim that the levy imposed was an unlawful and unconstitutional special assessment. Consequently, the requisite that the constitutionality of the law in question be the very *lis mota* of the case is present, making it proper for the trial court to rule on the constitutionality of LOI 1465.[16]

The CA held that even on the assumption that LOI No. 1465 was issued under the police power of the state, it is still

[15] *Id*. at 59.

[16] *Id*. at 54-55.

unconstitutional because it did not promote public welfare. The CA explained:

In declaring LOI 1465 unconstitutional, the trial court held that the levy imposed under the said law was an invalid exercise of the State's power of taxation inasmuch as it violated the inherent and constitutional prescription that taxes be levied only for public purposes. It reasoned out that the amount collected under the levy was remitted to the depository bank of *PPI*, which the latter used to advance its private interest.

On the other hand, appellant submits that the subject statute's passage was a valid exercise of police power. In addition, it disputes the court *a quo*'s findings arguing that the collections under LOI 1465 was for the benefit of Planters Foundation, Incorporated (PFI), a foundation created by law to hold in trust for millions of farmers, the stock ownership of PPI.

Of the three fundamental powers of the State, the exercise of police power has been characterized as the most essential, insistent and the least limitable of powers, extending as it does to all the great public needs. It may be exercised as long as the activity or the property sought to be regulated has some relevance to public welfare (*Constitutional Law*, by Isagani A. Cruz, p. 38, 1995 Edition).

Vast as the power is, however, it must be exercised within the limits set by the Constitution, which requires the concurrence of a lawful subject and a lawful method. Thus, our courts have laid down the test to determine the validity of a police measure as follows: (1) the interests of the public generally, as distinguished from those of a particular class, requires its exercise; and (2) the means employed are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals (*National Development Company v. Philippine Veterans Bank,* 192 SCRA 257 [1990]).

It is upon applying this established tests that We sustain the trial court's holding LOI 1465 unconstitutional. To be sure, ensuring the continued supply and distribution of fertilizer in the country is an undertaking imbued with public interest. However, the method by which LOI 1465 sought to achieve this is by no means a measure that will promote the public welfare. The government's commitment to support the successful rehabilitation and continued viability of PPI, a private corporation, is an unmistakable attempt to mask the subject statute's impartiality. There is no way to treat the self-interest

of a favored entity, like PPI, as identical with the general interest of the country's farmers or even the Filipino people in general. Well to stress, substantive due process exacts fairness and equal protection disallows distinction where none is needed. When a statute's public purpose is spoiled by private interest, the use of police power becomes a travesty which must be struck down for being an arbitrary exercise of government power. To rule in favor of appellant would contravene the general principle that revenues derived from taxes cannot be used for purely private purposes or for the exclusive benefit of private individuals.[17]

The CA did not accept PPI's claim that the levy imposed under LOI No. 1465 was for the benefit of Planters Foundation, Inc., a foundation created to hold in trust the stock ownership of PPI. The CA stated:

Appellant next claims that the collections under LOI 1465 was for the benefit of Planters Foundation, Incorporated (PFI), a foundation created by law to hold in trust for millions of farmers, the stock ownership of PFI on the strength of Letter of Undertaking (LOU) issued by then Prime Minister Cesar Virata on April 18, 1985 and affirmed by the Secretary of Justice in an Opinion dated October 12, 1987, to wit:

> "2. Upon the effective date of this Letter of Undertaking, the Republic shall cause FPA to include in its fertilizer pricing formula a capital recovery component, the proceeds of which will be used initially for the purpose of funding the unpaid portion of the outstanding capital stock of Planters presently held in trust by Planters Foundation, Inc. (Planters Foundation), which unpaid capital is estimated at approximately ₱206 million (subject to validation by Planters and Planters Foundation) (such unpaid portion of the outstanding capital stock of Planters being hereafter referred to as the 'Unpaid Capital'), and subsequently for such capital increases as may be required for the continuing viability of Planters.
>
> The capital recovery component shall be in the minimum amount of ₱10 per bag, which will be added to the price of all domestic sales of fertilizer in the Philippines by any importer

[17] *Id.* at 129-130.

and/or fertilizer mother company. In this connection, the Republic hereby acknowledges that the advances by Planters to Planters Foundation which were applied to the payment of the Planters shares now held in trust by Planters Foundation, have been assigned to, among others, the Creditors. Accordingly, the Republic, through FPA, hereby agrees to deposit the proceeds of the capital recovery component in the special trust account designated in the notice dated April 2, 1985, addressed by counsel for the Creditors to Planters Foundation. Such proceeds shall be deposited by FPA on or before the 15th day of each month.

The capital recovery component shall continue to be charged and collected until payment in full of (a) the Unpaid Capital and/or (b) any shortfall in the payment of the Subsidy Receivables, (c) any carrying cost accruing from the date hereof on the amounts which may be outstanding from time to time of the Unpaid Capital and/or the Subsidy Receivables and (d) the capital increases contemplated in paragraph 2 hereof. For the purpose of the foregoing clause (c), the 'carrying cost' shall be at such rate as will represent the full and reasonable cost to Planters of servicing its debts, taking into account both its peso and foreign currency-denominated obligations." (Records, pp. 42-43)

Appellant's proposition is open to question, to say the least. The LOU issued by then Prime Minister Virata taken together with the Justice Secretary's Opinion does not preponderantly demonstrate that the collections made were held in trust in favor of millions of farmers. Unfortunately for appellant, in the absence of sufficient evidence to establish its claims, this Court is constrained to rely on what is explicitly provided in LOI 1465 – that one of the primary aims in imposing the levy is to support the successful rehabilitation and continued viability of PPI.[18]

PPI moved for reconsideration but its motion was denied.[19] It then filed the present petition with this Court.

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[18] *Id.* at 55-58.

[19] *Id.* at 61-62.

Issues

Petitioner PPI raises four issues for Our consideration, *viz.*:

I

THE CONSTITUTIONALITY OF LOI 1465 CANNOT BE COLLATERALLY ATTACKED AND BE DECREED VIA A DEFAULT JUDGMENT IN A CASE FILED FOR COLLECTION AND DAMAGES WHERE THE ISSUE OF CONSTITUTIONALITY IS NOT THE VERY *LIS MOTA* OF THE CASE. NEITHER CAN LOI 1465 BE CHALLENGED BY ANY PERSON OR ENTITY WHICH HAS NO STANDING TO DO SO.

II

LOI 1465, BEING A LAW IMPLEMENTED FOR THE PURPOSE OF ASSURING THE FERTILIZER SUPPLY AND DISTRIBUTION IN THE COUNTRY, AND FOR BENEFITING A FOUNDATION CREATED BY LAW TO HOLD IN TRUST FOR MILLIONS OF FARMERS THEIR STOCK OWNERSHIP IN PPI CONSTITUTES A VALID LEGISLATION PURSUANT TO THE EXERCISE OF TAXATION AND POLICE POWER FOR PUBLIC PURPOSES.

III

THE AMOUNT COLLECTED UNDER THE CAPITAL RECOVERY COMPONENT WAS REMITTED TO THE GOVERNMENT, AND BECAME GOVERNMENT FUNDS PURSUANT TO AN EFFECTIVE AND VALIDLY ENACTED LAW WHICH IMPOSED DUTIES AND CONFERRED RIGHTS BY VIRTUE OF THE PRINCIPLE OF "OPERATIVE FACT" PRIOR TO ANY DECLARATION OF UNCONSTITUTIONALITY OF LOI 1465.

IV

THE PRINCIPLE OF UNJUST VEXATION (SHOULD BE ENRICHMENT) FINDS NO APPLICATION IN THE INSTANT CASE.[20]
(Underscoring supplied)

Our Ruling

We shall first tackle the procedural issues of *locus standi* and the jurisdiction of the RTC to resolve constitutional issues.

[20] *Id*. at 15.

Fertiphil has locus standi because it suffered direct injury; doctrine of standing is a mere procedural technicality which may be waived.

PPI argues that Fertiphil has no *locus standi* to question the constitutionality of LOI No. 1465 because it does not have a "personal and substantial interest in the case or will sustain direct injury as a result of its enforcement."[21] It asserts that Fertiphil did not suffer any damage from the CRC imposition because "incidence of the levy fell on the ultimate consumer or the farmers themselves, not on the seller fertilizer company."[22]

We cannot agree. The doctrine of *locus standi* or the right of appearance in a court of justice has been adequately discussed by this Court in a catena of cases. Succinctly put, the doctrine requires a litigant to have a material interest in the outcome of a case. In private suits, *locus standi* requires a litigant to be a "real party in interest," which is defined as "the party who stands to be benefited or injured by the judgment in the suit or the party entitled to the avails of the suit."[23]

In public suits, this Court recognizes the difficulty of applying the doctrine especially when plaintiff asserts a public right on behalf of the general public because of conflicting public policy issues.[24] On one end, there is the right of the ordinary citizen to petition the courts to be freed from unlawful government intrusion and illegal official action. At the other end, there is the public policy precluding excessive judicial interference in

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[21] *Id*. at 21.

[22] *Id*.

[23] Rules of Civil Procedure (1997), Rule 3, Sec. 2 provides:

"A real party-in-interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law of these Rules, every action must be prosecuted or defended in the name of the real party-in-interest."

[24] *David v. Macapagal-Arroyo,* G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006, 489 SCRA 160.

official acts, which may unnecessarily hinder the delivery of basic public services.

In this jurisdiction, We have adopted the "direct injury test" to determine *locus standi* in public suits. In *People v. Vera*,[25] it was held that a person who impugns the validity of a statute must have "a personal and substantial interest in the case such that he has sustained, or will sustain direct injury as a result." The "direct injury test" in public suits is similar to the "real party in interest" rule for private suits under Section 2, Rule 3 of the 1997 Rules of Civil Procedure.[26]

Recognizing that a strict application of the "direct injury" test may hamper public interest, this Court relaxed the requirement in cases of "transcendental importance" or with "far reaching implications." Being a mere procedural technicality, it has also been held that *locus standi* may be waived in the public interest.[27]

Whether or not the complaint for collection is characterized as a private or public suit, Fertiphil has *locus standi* to file it. Fertiphil suffered a direct injury from the enforcement of LOI No. 1465. It was required, and it did pay, the ₱10 levy imposed for every bag of fertilizer sold on the domestic market. It may be true that Fertiphil has passed some or all of the levy to the ultimate consumer, but that does not disqualify it from attacking the constitutionality of the LOI or from seeking a refund. As seller, it bore the ultimate burden of paying the levy. It faced the possibility of severe sanctions for failure to pay the levy. The fact of payment is sufficient injury to Fertiphil.

Moreover, Fertiphil suffered harm from the enforcement of the LOI because it was compelled to factor in its product the levy. The levy certainly rendered the fertilizer products of Fertiphil and other domestic sellers much more expensive. The harm to their business consists not only in fewer clients because of the increased price, but also in adopting alternative corporate

[25] 65 Phil. 56 (1937).

[26] See note 23.

[27] See note 24.

strategies to meet the demands of LOI No. 1465. Fertiphil and other fertilizer sellers may have shouldered all or part of the levy just to be competitive in the market. The harm occasioned on the business of Fertiphil is sufficient injury for purposes of *locus standi*.

Even assuming *arguendo* that there is no direct injury, We find that the liberal policy consistently adopted by this Court on *locus standi* must apply. The issues raised by Fertiphil are of paramount public importance. It involves not only the constitutionality of a tax law but, more importantly, the use of taxes for public purpose. Former President Marcos issued LOI No. 1465 with the intention of rehabilitating an ailing private company. This is clear from the text of the LOI. PPI is expressly named in the LOI as the direct beneficiary of the levy. Worse, the levy was made dependent and conditional upon PPI becoming financially viable. The LOI provided that "*the capital contribution shall be collected until adequate capital is raised to make PPI viable*."

The constitutionality of the levy is already in doubt on a plain reading of the statute. It is Our constitutional duty to squarely resolve the issue as the final arbiter of all justiciable controversies. The doctrine of standing, being a mere procedural technicality, should be waived, if at all, to adequately thresh out an important constitutional issue.

RTC may resolve constitutional issues; the constitutional issue was adequately raised in the complaint; it is the lis mota of the case.

PPI insists that the RTC and the CA erred in ruling on the constitutionality of the LOI. It asserts that the constitutionality of the LOI cannot be collaterally attacked in a complaint for collection.[28] Alternatively, the resolution of the constitutional issue is not necessary for a determination of the complaint for collection.[29]

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[28] *Rollo,* p. 17.

[29] *Id*. at 18.

Fertiphil counters that the constitutionality of the LOI was adequately pleaded in its complaint. It claims that the constitutionality of LOI No. 1465 is the very *lis mota* of the case because the trial court cannot determine its claim without resolving the issue.[30]

It is settled that the RTC has jurisdiction to resolve the constitutionality of a statute, presidential decree or an executive order. This is clear from Section 5, Article VIII of the 1987 Constitution, which provides:

> SECTION 5. The Supreme Court shall have the following powers:
>
> x x x x x x x x x
>
> (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. (Underscoring supplied)

In *Mirasol v. Court of Appeals*,[31] this Court recognized the power of the RTC to resolve constitutional issues, thus:

> On the *first issue*. It is settled that Regional Trial Courts have the authority and jurisdiction to consider the constitutionality of a statute, presidential decree, or executive order. The Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation not only in this Court, but in all Regional Trial Courts.[32]

In the recent case of *Equi-Asia Placement, Inc. v. Department of Foreign Affairs*,[33] this Court reiterated:

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[30] *Id.* at 290.

[31] G.R. No. 128448, February 1, 2001, 351 SCRA 44.

[32] *Mirasol v. Court of Appeals, id.* at 51.

[33] G.R. No. 152214, September 19, 2006, 502 SCRA 295.

There is no denying that regular courts have jurisdiction over cases involving the validity or constitutionality of a rule or regulation issued by administrative agencies. Such jurisdiction, however, is not limited to the Court of Appeals or to this Court alone for even the regional trial courts can take cognizance of actions assailing a specific rule or set of rules promulgated by administrative bodies. Indeed, the Constitution vests the power of judicial review or the power to declare a law, treaty, international or executive agreement, presidential decree, order, instruction, ordinance, or regulation in the courts, including the regional trial courts.[34]

Judicial review of official acts on the ground of unconstitutionality may be sought or availed of through any of the actions cognizable by courts of justice, not necessarily in a suit for declaratory relief. Such review may be had in criminal actions, as in *People v. Ferrer*[35] involving the constitutionality of the now defunct Anti-Subversion law, or in ordinary actions, as in *Krivenko v. Register of Deeds*[36] involving the constitutionality of laws prohibiting aliens from acquiring public lands. The constitutional issue, however, (a) must be properly raised and presented in the case, and (b) its resolution is necessary to a determination of the case, *i.e.,* the issue of constitutionality must be the very *lis mota* presented.[37]

Contrary to PPI's claim, the constitutionality of LOI No. 1465 was properly and adequately raised in the complaint for collection filed with the RTC. The pertinent portions of the complaint allege:

6. The CRC of ₱10 per bag levied under LOI 1465 on domestic sales of all grades of fertilizer in the Philippines, is unlawful, unjust, uncalled for, unreasonable, inequitable and oppressive because:

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[34] *Equi-Asia Placement, Inc. v. Department of Foreign Affairs, id*. at 309.

[35] G.R. Nos. L-32613-14, December 27, 1972, 48 SCRA 382.

[36] 79 Phil. 461 (1947).

[37] *Tropical Homes, Inc. v. National Housing Authority,* G.R. No. L-48672, July 31, 1987, 152 SCRA 540.

xxx xxx xxx

(c) It favors only one private domestic corporation, *i.e.*, defendant PPPI, and imposed at the expense and disadvantage of the other fertilizer importers/distributors who were themselves in tight business situation and were then exerting all efforts and maximizing management and marketing skills to remain viable;

xxx xxx xxx

(e) It was a glaring example of crony capitalism, a forced program through which the PPI, having been presumptuously masqueraded as "the" fertilizer industry itself, was the sole and anointed beneficiary;

7. The CRC was an unlawful; and unconstitutional special assessment and its imposition is tantamount to illegal exaction amounting to a denial of due process since the persons of entities which had to bear the burden of paying the CRC derived no benefit therefrom; that on the contrary it was used by PPI in trying to regain its former despicable monopoly of the fertilizer industry to the detriment of other distributors and importers.[38] (Underscoring supplied)

The constitutionality of LOI No. 1465 is also the very *lis mota* of the complaint for collection. Fertiphil filed the complaint to compel PPI to refund the levies paid under the statute on the ground that the law imposing the levy is unconstitutional. The thesis is that an unconstitutional law is void. It has no legal effect. Being void, Fertiphil had no legal obligation to pay the levy. Necessarily, all levies duly paid pursuant to an unconstitutional law should be refunded under the civil code principle against unjust enrichment. The refund is a mere consequence of the law being declared unconstitutional. The RTC surely cannot order PPI to refund Fertiphil if it does not declare the LOI unconstitutional. It is the unconstitutionality of the LOI which triggers the refund. The issue of constitutionality is the very *lis mota* of the complaint with the RTC.

[38] *Rollo,* pp. 197-198.

The ₱10 levy under LOI No. 1465 is an exercise of the power of taxation.

At any rate, the Court holds that the RTC and the CA did not err in ruling against the constitutionality of the LOI.

PPI insists that LOI No. 1465 is a valid exercise either of the police power or the power of taxation. It claims that the LOI was implemented for the purpose of assuring the fertilizer supply and distribution in the country and for benefiting a foundation created by law to hold in trust for millions of farmers their stock ownership in PPI.

Fertiphil counters that the LOI is unconstitutional because it was enacted to give benefit to a private company. The levy was imposed to pay the corporate debt of PPI. Fertiphil also argues that, even if the LOI is enacted under the police power, it is still unconstitutional because it did not promote the general welfare of the people or public interest.

Police power and the power of taxation are inherent powers of the State. These powers are distinct and have different tests for validity. Police power is the power of the State to enact legislation that may interfere with personal liberty or property in order to promote the general welfare,[39] while the power of taxation is the power to levy taxes to be used for public purpose. The main purpose of police power is the regulation of a behavior or conduct, while taxation is revenue generation. The "lawful subjects" and "lawful means" tests are used to determine the validity of a law enacted under the police power.[40] The power of taxation, on the other hand, is circumscribed by inherent and constitutional limitations.

We agree with the RTC that the imposition of the levy was an exercise by the State of its taxation power. While it is true that the power of taxation can be used as an implement of police

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[39] *Edu v. Ericta,* G.R. No. L-32096, October 24, 1970, 35 SCRA 481.

[40] *Lim v. Pacquing,* G.R. Nos. 115044 & 117263, January 27, 1995, 240 SCRA 649.

power,[41] the primary purpose of the levy is revenue generation. If the purpose is primarily revenue, or if revenue is, at least, one of the real and substantial purposes, then the exaction is properly called a tax.[42]

In *Philippine Airlines, Inc. v. Edu*,[43] it was held that the imposition of a vehicle registration fee is not an exercise by the State of its police power, but of its taxation power, thus:

> It is clear from the provisions of Section 73 of Commonwealth Act 123 and Section 61 of the Land Transportation and Traffic Code that the legislative intent and purpose behind the law requiring owners of vehicles to pay for their registration is mainly to raise funds for the construction and maintenance of highways and to a much lesser degree, pay for the operating expenses of the administering agency. x x x Fees may be properly regarded as taxes even though they also serve as an instrument of regulation.
>
> Taxation may be made the implement of the state's police power (*Lutz v. Araneta,* 98 Phil. 148). If the purpose is primarily revenue, or if revenue is, at least, one of the real and substantial purposes, then the exaction is properly called a tax. Such is the case of motor vehicle registration fees. The same provision appears as Section 59(b) in the Land Transportation Code. It is patent therefrom that the legislators had in mind a regulatory tax as the law refers to the imposition on the registration, operation or ownership of a motor vehicle as a "tax or fee." x x x Simply put, if the exaction under Rep. Act 4136 were merely a regulatory fee, the imposition in Rep. Act 5448 need not be an "additional" tax. Rep. Act 4136 also speaks of other "fees" such as the special permit fees for certain types of motor vehicles (Sec. 10) and additional fees for change of registration (Sec. 11). These are not to be understood as taxes because such fees are very minimal to be revenue-raising. Thus, they are not mentioned by Sec. 59(b) of the Code as taxes like the motor vehicle registration fee and chauffeurs' license fee. Such fees are to go into the expenditures

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[41] *Lutz v. Araneta,* 98 Phil. 148 (1966).

[42] *Philippine Airlines, Inc. v. Edu,* G.R. No. L-41383, August 15, 1988, 164 SCRA 320.

[43] *Supra*.

of the Land Transportation Commission as provided for in the last proviso of Sec. 61.[44] (Underscoring supplied)

The ₱10 levy under LOI No. 1465 is too excessive to serve a mere regulatory purpose. The levy, no doubt, was a big burden on the seller or the ultimate consumer. It increased the price of a bag of fertilizer by as much as five percent.[45] A plain reading of the LOI also supports the conclusion that the levy was for revenue generation. The LOI expressly provided that the levy was imposed "*until adequate capital is raised to make PPI viable*."

Taxes are exacted only for a public purpose. The ₱10 levy is unconstitutional because it was not for a public purpose. The levy was imposed to give undue benefit to PPI.

An inherent limitation on the power of taxation is public purpose. Taxes are exacted only for a public purpose. They cannot be used for purely private purposes or for the exclusive benefit of private persons.[46] The reason for this is simple. The power to tax exists for the general welfare; hence, implicit in its power is the limitation that it should be used only for a public purpose. It would be a robbery for the State to tax its citizens and use the funds generated for a private purpose. As an old United States case bluntly put it: "To lay with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprises and build up private fortunes, is nonetheless a robbery because it is done under the forms of law and is called taxation."[47]

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[44] *Philippine Airlines, Inc. v. Edu, supra* note 42, at 327-329.

[45] *Rollo,* p. 197.

[46] Cruz, I., *Constitutional Law*, 1998 ed., p. 90.

[47] Bernas, J., *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 1996 ed., p. 714.

The term "public purpose" is not defined. It is an elastic concept that can be hammered to fit modern standards. Jurisprudence states that "public purpose" should be given a broad interpretation. It does not only pertain to those purposes which are traditionally viewed as essentially government functions, such as building roads and delivery of basic services, but also includes those purposes designed to promote social justice. Thus, public money may now be used for the relocation of illegal settlers, low-cost housing and urban or agrarian reform.

While the categories of what may constitute a public purpose are continually expanding in light of the expansion of government functions, the inherent requirement that taxes can only be exacted for a public purpose still stands. Public purpose is the heart of a tax law. When a tax law is only a mask to exact funds from the public when its true intent is to give undue benefit and advantage to a private enterprise, that law will not satisfy the requirement of "public purpose."

The purpose of a law is evident from its text or inferable from other secondary sources. Here, We agree with the RTC and the CA that the levy imposed under LOI No. 1465 was not for a public purpose.

First, the LOI expressly provided that the levy be imposed to benefit PPI, a private company. The purpose is explicit from Clause 3 of the law, thus:

> 3. The Administrator of the Fertilizer Pesticide Authority to include in its fertilizer pricing formula a capital contribution component of not less than ₱10 per bag. This capital contribution shall be collected until adequate capital is raised to make PPI viable. Such capital contribution shall be applied by FPA to all domestic sales of fertilizers in the Philippines.[48] (Underscoring supplied)

It is a basic rule of statutory construction that the text of a statute should be given a literal meaning. In this case, the text

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[48] *Rollo,* p. 155.

of the LOI is plain that the levy was imposed in order to raise capital for PPI. The framers of the LOI did not even hide the insidious purpose of the law. They were cavalier enough to name PPI as the ultimate beneficiary of the taxes levied under the LOI. We find it utterly repulsive that a tax law would expressly name a private company as the ultimate beneficiary of the taxes to be levied from the public. This is a clear case of crony capitalism.

Second, the LOI provides that the imposition of the ₱10 levy was conditional and dependent upon PPI becoming financially "viable." This suggests that the levy was actually imposed to benefit PPI. The LOI notably does not fix a maximum amount when PPI is deemed financially "viable." Worse, the liability of Fertiphil and other domestic sellers of fertilizer to pay the levy is made indefinite. They are required to continuously pay the levy until adequate capital is raised for PPI.

Third, the RTC and the CA held that the levies paid under the LOI were directly remitted and deposited by FPA to Far East Bank and Trust Company, the depositary bank of PPI.[49] This proves that PPI benefited from the LOI. It also proves that the main purpose of the law was to give undue benefit and advantage to PPI.

Fourth, the levy was used to pay the corporate debts of PPI. A reading of the Letter of Understanding[50] dated May 18, 1985 signed by then Prime Minister Cesar Virata reveals that PPI was in deep financial problem because of its huge corporate debts. There were pending petitions for rehabilitation against PPI before the Securities and Exchange Commission. The government guaranteed payment of PPI's debts to its foreign creditors. To fund the payment, President Marcos issued LOI No. 1465. The pertinent portions of the letter of understanding read:

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[49] *Id*. at 52, 75-76.

[50] *Id*. at 150-154.

Republic of the Philippines
Office of the Prime Minister
Manila

LETTER OF UNDERTAKING

May 18, 1985

TO: THE BANKING AND FINANCIAL INSTITUTIONS
LISTED IN ANNEX A HERETO WHICH ARE
CREDITORS (COLLECTIVELY, THE "CREDITORS")
OF PLANTERS PRODUCTS, INC. ("PLANTERS")

Gentlemen:

This has reference to Planters which is the principal importer and distributor of fertilizer, pesticides and agricultural chemicals in the Philippines. As regards Planters, the Philippine Government confirms its awareness of the following: (1) that Planters has outstanding obligations in foreign currency and/or pesos, to the Creditors, (2) that Planters is currently experiencing financial difficulties, and (3) that there are presently pending with the Securities and Exchange Commission of the Philippines a petition filed at Planters' own behest for the suspension of payment of all its obligations, and a separate petition filed by Manufacturers Hanover Trust Company, Manila Offshore Branch for the appointment of a rehabilitation receiver for Planters.

In connection with the foregoing, the Republic of the Philippines (the "Republic") confirms that it considers and continues to consider Planters as a major fertilizer distributor. Accordingly, for and in consideration of your expressed willingness to consider and participate in the effort to rehabilitate Planters, the Republic hereby manifests its full and unqualified support of the successful rehabilitation and continuing viability of Planters, and to that end, hereby binds and obligates itself to the creditors and Planters, as follows:

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2. Upon the effective date of this Letter of Undertaking, the Republic shall cause FPA to include in its fertilizer pricing formula a capital recovery component, the proceeds of which will be used initially for the purpose of funding the unpaid portion of the outstanding capital stock of Planters presently held in trust by Planters Foundation, Inc. ("Planters

Foundation"), which unpaid capital is estimated at approximately ₱206 million (subject to validation by Planters and Planters Foundation) such unpaid portion of the outstanding capital stock of Planters being hereafter referred to as the "Unpaid Capital"), and subsequently for such capital increases as may be required for the continuing viability of Planters.

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The capital recovery component shall continue to be charged and collected until payment in full of (a) the Unpaid Capital and/or (b) any shortfall in the payment of the Subsidy Receivables, (c) any carrying cost accruing from the date hereof on the amounts which may be outstanding from time to time of the Unpaid Capital and/or the Subsidy Receivables, and (d) the capital increases contemplated in paragraph 2 hereof. For the purpose of the foregoing clause (c), the "carrying cost" shall be at such rate as will represent the full and reasonable cost to Planters of servicing its debts, taking into account both its peso and foreign currency-denominated obligations.

REPUBLIC OF THE PHILIPPINES
By:
(signed)
CESAR E. A. VIRATA
Prime Minister and Minister of Finance[51]

It is clear from the Letter of Understanding that the levy was imposed precisely to pay the corporate debts of PPI. We cannot agree with PPI that the levy was imposed to ensure the stability of the fertilizer industry in the country. The letter of understanding and the plain text of the LOI clearly indicate that the levy was exacted for the benefit of a private corporation.

All told, the RTC and the CA did not err in holding that the levy imposed under LOI No. 1465 was not for a public purpose. LOI No. 1465 failed to comply with the public purpose requirement for tax laws.

The LOI is still unconstitutional even if enacted under the police power; it did not promote public interest.

[51] *Id*.

Even if We consider LOI No. 1695 enacted under the police power of the State, it would still be invalid for failing to comply with the test of "lawful subjects" and "lawful means." Jurisprudence states the test as follows: (1) the interest of the public generally, as distinguished from those of particular class, requires its exercise; and (2) the means employed are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.[52]

For the same reasons as discussed, LOI No. 1695 is invalid because it did not promote public interest. The law was enacted to give undue advantage to a private corporation. We quote with approval the CA ratiocination on this point, thus:

> It is upon applying this established tests that We sustain the trial court's holding LOI 1465 unconstitutional. To be sure, ensuring the continued supply and distribution of fertilizer in the country is an undertaking imbued with public interest. However, the method by which LOI 1465 sought to achieve this is by no means a measure that will promote the public welfare. The government's commitment to support the successful rehabilitation and continued viability of PPI, a private corporation, is an unmistakable attempt to mask the subject statute's impartiality. There is no way to treat the self-interest of a favored entity, like PPI, as identical with the general interest of the country's farmers or even the Filipino people in general. Well to stress, substantive due process exacts fairness and equal protection disallows distinction where none is needed. When a statute's public purpose is spoiled by private interest, the use of police power becomes a travesty which must be struck down for being an arbitrary exercise of government power. To rule in favor of appellant would contravene the general principle that revenues derived from taxes cannot be used for purely private purposes or for the exclusive benefit of private individuals. (Underscoring supplied)

The general rule is that an unconstitutional law is void; the doctrine of operative fact is inapplicable.

PPI also argues that Fertiphil cannot seek a refund even if LOI No. 1465 is declared unconstitutional. It banks on the doctrine

[52] *Id*. at 55-58.

of operative fact, which provides that an unconstitutional law has an effect before being declared unconstitutional. PPI wants to retain the levies paid under LOI No. 1465 even if it is subsequently declared to be unconstitutional.

We cannot agree. It is settled that no question, issue or argument will be entertained on appeal, unless it has been raised in the court *a quo*.[53] PPI did not raise the applicability of the doctrine of operative fact with the RTC and the CA. It cannot belatedly raise the issue with Us in order to extricate itself from the dire effects of an unconstitutional law.

At any rate, We find the doctrine inapplicable. The general rule is that an unconstitutional law is void. It produces no rights, imposes no duties and affords no protection. It has no legal effect. It is, in legal contemplation, inoperative as if it has not been passed.[54] Being void, Fertiphil is not required to pay the levy. All levies paid should be refunded in accordance with the general civil code principle against unjust enrichment. The general rule is supported by Article 7 of the Civil Code, which provides:

> ART. 7. Laws are repealed only by subsequent ones, and their violation or non-observance shall not be excused by disuse or custom or practice to the contrary.
>
> When the courts declare a law to be inconsistent with the Constitution, the former shall be void and the latter shall govern.

The doctrine of operative fact, as an exception to the general rule, only applies as a matter of equity and fair play.[55] It nullifies the effects of an unconstitutional law by recognizing that the existence of a statute prior to a determination of unconstitutionality is an operative fact and may have consequences which cannot

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[53] *Cojuangco, Jr. v. Court of Appeals,* G.R. No. 119398, July 2, 1999, 309 SCRA 602, 614-615.

[54] See note 46, at 33-34.

[55] *Republic v. Court of Appeals,* G.R. No. 79732, November 8, 1993, 227 SCRA 509.

always be ignored. The past cannot always be erased by a new judicial declaration.[56]

The doctrine is applicable when a declaration of unconstitutionality will impose an undue burden on those who have relied on the invalid law. Thus, it was applied to a criminal case when a declaration of unconstitutionality would put the accused in double jeopardy[57] or would put in limbo the acts done by a municipality in reliance upon a law creating it.[58]

Here, We do not find anything iniquitous in ordering PPI to refund the amounts paid by Fertiphil under LOI No. 1465. It unduly benefited from the levy. It was proven during the trial that the levies paid were remitted and deposited to its bank account. Quite the reverse, it would be inequitable and unjust not to order a refund. To do so would unjustly enrich PPI at the expense of Fertiphil. Article 22 of the Civil Code explicitly provides that "every person who, through an act of performance by another comes into possession of something at the expense of the latter without just or legal ground shall return the same to him." We cannot allow PPI to profit from an unconstitutional law. Justice and equity dictate that PPI must refund the amounts paid by Fertiphil.

WHEREFORE, the petition is *DENIED*. The Court of Appeals Decision dated November 28, 2003 is *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Nachura, JJ.,* concur.

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[56] *Peralta v. Civil Service Commission,* G.R. No. 95832, August 10, 1992, 212 SCRA 425.

[57] *Tan v. Barrios,* G.R. Nos. 85481-82, October 18, 1990, 190 SCRA 686, citing *Aquino, Jr. v. Military Commission No. 2,* G.R. No. L-37364, May 9, 1975, 63 SCRA 546.

[58] *Id*., citing *Municipality of Malabang v. Benito,* G.R. No. L-28113, March 28, 1969, 27 SCRA 533.

THIRD DIVISION

[G.R. No. 166520. March 14, 2008]

VILMA C. TAN, GERARDO "JAKE" TAN and GERALDINE TAN, REPRESENTED BY EDUARDO NIERRAS, *petitioners, vs.* **THE HON. FRANCISCO C. GEDORIO, JR., IN HIS CAPACITY AS PRESIDING JUDGE OF THE REGIONAL TRIAL COURT, BRANCH 12, ORMOC CITY, ROGELIO LIM SUGA and HELEN TAN RACOMA, REPRESENTED BY ROMUALDO LIM,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL PROCEEDINGS; LETTERS TESTAMENTARY AND OF ADMINISTRATION, WHEN AND TO WHOM ISSUED; THE PREFERENCE UNDER SECTION 6, RULE 78 OF THE RULES OF COURT FOR THE NEXT OF KIN REFERS TO THE APPOINTMENT OF A REGULAR ADMINISTRATOR, AND NOT OF A SPECIAL ADMINISTRATOR, AS THE APPOINTMENT OF THE LATTER LIES ENTIRELY IN THE DISCRETION OF THE COURT, AND NOT APPEALABLE. — The order of preference petitioners speak of is found in Section 6, Rule 78 of the Rules of Court. However, this Court has consistently ruled that the order of preference in the appointment of a regular administrator as provided in the afore-quoted provision does not apply to the selection of a special administrator. The preference under Section 6, Rule 78 of the Rules of Court for the next of kin refers to the appointment of a regular administrator, and not of a **special administrator**, as the **appointment of the latter lies entirely in the discretion of the court, and is not appealable.**

2. ID.; SPECIAL CIVIL ACTIONS; *CERTIORARI* NOT BEING APPEALABLE, THE ONLY REMEDY AGAINST THE APPOINTMENT OF NA SPECIAL ADMINISTRATOR IS *CERTIORARI* UNDER RULE 65 OF THE RULES OF COURT WHICH REQUIRES NOTHING LESS THAN GRAVE ABUSE OF DISCRETION. — Not being appealable, the only remedy

against the appointment of a special administrator is *Certiorari* under Rule 65 of the Rules of Court, which was what petitioners filed with the Court of Appeals. *Certiorari*, however, requires nothing less than grave abuse of discretion, a term which implies such capricious and whimsical exercise of judgment which is equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law.

3. ID.; ID.; ID.; NO GRAVE ABUSE OF DISCRETION ON THE PART OF RESPONDENT JUDGE IN THE APPOINTMENT OF A SPECIAL ADMINISTRATOR. — We agree with the Court of Appeals that there was no grave abuse of discretion on the part of respondent Judge Gedorio in affirming Judge Menchavez's appointment of Romualdo as special administrator. Judge Menchavez clearly considered petitioner Vilma for the position of special administratrix of Gerardo's estate, but decided against her appointment for the following reasons: Atty. Clinton C. Nuevo, in his capacity as court appointed commissioner, directed oppositor Vilma Tan in the latter's capacity as *de fact[o]* administratrix, to deposit in the fiduciary account of the court all money and cash at hand or deposited in the banks which rightfully belong to the estate within five days from receipt of the directive. Oppositor Vilma Tan was likewise directed to deposit in the same account the proceeds of all sugarcane harvest or any crop from the estate of the decedent. She was likewise directed to submit a financial report as regards the background of the cash on hand, if any, the expenses incurred in the course of her administration. **The directive was issued by Atty. Nuevo on March 18, 2002 or more than a year ago. On May 23, 2003, this Court, acting on the urgent *ex parte* motion to resolve pending incident, gave Vilma Tan another ten days to comply with the directive of Atty. Nuevo. Again, no compliance has been made.** This Court is called upon to preserve the estate of the late Gerardo Tan for the benefit of all heirs be that heir is (sic) the nearest kin or the farthest kin. **The actuation of oppositor Vilma Tan does not satisfy the requirement of a special administrator who can effectively and impartially administer the estate of Gerardo Tan for the best interest of all the heirs.**

4. ID.; ID.; ID.; ASSUMING FOR THE SAKE OF ARGUMENT THAT PETITIONER IS INDEED BETTER SUITED FOR THE JOB OF SPECIAL ADMINISTRATRIX, AS OPPOSED TO THE ONE APPOINTED BY THE COURT, THE LATTER'S APPOINTMENT, AT BEST, WOULD CONSTITUTE A MERE ERROR OF JUDGMENT AND WOULD CERTAINLY NOT BE A GRAVE ABUSE OF DISCRETION. — Assuming for the sake of argument that petitioner Vilma is indeed better suited for the job as special administratrix, as opposed to Romualdo, who was actually appointed by the court as special administrator of Gerardo's estate, the latter's appointment, at best, would constitute a mere error of judgment and would certainly not be grave abuse of discretion. An error of judgment is one which the court may commit in the exercise of its jurisdiction, and which error is reviewable only by an appeal. On the other hand, an error of jurisdiction is one in which the act complained of was issued by the court, officer or a quasi-judicial body without or in excess of jurisdiction, or with grave abuse of discretion which is tantamount to lack or excess of jurisdiction. The Court of Appeals could not have reversed a mere error of judgment in a *Certiorari* petition. Furthermore, petitioners were not able to sufficiently substantiate their claim that their co-petitioner Vilma would have been the more competent and capable choice to serve as the special administratrix of Gerardo's estate. Contrary to petitioners' bare assertions, both the RTC and the Court of Appeals found that the documented failure of petitioner Vilma to comply with the reportorial requirements after the lapse of a considerable length of time certainly militates against her appointment. We find immaterial the fact that private respondents reside abroad, for the same cannot be said as regards their attorney-in-fact, Romualdo, who is, after all, the person appointed by the RTC as special administrator. It is undisputed that Romualdo resides in the country and can, thus, personally administer Gerardo's estate.

5. ID.; SPECIAL PROCEEDINGS; LETTERS TESTAMENTARY AND OF ADMINISTRATION, WHEN AND TO WHOM ISSUED; IF PETITIONERS REALLY DESIRE TO AVAIL THEMSELVES OF THE ORDER OF PREFERENCE PROVIDED IN SECTION 6, RULE 78 OF THE RULES OF COURT, THEY SHOULD PURSUE THE APPOINTMENT OF A REGULAR ADMINISTRATOR AND PUT AN END TO THE DELAY

WHICH NECESSITATED THE APPOINTMENT OF A SPECIAL ADMINISTRATOR. — If petitioners really desire to avail themselves of the order of preference provided in Section 6, Rule 78 of the Rules of Court, so that petitioner Vilma as the supposed next of kin of the late Gerardo may take over administration of Gerardo's estate, they should already pursue the appointment of a regular administrator and put to an end the delay which necessitated the appointment of a special administrator. The appointment of a special administrator is justified only when there is delay in granting letters, testamentary (in case the decedent leaves behind a will) or administrative (in the event that the decedent leaves behind no will, as in the Petition at bar) occasioned by any cause. The principal object of the appointment of a temporary administrator is to preserve the estate until it can pass into the hands of a person fully authorized to administer it for the benefit of creditors and heirs. In the case at bar, private respondents were constrained to move for the appointment of a special administrator due to the delay caused by the failure of petitioner Vilma to comply with the directives of the court-appointed commissioner. It would certainly be unjust if petitioner Vilma were still appointed special administratix, when the necessity of appointing one has been brought about by her defiance of the lawful orders of the RTC or its appointed officials. Petitioners submit the defense that petitioner Vilma was unable to comply with the directives of the RTC to deposit with the court the income of Gerardo's estate and to provide an accounting thereof because of the fact that Gerardo's estate had no income. This defense is clearly specious and insufficient justification for petitioner Vilma's non-compliance. If the estate truly did not have any income, petitioners should have simply filed a manifestation to that effect, instead of continuing to disregard the court's orders.

APPEARANCES OF COUNSEL

Capahi Law Office for petitioners.
Escalon Law Office for respondents.

D E C I S I O N

CHICO-NAZARIO, *J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court seeking the reversal of the Decision[1] dated 29 July 2004 of the Court of Appeals in CA-G.R. SP No. 79335. The assailed Decision of the Court of Appeals affirmed the Order[2] dated 17 July 2003 of the Regional Trial Court (RTC) of Ormoc City in SP. PROC. No. 4014-0 denying reconsideration of its Order dated 12 June 2003 whereby it appointed Romualdo D. Lim as special administrator to the estate of the late Gerardo Tan.

The factual and procedural antecedents of this case are as follows:

Gerardo Tan (Gerardo) died on 14 October 2000, leaving no will. On 31 October 2001, private respondents, who are claiming to be the children of Gerardo Tan, filed with the RTC a Petition for the issuance of letters of administration. The Petition was docketed as Special Proceeding No. 4014-0 and was raffled to Branch 12. Petitioners, claiming to be legitimate heirs of Gerardo Tan, filed an Opposition to the Petition.

Private respondents then moved for the appointment of a special administrator, asserting the need for a special administrator to take possession and charge of Gerardo's estate until the Petition can be resolved by the RTC or until the appointment of a regular administrator. They prayed that their attorney-in-fact, Romualdo D. Lim (Romualdo), be appointed as the special administrator.Petitioners filed an Opposition to private respondents' Motion for Appointment, arguing that none of the private respondents can be appointed as the special administrator since they are not residing in the country. Petitioners contend

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[1] Penned by Associate Justice Isaias P. Dicdican with Associate Justices Elvi John S. Asuncion and Ramon M. Bato, Jr., concurring; *rollo*, pp. 22-26.

[2] Issued by public respondent Executive Judge Francisco C. Gedorio, Jr. Records, p. 130.

further that Romualdo does not have the same familiarity, experience or competence as that of their co-petitioner Vilma C. Tan (Vilma) who was already acting as *de facto* administratrix of his estate since his death.

On 18 March 2002, Atty. Clinton Nuevo (Nuevo), as court-appointed commissioner, issued directives to Vilma, in her capacity as *de facto* administratrix, to wit:

> b.1.) requiring the *de facto* administratrix Ms. Vilma Tan to deposit in the fiduciary account of the Court all money and or cash at hand or deposited in the bank(s) which rightfully belong to the estate of the decedent within five (5) days from receipt hereof;
>
> b.2.) requiring the same administratrix to deposit in the same account the proceeds of all sugarcane harvest or any crop harvest, if any, done in the past or is presently harvesting or about to undertake, which belong to the estate of the decedent;
>
> b.3.) relative to the foregoing, the same *de facto* administratrix is also required to submit a financial report to the Commission as regards the background of the cash at hand or deposited in bank(s), if any, the expenses incurred in course of her administration and other relevant facts including that of the proceeds of the sugarcane/crop harvest, which submission will be done upon deposit of the foregoing with the court as above-required.[3]

More than a year later or on 23 May 2003, the RTC, acting on the private respondents' Urgent *Ex-parte* Motion to resolve pending incident, gave Vilma another 10 days to comply with the directive of Atty. Nuevo. Again, no compliance has been made.

Consequently, on 12 June 2003, RTC Judge Eric F. Menchavez issued an Order[4] appointing Romualdo as special administrator of Gerardo's Estate, the *fallo* of which states:

> Foregoing considered, the motion for the appointment of a special administrator is hereby GRANTED. Mr. Romualdo D. Lim is hereby appointed as Special Administrator and shall immediately take possession and charge of the goods, chattels, rights, credits and

[3] *Id*. at 82.

[4] *Id*. at 112-113.

estate of the deceased and preserve the same for the executor or administrator afterwards appointed, upon his filing of a bond in the amount of ₱50,000.00 and upon approval of the same by this Court.[5]

Petitioners filed on 19 June 2003 a Motion for Reconsideration of the foregoing Order, claiming that petitioner Vilma should be the one appointed as special administratix as she was allegedly next of kin of the deceased.

On 17 July 2003, respondent Judge Francisco Gedorio (Gedorio), in his capacity as RTC Executive Judge, issued an Order[6] denying petitioners' Motion for Reconsideration.

Petitioners instituted with the Court of Appeals a Petition for *Certiorari* and Prohibition assailing the 17 July 2003 Order, again insisting on petitioner Vilma's right to be appointed as special administratix. Petitioners likewise prayed for the issuance of preliminary injunction and/or temporary restraining order (TRO) to enjoin Romualdo from entering the estate and acting as special administrator thereof.

On 29 July 2004, the Court of Appeals issued a Decision denying petitioners' Petition. On 6 December 2004, the Court of Appeals similarly denied the ensuing Motion for Reconsideration filed by petitioners, to wit:

> WHEREFORE, in view of all the foregoing premises, judgment is hereby rendered by us DENYING and DISMISSING the petition filed in this case and AFFIRMING the assailed order in Special Proceeding No. 4014-0.[7]

On 22 January 2005, petitioners filed the instant Petition for Review on *Certiorari* assigning the following errors:

I.

THE COURT OF APPEALS AND THE COURT *A QUO* BOTH GRIEVOUSLY ERRED IN DENYING PETITIONERS' PLEA TO BE

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[5] *Id*. at 113.

[6] *Id*. at 130.

[7] *Rollo*, p. 26.

GIVEN PRIMACY IN THE ADMINISTRATION OF THEIR FATHER'S ESTATE.

II.

THE COURT OF APPEALS LIKEWISE ERRED IN DENYING PETITIONERS' PLEA FOR THE ISSUANCE OF A WRIT OF PRELIMINARY INJUNCTION AND/OR A TEMPORARY RESTRAINING ORDER AGAINST PRIVATE RESPONDENTS AND THEIR ATTORNEY-IN-FACT.[8]

On 14 February 2005, this Court issued a Resolution[9] denying the Petition on the ground of late filing, failure to submit an affidavit of service of a copy of the Petition on the Court of Appeals and proof of such service, failure to properly verify the Petition, and failure to pay the deposit for the Salary Adjustment for the Judiciary (SAJ) fund and sheriff's fee. Upon Motion for Reconsideration filed by petitioners, however, this Court issued on 18 July 2005 a Resolution[10] reinstating the Petition.

Petitioners contend[11] that they should be given priority in the administration of the estate since they are allegedly the legitimate heirs of the late Gerardo, as opposed to private respondents, who are purportedly Gerardo's illegitimate children. Petitioners rely on the doctrine that generally, it is the nearest of kin, whose interest is more preponderant, who is preferred in the choice of administrator of the decedent's estate.

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[8] *Id*. at 15.

[9] *Id*. at 110-111.

[10] *Id*. at 135.

[11] Petitioners state in their Memorandum:

Petitioner Vilma Tan is Gerardo's biological daughter; Jake and Geraldine Tan, together with their late brother Christopher, are petitioner Vilma Tan's biological children who were adopted by Gerardo Tan via adoption proceedings docketed as Sp. Proc. No. 1386 at the Regional Trial Court Branch VII, Tacloban City, Leyte.

The late Christopher Tan died on October 28, 1994, when he was only seventeen (17) years old. He was single when he died, he had no children and did not leave a last will and testament. For this reason, his interests in the estate of the late Gerardo Tan are represented by his biological mother, herein Petitioner Vilma Tan. (*Rollo*, p. 176.)

Petitioners also claim that they are more competent than private respondents or their attorney-in-fact to administer Gerardo's estate. Petitioners Vilma and Gerardo "Jake" Tan (Jake) claim to have lived for a long time and continue to reside on Gerardo's estate, while respondents are not even in the Philippines, having long established residence abroad.

Petitioners additionally claim that petitioner Vilma has been acting as the administratrix of the estate since Gerardo's death on 14 October 2000 and is thus "well steeped in the actual management and operation of the estate (which essentially consists of agricultural landholdings)."[12]

As regards the denial of petitioners' plea for the issuance of a Writ of Preliminary Injunction and/or TRO, petitioners argue that such denial would leave Romualdo, private respondents' attorney-in-fact, free to enter Gerardo's estate and proceed to act as administrator thereof to the prejudice of petitioners.

The appeal is devoid of merit.

The order of preference petitioners speak of is found in Section 6, Rule 78 of the Rules of Court, which provides:

SEC. 6. *When and to whom letters of administration granted.*— If no executor is named in the will, or the executor or executors are incompetent, refuse the trust, or fail to give bond, or a person dies intestate, administration shall be granted:

(a) To the surviving husband or wife, as the case may be, or next of kin, or both, in the discretion of the court, or to such person as such surviving husband or wife, or next of kin, requests to have appointed, if competent and willing to serve;

(b) If such surviving husband or wife, as the case may be, or next of kin, or the person selected by them, be incompetent or unwilling, or if the husband or widow, or next of kin, neglects for thirty (30) days after the death of the person to apply for administration or to request that administration be granted to some other person, it may be granted to one or more of the principal creditors, if competent and willing to serve;

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[12] *Id.* at 8.

(c) If there is no such creditor competent and willing to serve, it may be granted to such other person as the court may select.

However, this Court has consistently ruled that the order of preference in the appointment of a regular administrator as provided in the afore-quoted provision does not apply to the selection of a special administrator.[13] The preference under Section 6, Rule 78 of the Rules of Court for the next of kin refers to the appointment of a regular administrator, and not of a **special administrator**, as the **appointment of the latter lies entirely in the discretion of the court, and is not appealable**.[14]

Not being appealable, the only remedy against the appointment of a special administrator is *Certiorari* under Rule 65 of the Rules of Court, which was what petitioners filed with the Court of Appeals. *Certiorari*, however, requires nothing less than grave abuse of discretion, a term which implies such capricious and whimsical exercise of judgment which is equivalent to an excess or lack of jurisdiction. The abuse of discretion must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law.[15]

We agree with the Court of Appeals that there was no grave abuse of discretion on the part of respondent Judge Gedorio in affirming Judge Menchavez's appointment of Romualdo as special administrator. Judge Menchavez clearly considered petitioner Vilma for the position of special administratrix of Gerardo's estate, but decided against her appointment for the following reasons:

Atty. Clinton C. Nuevo, in his capacity as court appointed commissioner, directed oppositor Vilma Tan in the latter's capacity

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[13] *Ozaeta v. Pecson*, 93 Phil. 416, 419-420 (1953); *Roxas v. Pecson*, 82 Phil. 407, 410 (1948); *Heirs of Belinda Dalhlia Castillo v. Lacuata-Gabriel,* G.R. No. 162934, 11 November 2005, 474 SCRA 747, 757.

[14] *Pijuan v. De Gurrea*, 124 Phil. 1527, 1531-1532 (1966).

[15] *Perez v. Court of Appeals,* G.R. No. 162580, January 27, 2006, 480 SCRA 411, 416; *Banal III v. Panganiban,* G.R. No. 167474, 15 November 2005, 475 SCRA 164, 174.

as *de fact[o*] administratrix, to deposit in the fiduciary account of the court all money and cash at hand or deposited in the banks which rightfully belong to the estate within five days from receipt of the directive. Oppositor Vilma Tan was likewise directed to deposit in the same account the proceeds of all sugarcane harvest or any crop from the estate of the decedent. She was likewise directed to submit a financial report as regards the background of the cash on hand, if any, the expenses incurred in the course of her administration. **The directive was issued by Atty. Nuevo on March 18, 2002 or more than a year ago. On May 23, 2003, this Court, acting on the urgent *ex parte* motion to resolve pending incident, gave Vilma Tan another ten days to comply with the directive of Atty. Nuevo. Again, no compliance has been made.**

This Court is called upon to preserve the estate of the late Gerardo Tan for the benefit of all heirs be that heir is (sic) the nearest kin or the farthest kin. **The actuation of oppositor Vilma Tan does not satisfy the requirement of a special administrator who can effectively and impartially administer the estate of Gerardo Tan for the best interest of all the heirs.**[16] **(Emphases supplied.)**

Assuming for the sake of argument that petitioner Vilma is indeed better suited for the job as special administratrix, as opposed to Romualdo, who was actually appointed by the court as special administrator of Gerardo's estate, the latter's appointment, at best, would constitute a mere error of judgment and would certainly not be grave abuse of discretion. An error of judgment is one which the court may commit in the exercise of its jurisdiction, and which error is reviewable only by an appeal. On the other hand, an error of jurisdiction is one in which the act complained of was issued by the court, officer or a quasi-judicial body without or in excess of jurisdiction, or with grave abuse of discretion which is tantamount to lack or excess of jurisdiction.[17] The Court of Appeals could not have reversed a mere error of judgment in a *Certiorari* petition.

Furthermore, petitioners were not able to sufficiently substantiate their claim that their co-petitioner Vilma would have been the more competent and capable choice to serve as

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[16] Records, p. 113.

[17] *Fortich v. Corona*, 352 Phil. 461, 477 (1998).

the special administratrix of Gerardo's estate. Contrary to petitioners' bare assertions, both the RTC and the Court of Appeals found that the documented failure of petitioner Vilma to comply with the reportorial requirements after the lapse of a considerable length of time certainly militates against her appointment.

We find immaterial the fact that private respondents reside abroad, for the same cannot be said as regards their attorney-in-fact, Romualdo, who is, after all, the person appointed by the RTC as special administrator. It is undisputed that Romualdo resides in the country and can, thus, personally administer Gerardo's estate.

If petitioners really desire to avail themselves of the order of preference provided in Section 6, Rule 78 of the Rules of Court, so that petitioner Vilma as the supposed next of kin of the late Gerardo may take over administration of Gerardo's estate, they should already pursue the appointment of a regular administrator and put to an end the delay which necessitated the appointment of a special administrator. The appointment of a special administrator is justified only when there is delay in granting letters, testamentary (in case the decedent leaves behind a will) or administrative (in the event that the decedent leaves behind no will, as in the Petition at bar) occasioned by any cause.[18] The principal object of the appointment of a temporary administrator is to preserve the estate until it can pass into the hands of a person fully authorized to administer it for the benefit of creditors and heirs.[19]

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[18] Section 1, Rule 80 of the Rules of Court provides:

Section 1. *Appointment of special administrator.*—When there is delay in granting letters testamentary or of administration by any cause including an appeal from the allowance or disallowance of a will, the court may appoint a special administrator to take possession and charge of the estate of the deceased until the questions causing the delay are decided and executors or administrators appointed.

[19] *De Guzman v. Guadiz, Jr.*, G.R. No. L-48585, 31 March 1980, 96 SCRA 938, 945.

In the case at bar, private respondents were constrained to move for the appointment of a special administrator due to the delay caused by the failure of petitioner Vilma to comply with the directives of the court-appointed commissioner. It would certainly be unjust if petitioner Vilma were still appointed special administratix, when the necessity of appointing one has been brought about by her defiance of the lawful orders of the RTC or its appointed officials. Petitioners submit the defense that petitioner Vilma was unable to comply with the directives of the RTC to deposit with the court the income of Gerardo's estate and to provide an accounting thereof because of the fact that Gerardo's estate had no income. This defense is clearly specious and insufficient justification for petitioner Vilma's non-compliance. If the estate truly did not have any income, petitioners should have simply filed a manifestation to that effect, instead of continuing to disregard the court's orders.

Finally, as we are now resolving the case in favor of private respondents, there is no longer any need to discuss petitioners' arguments regarding the denial by the appellate court of their prayer for the issuance of a writ of preliminary injunction and/or TRO.

WHEREFORE, the instant Petition for Review on *Certiorari* is *DENIED*. The Decision dated 29 July 2004 of the Court of Appeals in CA-G.R. SP No. 79335 affirming the Order dated 17 July 2003 of the Regional Trial Court (RTC) of Ormoc City, in SP. PROC. No. 4014-0 denying reconsideration of its Order dated 12 June 2003, whereby it appointed Romualdo D. Lim as special administrator of the estate of Gerardo Tan, is *AFFIRMED*. Costs against petitioners.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Nachura, and *Reyes, JJ.,* concur.

EN BANC

[G.R. No. 167763. March 14, 2008]

CIVIL SERVICE COMMISSION, *petitioner, vs.* **JESSIE V. RABANG,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS; RESPONDENT IS GUILTY OF SIMPLE NEGLIGENCE AND NOT GROSS NEGLIGENCE; THE DEPARTMENT OF TRANSPORTATION AND COMMUNICATION (DOTC) AND THE CIVIL SERVICE COMMISSION (CSC) FAILED TO SHOW SUFFICIENT BASIS FOR CONCLUDING THAT RESPONDENT'S NEGLIGENCE IN FAILING TO DETECT THE DEFECTS/ALTERATIONS OF THE CHASSIS OF THE SUBJECT VEHICLE IS WILLFUL AND INTENTIONAL. — Gross neglect of duty or gross negligence refers to negligence characterized by the want of even slight care, acting or omitting to act in a situation where there is a duty to act, **not inadvertently but willfully and intentionally,** with a conscious indifference to consequences, insofar as other persons may be affected. It is the omission of that care which even inattentive and thoughtless men never fail to give to their own property. In cases involving public officials, there is gross negligence when a breach of duty is flagrant and palpable. In this case, the Court agrees with the CA's finding that while it is true that the DOTC and CSC held that the defects/alterations of the chassis of the subject vehicle could be seen by the naked eye, the DOTC and CSC failed to show sufficient basis for concluding that respondent's negligence in failing to detect such defects was willful and intentional. What appears in the records is that respondent complied with the regular procedure of the LTO before the subject vehicle was registered in the name of Mr. Young. The regularity of the procedure undertaken by respondent was established by the fact that the subject vehicle was subsequently transferred to another person named Jasmin Ebro. Hence, the CA correctly ruled that respondent can only be held liable for simple negligence.

2. ID.; ID.; ID.; PAYMENT OF BACKWAGES DURING THE SUSPENSION OF A PUBLIC SERVANT WHO IS SUBSEQUENTLY REINSTATED IS PROPER IF HE IS FOUND INNOCENT OF THE CHARGES AND THE SUSPENSION IS UNJUSTIFIED; A DECISION OF DISMISSAL BY THE CSC IS EXECUTORY AND EVEN AN APPEAL SHALL NOT STOP THE DECISION FROM BEING EXECUTORY. — *Bruguda v. Secretary of Education, Culture and Sports,* reiterated the rule that "the payment of backwages during the period of suspension of a civil servant who is subsequently reinstated is proper **if he is found innocent of the charges and the suspension is unjustified."** In this case, although the Court does not find respondent guilty of gross neglect of duty, he is, however, liable for simple neglect of duty. Hence, respondent is not exonerated from liability. Moreover, his separation from the service, which is considered as preventive suspension during the pendency of his appeal, was not unjustified as it was to protect public interest considering that he was charged with gross negligence/ gross neglect of duty and found guilty thereof by the DOTC and the CSC. Further, the decision of dismissal by the CSC is executory based on Book V of the Administrative Code of 1987, unless on appeal, the dismissal is ordered restrained by the CA. Sec. 47, Chapter 6, Subtitle A, Title 1, Book V of the Administrative Code of 1987 provides: xxx (4) **An appeal shall not stop the decision from being executory, and in case the penalty is suspension or removal, the respondent shall be considered as having been under preventive suspension during the pendency of the appeal in the event he wins an appeal.** Sec. 22, Rule XIV of the Omnibus Civil Service Rules and Regulations classifies Simple Neglect of Duty as a less grave offense punishable by suspension for one month and one day to six months for the first offense, and dismissal for the second offense. The Court sustains the penalty of suspension for three months without pay imposed on respondent by the CA for simple neglect of duty since this is his first offense in his fifteen years of service in the Government.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Jose I. Lapak, Jr. for respondent.

D E C I S I O N

AZCUNA, *J.*:

This is a petition for review on *certiorari*[1] of the Decision of the Court of Appeals (CA) promulgated on September 3, 2004 in CA-G.R. No SP No. 74919 and its Resolution promulgated on April 11, 2005 denying petitioner's motion for reconsideration.

The CA Decision modified the Resolutions[2] of the Civil Service Commission (CSC) finding respondent Jessie V. Rabang guilty of gross neglect of duty, and instead found him merely liable for simple neglect of duty.

The facts are as follows:

Respondent was a transportation regulation officer of the Land Transportation Office (LTO), Bacolod City. Among his regular duties were the inspection of motor vehicles sought to be registered and the processing of applications for vehicle registration.

Sometime in December 1991, a certain Steniel Young applied for assignment of a chassis number to an Isuzu truck purportedly new and locally rebuilt and/or assembled.

After evaluating the documents submitted by Mr. Young, respondent conducted an ocular inspection of the vehicle. Finding the vehicle to be a newly rebuilt/assembled unit, respondent recommended that it be assigned Chassis Identification Number (CIN) 0604-91-544-C, which recommendation was approved by his superior Antonio Norman Saril, Chief of Transportation Regulation Office, Bacolod City.

Respondent then directed Mr. Young to have the CIN stamped on the vehicle and to secure a clearance from the Constabulary Highway Patrol Group. After Mr. Young complied with the

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[1] Under Rule 45 of the Rules of Court.

[2] Resolution No. 011810 dated November 20, 2001 and Resolution No. 021425 dated October 23, 2002.

directive, respondent conducted a second ocular inspection of the vehicle and issued Motor Vehicle Inspection Report No. 5070702.

On December 27, 1991, upon payment of the registration fee, Antonio Norman Saril approved the registration of the vehicle.

However, it turned out that the vehicle was stolen from its owner Dickson N. Yu.

The Department of Transportation and Communication (DOTC) conducted an investigation on the participation of respondent and Antonio Norman Saril in the registration of the stolen vehicle in the name of Mr. Young.

Thereafter, respondent and Antonio Norman Saril were charged with grave misconduct, gross negligence in the performance of official duties and conduct prejudicial to the best interest of the service, among others. The formal charge alleged:

> That on 27 December 1991, as Chief and Assistant Chief of the LTO District Office, Bacolod City, you registered and caused to be registered a motor vehicle purportedly a rebuilt unit under the name of Steniel Young x x x **without conducting an ocular inspection as required by law** particularly Section 4, par. 6 and Section 14, Article III of RA 4136.[3]

On March 23, 1999, DOTC Secretary Vicente C. Rivera, Jr. rendered a decision finding respondent guilty of gross negligence and penalizing him with suspension for six months. Saril was admonished to be more careful and diligent in the performance of his duties. Respondent's motion for reconsideration was denied.

Respondent appealed the DOTC decision to the CSC.

In Resolution No. 011810 dated November 20, 2001, the CSC sustained the DOTC's finding that respondent was guilty of gross neglect of duty, but it imposed on him the penalty of dismissal from the service in accordance with Sec. 52 A(2) of the Uniform Rules on Administrative Cases in the Civil Service.

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[3] Emphasis supplied.

Respondent's motion for reconsideration was denied in Resolution No. 021425 dated October 23, 2002.

Respondent filed a petition for review of the CSC Resolutions before the CA.

In a Decision promulgated on September 3, 2004, the CA found respondent liable only for simple negligence and penalized him with suspension for three months without pay. The dispositive portion of the Decision reads:

> WHEREFORE, the petition is hereby **GRANTED**. The assailed Resolutions rendered by the Civil Service Commission are hereby **MODIFIED** in that the herein petitioner is hereby suspended for three months without pay. The herein public respondents are hereby ordered to REINSTATE the petitioner to his former position before he was dismissed from the service and to pay the corresponding backwages and benefits due him after he has served his three months suspension.
>
> SO ORDERED.[4]

Petitioner's motion for reconsideration was denied by the CA in a Resolution promulgated on April 11, 2005.

On May 3, 2005, petitioner filed this petition raising these issues:

1. Whether or not the Court of Appeals erred in ruling that respondent is not guilty of gross neglect of duty but only simple neglect of duty.
2. Whether or not the Court of Appeals erred in ordering the payment of backwages to respondent.

Petitioner contends that respondent was guilty of gross neglect of duty because he failed to fulfill his duty of conducting an ocular inspection of the subject vehicle before registration with the requisite attention, based on the finding of the DOTC, thus:

> . . . If it was true that Rabang inspected the chassis, he could not have missed the welding marks and rough edges and other physical signs showing that the chassis was not new and was tampered with.

[4] *Rollo*, pp. 32-33.

Or if he did inspect, he did it so haphazardly that he missed marks that were obvious to the naked eye.

Petitioner asserts that the finding of the DOTC, charged with its specific field of expertise, is entitled to respect and finality.

The Court is not persuaded by petitioner's arguments. It agrees with the decision of the Court of Appeals, which explained thus:

> In a letter dated February 24, 1998, the petitioner (Rabang) was charged by former DOTC Secretary J. Trinidad-Lichauco with Grave Misconduct, Gross Negligence in the Performance of Duty, Inefficiency and Incompetence in the Performance of Official Duties and Conduct Prejudicial to the Best Interest of the Service. **The letter stated that the petitioner registered the subject vehicle without conducting an actual ocular inspection as required by law**, particularly Section 4, par. 6 and Section 14, Article III of RA 4136. **Thus, in this case, the initial inquiry is whether the petitioner did not conduct an ocular inspection of the subject vehicle**.

In the assailed Decision, the CSC quoting the DOTC Secretary opined:

> "With all of the experience he acquired during those years of his employment with the LTO, Rabang can be considered an expert when it comes to the inspection and examination of the motor and chassis numbers of each motor vehicle brought to his office for registration. Accordingly, when he inspected and examined the said Isuzu truck which was then being sought to be registered in the name of Steniel Young, he could have, had he wanted to, easily detected and noticed the deformities, the imperfections, and the alterations made on its original chassis number. Had he been conscientious and exerted even just an ordinary care in the performance of his duties and responsibilities, it would not have been difficult for him to determine that said original chassis number had been defaced and superimposed with another number. And for sure, had he only been circumspect in the performance of his official functions, the registration of a stolen vehicle could have been aborted and the perpetrators thereof brought before the law with ease at the earliest possible time.

Thus, the Commission quotes with approval the findings of the Philippine National Police (PNP) Crime Laboratory Service Regional Unit 6, Camp Delgado, Iloilo City, which was adopted in the DOTC Decision and Resolution which are now the subject of the instant appeal, to wit:

> 'As pointed out, Movant's (Rabang's) Motor Vehicle Inspection Report dated 24 December 1991 . . . and Memorandum dated 20 December 1991 to his co-respondent Norman Saril recommending the assignment of chassis number indeed **proved that an ocular inspection was conducted by Rabang on the Isuzu truck in question**. Said inspection was, however, not properly done as evinced by his (Rabang) inability and/or failure to notice and detect the filing marks and grinding on the metal surface of the chassis and the signs of the welding marks surrounding it (PNP Macro Etching Report dated 14 August 1992) which are visible to the naked eye of an ordinary person who is not even a motor vehicle inspector. Such fact establishes palpable absence of due diligence of respondent Rabang in the exercise of his duties as Motor Inspector to examine every minute detail of the chassis of the subject vehicle." (DOTC Resolution dated October 7, 1999)'

It is evident from the aforesaid findings of facts of the two administrative agencies that there was an ocular inspection of the subject vehicle conducted by the petitioner, which is contrary to the formal charge that he did not conduct such inspection. It can also be deduced from the findings of the two agencies that while they ruled that the petitioner made an ocular inspection, the same according to them, was not done by the petitioner with due care, thus finding him administratively liable for gross negligence.[5]

Since it is evident that respondent conducted an ocular inspection of the subject vehicle contrary to the formal charge against him, what is to be determined is whether the ocular inspection conducted by respondent was characterized by gross neglect of duty as alleged by petitioner.

Gross neglect of duty or gross negligence refers to negligence characterized by the want of even slight care, acting or omitting

[5] *Rollo*, pp. 29-31; emphasis supplied.

to act in a situation where there is a duty to act, **not inadvertently but willfully and intentionally,** with a conscious indifference to consequences, insofar as other persons may be affected. It is the omission of that care which even inattentive and thoughtless men never fail to give to their own property. In cases involving public officials, there is gross negligence when a breach of duty is flagrant and palpable.[6]

In this case, the Court agrees with the CA's finding that while it is true that the DOTC and CSC held that the defects/ alterations of the chassis of the subject vehicle could be seen by the naked eye, the DOTC and CSC failed to show sufficient basis for concluding that respondent's negligence in failing to detect such defects was willful and intentional. What appears in the records is that respondent complied with the regular procedure of the LTO before the subject vehicle was registered in the name of Mr. Young. The regularity of the procedure undertaken by respondent was established by the fact that the subject vehicle was subsequently transferred to another person named Jasmin Ebro.

Hence, the CA correctly ruled that respondent can only be held liable for simple negligence.

As regards the second issue, petitioner contends that the CA erred in ruling that respondent is entitled to backwages because he was not exonerated and the cause for his prior separation from the service was directly attributable to his own fault.

Petitioner's contention is meritorious.

Bruguda v. Secretary of Education, Culture and Sports,[7] reiterated the rule that "the payment of backwages during the period of suspension of a civil servant who is subsequently reinstated is proper **if he is found innocent of the charges and the suspension is unjustified**."[8]

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[6] *Golangco v. Fung*, G.R. No. 147640, October 16, 2006, 504 SCRA 321, 331.

[7] G.R. Nos. 142332-43, January 31, 2005, 450 SCRA 224, 231.

[8] Emphasis supplied.

In this case, although the Court does not find respondent guilty of gross neglect of duty, he is, however, liable for simple neglect of duty. Hence, respondent is not exonerated from liability. Moreover, his separation from the service, which is considered as preventive suspension during the pendency of his appeal, was not unjustified as it was to protect public interest considering that he was charged with gross negligence/gross neglect of duty and found guilty thereof by the DOTC and the CSC.

Further, the decision of dismissal by the CSC is executory based on Book V of the Administrative Code of 1987, unless on appeal, the dismissal is ordered restrained by the CA.[9]

Sec. 47, Chapter 6, Subtitle A, Title 1, Book V of the Administrative Code of 1987 provides:

SEC. 47. *Disciplinary Jurisdiction*.— (1) The [Civil Service] Commission shall decide upon appeal all administrative disciplinary cases involving the imposition of a penalty or suspension for more than thirty days, or fine in an amount exceeding thirty days' 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.

(2) The Secretaries and heads of agencies and instrumentalities, provinces, cities and municipalities shall have jurisdiction to investigate and decide matters involving disciplinary action against officers and employees under their jurisdiction. Their decisions shall be final in case the penalty imposed is suspension for not more than thirty days or fine in an amount not exceeding thirty days' salary. In case the decision rendered by a bureau or office head is appealable to the Commission, the same may be initially appealed to the department and finally to the Commission and pending appeal, the same shall be executory

[9] Rules of Court, Rule 43, Sec. 12. *Effect of appeal*. – The appeal shall not stay the award, judgment, final order or resolution sought to be reviewed unless the Court of Appeals shall direct otherwise upon such terms as it may deem just.

except when the penalty is removal, in which case the same shall be executory only after confirmation by the Secretary concerned.

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(4) **An appeal shall not stop the decision from being executory, and in case the penalty is suspension or removal, the respondent shall be considered as having been under preventive suspension during the pendency of the appeal in the event he wins an appeal**.[10]

Sec. 22, Rule XIV of the Omnibus Civil Service Rules and Regulations classifies Simple Neglect of Duty as a less grave offense punishable by suspension for one month and one day to six months for the first offense, and dismissal for the second offense.

The Court sustains the penalty of suspension for three months without pay imposed on respondent by the CA for simple neglect of duty since this is his first offense in his fifteen years of service in the Government.

WHEREFORE, the petition is partly *GRANTED*. The Decision of the Court of Appeals in CA-G.R. SP No. 74919 promulgated on September 3, 2004 and its Resolution promulgated on April 11, 2005 are *AFFIRMED* insofar as respondent Jessie V. Rabang is found guilty of Simple Neglect of Duty and penalized with suspension for three months without pay, and the petitioner CSC and the DOTC are ordered to *REINSTATE* the respondent to his former position before he was dismissed from the service.

However, respondent is not entitled to payment to backwages during the period of time he was considered to be on preventive suspension.

No costs.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Carpio Morales, Tinga, Chico-Nazario, Velasco, Jr., Nachura, Reyes, and *Leonardo-de Castro, JJ.,* concur.

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[10] Emphasis supplied.

THIRD DIVISION

[G.R. No. 169314. March 14, 2008]

PNB-REPUBLIC BANK (now known as Maybank Philippines, Inc.), *petitioner, vs.* **SPOUSES JOSE AND SALVACION CORDOVA,**[1] *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; SECOND NOTICE OF APPEAL IS NOT NECESSARY WHEN THE APPEAL IS ALREADY PERFECTED. — Its appeal having been perfected, petitioner did not need to file a second notice of appeal even if the trial court granted, as it did, the other party's motion for reconsideration and modified the decision to increase the monetary award. An essential and logical implication of the said rule is that the filing of a second notice of appeal from the modified decision is a superfluity, if not a useless ceremony. It, therefore, matters no longer whether that second notice is timely filed or not. Hence, in this case, petitioner's filing of a belated second notice of appeal does not affect or foreclose its already perfected appeal.

2. ID.; ID.; ID.; FILING OF A MOTION FOR RECONSIDERATION DOES NOT HAVE THE EFFECT OF ABANDONING A PERFECTED APPEAL. — Respondents want the Court to depart from the aforesaid rules because, in this case, petitioner, in effect, abandoned its perfected appeal when it filed a motion for reconsideration of the order modifying the decision. The Court does not agree. Petitioner's filing of the said motion does not have the effect of a waiver of the appeal, and, like the second notice, is a pointless formality which does not prejudice the already perfected appeal.

3. ID.; ID.; ID.; EFFECT OF A PERFECTED APPEAL. — When the appeal is perfected as to petitioner's filing of the first notice in due time, the trial court, insofar as the petitioner is concerned,

[1] In its December 12, 2005 Resolution, the Court resolved to note respondents' Manifestation that the Court of Appeals already granted the substitution of the seven children of the spouses in lieu of the untimely demise of Jose Cordova. (*Rollo*, p. 114.)

loses its jurisdiction over the case except to issue orders for the protection and preservation of the rights of the parties *which do not involve any matter litigated by the appeal*. Obviously, the issue of the correctness of the decision is the subject of the perfected appeal. The trial court no longer had jurisdiction to reverse the February 18, 2002 Decision, as modified by the July 2, 2002 Order, which would have meant petitioner's *abandonment of its appeal*. In fact, to paraphrase the words of remedial law expert Justice Florenz D. Regalado, petitioner, with its appeal already perfected, cannot withdraw the same for the purpose of reviving the jurisdiction of the trial court and enabling it to take another course of action calling for the exercise of that jurisdiction.

APPEARANCES OF COUNSEL

Santiago & Vidad Law Offices for petitioner.
Padilla Law Office for respondents.

D E C I S I O N

NACHURA, *J.*:

Before the Court is a petition for review on *certiorari* under Rule 45 of the Rules of Court assailing the April 29, 2005 Resolution[2] of the Court of Appeals (CA) in CA-G.R. CV No. 80735, and the August 12, 2005 Resolution[3] denying the motion for reconsideration (MR) thereof.

In its February 18, 2002 Decision, the Regional Trial Court (RTC) of Manila, Branch 7, in Civil Case No. 98-89355, dismissed petitioner's complaint for rescission of a contract of lease but granted respondents' counterclaim.[4] Discontented with the trial

[2] Penned by Associate Justice Vicente S.E. Veloso, with Associate Justices Roberto A. Barrios and Amelita G. Tolentino, concurring; *id*. at 30-36.

[3] *Id*. at 38-39.

[4] The dispositive portion of the February 18, 2002 RTC Decision reads:

WHEREFORE and considering the foregoing, judgment is rendered dismissing the complaint for lack of merit and on defendants *(sic)* counterclaim, judgment is rendered ordering the plaintiff bank PNB-RB or

court's disposition, petitioner, which received a copy of the decision on March 15, 2002, timely filed a notice of appeal on March 20, 2002 [the **first** notice of appeal].

Also dissatisfied with the decision, respondents moved for its reconsideration. In an Order dated July 2, 2002, the trial court reconsidered and amended its February 18, 2002 Decision to increase the amount of damages awarded to respondents.[5]

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now Maybank to pay the [defendants] spouses Jose and Salvacion Cordova: (1) the sum of ₱2,168,050.00 representing unpaid rentals from October 7, 1995 up to September 7, 1998; monthly rentals at the rate of ₱66,650.00 from September 8, 1998 until November 7, 1998 which now includes the stipulated 10% yearly increased *(sic)* in monthly rentals for the succeeding year plus the increased rentals with 10% per year increase in subsequent years thereafter until the termination of the period fixed in the contract; (2) the sum of ₱2,000,000.00 representing the improvements which plaintiffs should have introduced in the premises as provided for in the contract of lease the parties executed; (3) Interest at the rate of 12% per annum on all unpaid rentals; (4) Attorney's fees in the sum of ₱50,000.00; and (5) the costs of suit. (*Rollo,* p. 68.)

[5] The dispositive portion of the July 2, 2002 Order reads:

WHEREFORE and considering the foregoing, judgment is hereby rendered reconsidering and amending this court's Decision of February 18, 2002, to read as follows: dismissing the complaint for lack of merits *(sic)* and on defendants *(sic)* counterclaim judgment is rendered ordering the plaintiff Bank PNB-RB now Maybank to pay the defendants spouses Jose and Salvacion Cordova:

1) The sum of ₱2,168,050.00 representing unpaid rentals from October 7, 1995 up to September 7, 1998; monthly rentals at the rate of ₱66,650.00 from September 8, 1998 until November 7, 1998 which now includes the stipulated 10% yearly increased *(sic)* in monthly rentals; and 10% per year [increase] in subsequent years thereafter until the termination of the period fixed in the contract;

2) The sum of ₱2,000,000.00 representing the improvements which plaintiff should have introduced in the premises as provided for in the contract of lease the parties executed;

3) Interest at the rate of 12% per annum on all unpaid monthly rentals and the additional 12% per annum interest on all accrued unpaid interest, from the time they fell due until paid Computed and Compounded Monthly as shown in plaintiff's Exhibit "11", except that therein *(sic)* computation should be reduced from 3% per month to 1% per month on all unpaid

After receiving a copy of this Order on **August 7, 2002**, petitioner this time filed a **motion for reconsideration** on August 22, 2002. On September 30, 2002, the trial court denied petitioner's motion and affirmed its earlier order. Petitioner received a copy of the denial order on **October 14, 2002**. It, subsequently, filed another Notice of Appeal on **October 23, 2002** [the **second** notice of appeal].[6]

Respondents moved for the dismissal of the appeal. As this motion was denied by the trial court, they re-filed it with the appellate court. In their motion, respondents argued that petitioner only had one (1) day left to file the second notice when it received the order denying the MR, inasmuch as it had already consumed the 15-day reglementary period when it filed the MR on August 22, 2002. Since the February 18, 2002 Decision was vacated, revised and replaced by the July 2, 2002 Order, the first notice of appeal became ineffective and invalid.[7]

On November 3, 2004, the CA resolved to deny the motion.[8] Respondents moved for its reconsideration.[9] In a volte-face, the appellate court granted respondent's motion and dismissed the appeal on April 29, 2005.[10] Petitioner's motion for the reconsideration of the resolution of dismissal was further denied by the CA on August 12, 2005.[11]

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monthly rentals and the additional 3% per month interest on all accrued unpaid interest to 1% per month.

4) Attorney's fees in the sum of ₱200,000.00

5) Moral damages in the sum of ₱100,000.00

6) Litigation expenses in the amount of ₱50,000.00; and

7) Costs of suit. (*Id*. at 69.)

[6] *Rollo*, p. 70.

[7] *Id*. at 70-71.

[8] *Id*. at 67-75.

[9] *Id*. at 76-84.

[10] *Supra* note 2.

[11] *Supra* note 3.

Petitioner, thus, filed the instant Petition for Review on *Certiorari*[12] raising the following issues for our resolution:

WHETHER THE HONORABLE COURT OF APPEALS ERRED IN GRANTING RESPONDENTS' MOTION TO DISMISS APPEAL AND IN DECLARING THAT MAYBANK'S FIRST NOTICE OF APPEAL HAD BECOME INEFFECTIVE AND INVALID WHILE MAYBANK'S SECOND NOTICE OF APPEAL HAD NOT BEEN PERFECTED ON TIME.

WHETHER THE HONORABLE COURT OF APPEALS ERRED IN DECLARING THAT IT HAD NO JURISDICTION TO ALTER THE FINAL JUDGMENT OF THE COURT *A QUO* AND TO ENTERTAIN MAYBANK'S APPEAL.[13]

The Court finds merit in the petition.

Petitioner's appeal is deemed perfected "as to [it]" when it timely filed its first notice of appeal, following Section 9, Rule 41 of the Rules of Court.[14] Incidentally, this perfected appeal is not docketed with the CA, because the trial court, which was still to resolve respondents' motion for reconsideration, had not

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[12] *Rollo*, pp. 8-28.

[13] *Id*. at 17.

[14] SEC. 9. *Perfection of Appeal; effect thereof.*—A party's appeal by notice of appeal is deemed perfected as to him upon the filing of the notice of appeal in due time.

A party's appeal by record on appeal is deemed perfected as to him with respect to the subject matter thereof upon the approval of the record on appeal filed in due time.

In appeals by notice of appeal, the court loses jurisdiction over the case upon the perfection of the appeals filed in due time and the expiration of the time to appeal of the other parties.

In appeals by record on appeal, the court loses jurisdiction only over the subject matter thereof upon the approval of the records on appeal filed in due time and the expiration of the time to appeal of the other parties.

In either case, prior to the transmittal of the original record or the record on appeal, the court may issue orders for the protection and preservation of the rights of the parties which do not involve any matter litigated by the appeal, approve compromises, permit appeals of indigent litigants, order execution pending appeal in accordance with Section 2 of Rule 39, and allow withdrawal of the appeal.

yet transmitted the records of the case to the appellate court. Incumbent, nonetheless, on the part of the RTC is the elevation of the records after a resolution of the merits of respondents' motion.[15]

Its appeal having been perfected, petitioner did not need to file a second notice of appeal even if the trial court granted, as it did, the other party's motion for reconsideration and modified the decision to increase the monetary award. This is in accordance with our ruling in *Pacific Life Assurance Corporation v. Sison*,[16] thus:

> We hold that petitioner did not have to file another notice of appeal, having given notice of its intention to appeal the original decision.
>
> x x x Since the decision, as modified by the order of March 11, 1993, more than doubled petitioner's liability, there is no reason to believe that petitioner's failure to appeal therefrom in any way indicated its acceptance thereof.
>
> xxx xxx xxx
>
> x x x [S]ince the decision as modified substantially increased petitioner's liability, the logical inference is that petitioner would all the more want to appeal from the decision as modified. To deny petitioner's appeal on the sole ground that it failed to file another notice of appeal in order to signify its objection to the modified decision would be to put a premium on technicalities at the expense of a just resolution of the case.[17]

An essential and logical implication of the said rule is that the filing of a second notice of appeal from the modified decision is a superfluity, if not a useless ceremony. It, therefore, matters no longer whether that second notice is timely filed or not. Hence, in this case, petitioner's filing of a belated second notice of appeal does not affect or foreclose its already perfected appeal.

Respondents want the Court to depart from the aforesaid rules because, in this case, petitioner, in effect, abandoned its perfected appeal when it filed a motion for reconsideration of

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[15] See RULES OF COURT, Rule 41, Secs. 10-12.

[16] 359 Phil. 332 (1998).

[17] *Id.* at 338.

the order modifying the decision. The Court does not agree. Petitioner's filing of the said motion does not have the effect of a waiver of the appeal,[18] and, like the second notice, is a pointless formality which does not prejudice the already perfected appeal.

When the appeal is perfected as to petitioner's filing of the first notice in due time, the trial court, insofar as the petitioner is concerned, loses its jurisdiction over the case except to issue orders for the protection and preservation of the rights of the parties *which do not involve any matter litigated by the appeal*.[19] Obviously, the issue of the correctness of the decision is the subject of the perfected appeal. The trial court no longer had jurisdiction to reverse the February 18, 2002 Decision, as modified by the July 2, 2002 Order, which would have meant petitioner's *abandonment of its appeal*. In fact, to paraphrase the words of remedial law expert Justice Florenz D. Regalado, petitioner, with its appeal already perfected, cannot withdraw the same for the purpose of reviving the jurisdiction of the trial court and enabling it to take another course of action calling for the exercise of that jurisdiction. This is because by filing the notice of appeal, petitioner *insofar as it is concerned* has perfected its appeal to the CA, and it should be in that court where he may pursue any further remedy.[20]

If at all, petitioner's motion for reconsideration of the order modifying the decision, and its second notice of appeal, more than ever, manifest its continuing desire to question the adverse decision. We emphasize, at this point, that an appeal should not be dismissed on a mere technicality—all litigants must be

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[18] See *R.F. Navarro & Co., Inc. v. Hon. Vailoces*, 413 Phil. 432, 440 (2001), in which the Court ruled that the filing of a motion for new trial does not work as a waiver of the appeal.

[19] RULES OF COURT, Rule 41, Sec. 9; *People v. Dela Cruz*, G.R. No. 68319, March 31, 1992, 207 SCRA 632, 642; *Evaristo v. Hon. Lastrilla*, 110 Phil. 181, 183 (1960).

[20] Regalado, *Remedial Law Compendium, Si*xth Revised Edition, Vol. 1, p. 507.

afforded the fullest opportunity for the adjudication of their cases on the merits.[21]

The necessary consequence of our ruling that petitioner's perfected appeal springs from the first notice is that such first appeal should be the one docketed by the appellate court. CA-G.R. CV No. 80735, the subject of this petition, is the mistaken appeal, for it traces its origin from the superfluous second notice. Considering, however, that the records were already transmitted to the appellate court in the appeal docketed as CA-G.R. CV No. 80735, for us to have to go through the process of dismissing the said mistaken appeal, then have the perfected appeal from the first notice docketed, and finally, order the records of the case re-transmitted through that docketed appeal, would be too circuitous a procedure. Thus, for expediency, we simply reinstate the appeal without a further re-docket, and direct the appellate court to resolve the case without further delay.

WHEREFORE, premises considered, the petition for review on *certiorari* is *GRANTED*. The April 29, 2005 and the August 12, 2005 Resolutions of the Court of Appeals in CA-G.R. CV No. 80735 are *REVERSED and SET ASIDE*. Petitioner's appeal is *REINSTATED*. The appellate court is *DIRECTED* to resolve the same with dispatch.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Reyes, JJ.,* concur.

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[21] *Pacific Life Assurance Corporation v. Sison*, *supra* note 16, at 339

THIRD DIVISION

[G.R. No. 169712. March 14, 2008]

MA. WENELITA TIRAZONA, *petitioner, vs.* **COURT OF APPEALS, PHILIPPINE EDS-TECHNO SERVICE INC. (PET INC.) AND/OR KEN KUBOTA, MAMORU ONO and JUNICHI HIROSE,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; PETITION FOR *CERTIORARI* UNDER RULE 65 DISTINGUISHED FROM PETITION FOR REVIEW ON *CERTIORARI* UNDER RULE 45. — For a Petition for *Certiorari* under Rule 65 of the Rules of Court to prosper, the following requisites must be present: (1) the writ is directed against a tribunal, a board or an officer exercising judicial or quasi-judicial functions: (2) such tribunal, board or officer has acted without or in excess of jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction; and (3) there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law. There is grave abuse of discretion "when there is a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, such as 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 so 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." The Petition for *Certiorari* shall be filed not later than sixty (60) days from notice of the judgment, order or resolution. In case a motion for reconsideration is timely filed, the sixty (60)-day period shall be counted from notice of the denial of the said motion. On the other hand, Rule 45 of the Rules of Court pertains to a Petition for Review on *Certiorari* whereby "a party desiring to appeal by *certiorari* from a judgment or final order or resolution of the Court of Appeals x x x may file with the Supreme Court a verified petition for review on *certiorari*. The petition shall raise only questions

of law which must be distinctly set forth." The petition shall be filed within fifteen (15) days from notice of the judgment or final order or resolution appealed from, or of the denial of the petitioner's motion for new trial or reconsideration filed in due time after notice of the judgment.

2. ID.; ID.; ID.; *CERTIORARI,* NOT A SUBSTITUTE FOR THE LOST REMEDY OF APPEAL; APPLICATION. — From the foregoing, it is fairly obvious that Tirazona was aware that she was supposed to file an appeal through a Petition for Review on *Certiorari* under Rule 45. That she filed the instant Petition for *Certiorari* under Rule 65 and only after an inexplicably long period of time leads to the inescapable conclusion that the same was merely an afterthought, nothing more than a desperate attempt to revive a lost appeal. The special civil action of *certiorari* under Rule 65 is an independent action that cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that under Rule 45, especially if such loss or lapse was occasioned by one's own neglect or error in the choice of remedies. It also bears to stress the well-settled principle that the remedies of appeal and *certiorari* are mutually exclusive and not alternative or successive. Under Rule 56, Sec. 5(f) of the Revised Rules of Court, a wrong or inappropriate mode of appeal merits an outright dismissal.

3. ID.; ID.; ID.; THE COURT MAY TREAT A PETITION FOR *CERTIORARI* UNDER RULE 65 AS HAVING BEEN FILED UNDER RULE 45 IF IT IS FILED WITHIN THE REGLEMENTARY PERIOD FOR FILING AN APPEAL. — In this regard, it needs to be emphasized that before the Court may treat the present petition as having been filed under Rule 45, the same must comply with the reglementary period for filing an appeal. This requirement is not only mandatory but also jurisdictional such that failure to do so renders the assailed decision final and executory, and deprives this Court of jurisdiction to alter the final judgment, much less to entertain the appeal. Since the instant petition was filed after the lapse of the extended period for filing an appeal, the same should be dismissed outright.

4. ID.; COURTS; SUPREME COURT, NOT A TRIER OF FACTS; APPLICATION. — In the instant case, Tirazona would have the Court examine the actual wording, tenor, and contextual

background of both her demand letter and the PET's notice of charge against her. Similarly, the determination of whether Tirazona is a managerial or rank-and-file employee would require the Court to review the evidence that pertains to Tirazona's duties and obligations in the company. Also, in order to ascertain whether the breach of trust was clearly established against Tirazona, the Court will have to sift through and evaluate the respective evidence of the parties as well. These tasks are not for the Court to accomplish. The Court is not a trier of facts. It is not the function of this Court to analyze or weigh evidence all over again, unless there is a showing that the findings of the lower court are totally devoid of support or are glaringly erroneous as to constitute palpable error or grave abuse of discretion.

5. POLITICAL LAW; CONSTITUTIONAL LAW; DUE PROCESS IN ADMINISTRATIVE PROCEEDINGS; TWIN REQUIREMENTS THEREOF; PRESENT. — Procedural due process is simply defined as giving an opportunity to be heard before judgment is rendered. The twin requirements of notice and hearing constitute the essential elements of due process, and neither of those elements can be eliminated without running afoul of the constitutional guaranty. The employer must furnish the employee two written notices before termination may be effected. The first notice apprises the employee of the particular acts or omissions for which his dismissal is sought, while the second notice informs the employee of the employer's decision to dismiss him. It is fairly obvious in this case that Tirazona was served with the required twin notices. The first was embodied in the Notice of Charge dated 25 March 2002 where PET informed Tirazona that it was considering her termination from employment and required her to submit a written explanation. In the said Notice, PET apprised Tirazona of the ground upon which it was considering her dismissal: (1) her letter that contained false accusations against the company, and (2) her demand for two million pesos in damages, with a threat of a lawsuit if the said amount was not paid. The Notice of Termination dated 22 April 2002 given to Tirazona constitutes the second notice whereby the company informed her that it found her guilty of breach of trust warranting her dismissal from service.

APPEARANCES OF COUNSEL

Law Firm of Lapeña & Associates for petitioner.
Jimenez Gonzales Liwanag Bello Valdez Caluya & Fernandez for respondents.

D E C I S I O N

CHICO-NAZARIO, *J.*:

Assailed in this Special Civil Action for *Certiorari*[1] under Rule 65 of the Rules of Court are the Decision[2] and Resolution[3] of the Court of Appeals dated 24 May 2005 and 7 September 2005, respectively, in CA-G.R. SP No. 85065. The appellate court's Decision dismissed petitioner Ma. Wenelita Tirazona's Special Civil Action for *Certiorari* and affirmed the Decision[4] dated 30 January 2004 of the National Labor Relations Commission (NLRC) in NLRC CA No. 034872-03, which ruled that petitioner's dismissal from employment was legal; and its Resolution which denied petitioner's Motion for Reconsideration.

The factual and procedural antecedents of the case are as follows:

Private respondent Philippine EDS-Techno Services Inc. (PET) is a corporation duly registered under Philippine laws and is engaged in the business of designing automotive wiring harnesses for automobile manufacturers. Private respondents Ken Kubota, Mamoru Ono and Junichi Hirose are all Japanese nationals, the first being the President and the latter two being the directors of PET.

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[1] *Rollo*, pp. 8-18; dated 5 December 2005.

[2] Penned by Associate Justice Bienvenido L. Reyes with Associate Justices Godardo A. Jacinto and Rosalinda Asuncion-Vicente, concurring; *id*. at 20-46.

[3] *Id*. at 47-49.

[4] CA *rollo*, pp. 25-35.

On 21 July 1999, PET employed Ma. Wenelita S. Tirazona (Tirazona) as Administrative Manager. Being the top-ranking Filipino Manager, she acted as the liaison between the Japanese management and the Filipino staff.

On 15 January 2002, Fe Balonzo, a rank-and-file employee, wrote a letter[5] that was addressed to nobody in particular, but was later acquired by PET management. In her letter, Balonzo complained that Tirazona humiliated her while she was reporting back to work after recuperating from a bout of tuberculosis. Balonzo explained that Tirazona insinuated, in a manner loud enough to be heard from the outside, that Balonzo still had the disease. This allegedly occurred despite Balonzo's possession of a medical clearance that proved her fitness to return to work. Balonzo thus requested that the necessary action be undertaken to address the said incident.

Upon receiving the letter, the PET management directed Tirazona to file her comment. Tirazona replied accordingly in a letter[6] wherein she denied the accusations against her. Tirazona stated that her only intention was to orient Balonzo about the latter's rights as a sick employee, *i.e.*, that under the law, if the latter planned to resign, the company can give her separation pay. Tirazona likewise asked for an independent investigation and threatened to file a libel case against Balonzo for allegedly trying to destroy her reputation and credibility.

After weighing the situation, PET director Ono sent a memorandum to Tirazona, which reads:

February 8, 2002

To: Mrs. W. Tirazona
Re: Letter-Complaint of Fe S. Balonzo

This is to advise you that Management is satisfied that you did not intend to humiliate or embarrass Ms. Balonzo during the incident on January 14, 2002. It also appreciates the concern you profess for the welfare of PET employees.

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[5] *Id*. at 91.

[6] *Id*. at 92-94.

Nonetheless, Management finds your handling of the situation less than ideal. Considering the sensitive nature of the issue, a little more circumspection could have readily avoided the incident which it cannot be denied caused unnecessary discomfort and hurt feelings to Ms. Balonzo. Certainly, you could have discussed the matter in private and allowed her to first deliver her piece rather than pre-empt her declaration. As it turned out, your assumption (that Ms. Balonzo would request for a leave extension) was in fact wrong and she had a medical certificate attesting her fitness to return to work.

Management therefore would like to remind you of the high expectations of your position.

Management considers this matter closed, and finds it appropriate to convey to you that it does not view with favor your notice to file legal action. Management believes that you share the idea that issues regarding employee relations are best threshed out within the Company. Resorting to legal action is unlikely to solve but on the contrary would only exacerbate such problems.

We trust that, after emotions have calmed down, you would still see it that way.

(Sgd.)
Mamoru Ono
Director[7]

On 6 March 2002, Tirazona's counsels sent demand letters[8] to PET's business address, directed separately to Ono and Balonzo. The letter to Ono states:

February 27, 2002

MR. MAMORU ONO
Director
PET, Inc.
20/F 6788 Ayala Avenue
Oledan Square, Makati City

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[7] Records, p. 62.

[8] *Id*. at 63.

Dear Mr. Ono:

We are writing in [sic] behalf of our client, **Ms. MA. WENELITA S. TIRAZONA**, Administrative Manager of your corporation.

We regret that on February 8, 2002, you delivered to our client a letter containing among others, your conclusion that Ms. Tirazona was guilty of the unfounded and baseless charges presented by Ms. Fe Balonzo in her letter-complaint dated January 15, 2002. You may please recall that in Ms. Tirazona's letter to Mr. Junichi Hirose, she presented point by point, her side on the allegations made by the complainant. In the same letter, Ms. Tirazona requested for an independent investigation of the case in order to thresh out all issues, ferret out the truth and give her the opportunity to be heard and confront her accuser. These were all denied our client.

As a result of the foregoing, Ms. Tirazona's constitutional right to due process was violated and judgment was rendered by you on mere allegations expressed in a letter-complaint to an unknown addressee.

Considering the position and stature of Mrs. Tirazona in the community and business circles, we are constrained to formally demand payment of ₱2,000,000.00 in damages, injured feelings, serious anxiety and besmirched reputation that she is now suffering.

We are giving you five (5) days from receipt hereof to make favorable response, otherwise, much to our regret, we will institute legal procedures to protect our client's interests.

Please give this matter the attention it deserves.

Very truly yours,

PRINCIPE, VILLANO, VILLACORTA & CLEMENTE
By:

(Sgd.)
PEDRO S. PRINCIPE

(Sgd.)
GLICERIO E. VILLANO

The letter sent to Balonzo likewise sought the same amount of damages for her allegedly baseless and unfounded accusations against Tirazona.

Because of Tirazona's obstinate demand for compensation, PET sent her a Notice of Charge,[9] which informed her that they were considering her termination from employment by reason of serious misconduct and breach of trust. According to the management, they found her letter libelous, since it falsely accused the company of finding her guilty of the charges of Balonzo and depriving her of due process.

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[9] The Notice of Charge states:

To: Ma. Wenelita S. Tirazona
From: Management
Re: Notice of Charge
Date: March 25, 2002

This is to inform you that Management is considering your termination from employment, for serious misconduct and breach of trust, arising from your counsel's demand letter dated 27 February 2002 x x x wherein you falsely accused the Company of:

- Finding you guilty of the charges laid by Ms. Fe S. Balonzo
- Depriving you of due process

-and demanding from the Company ₱2,000,000.00 in damages with threat of an inevitable lawsuit if your baseless demands are not satisfied within five (5) days from receipt of the demand letter.

The Company finds your letter libelous. Your rash action is a serious misconduct and an open display of disloyalty. Being part of the management, you as an officer is [sic] required not to assert any adverse interest against the Company. Your position demands utmost trust and confidence. Your ill-advised action is a flagrant breach of your fiduciary duty and is highly prejudicial to the Company's interest.

You are hereby given thirty six (36) hours from receipt of this memo to submit a written explanation and justify why your services should not be terminated for serious misconduct and breach of trust.

Be guided accordingly.

(SGD.) MAMORO ONO
(DIRECTOR)

Noted by:

(SGD.) Mr. Ken Kubota
President (Records, p. 67.)

On 26 March 2002, Tirazona explained in a letter[10] that her counsels' demand letter was brought about by the denial of her repeated requests for reinvestigation of the Balonzo incident, and that the same was personally addressed to Mamoru Ono and not to the company. She also reiterated her request for an investigation and/or an open hearing to be conducted on the matter.

The PET management replied[11] that the Balonzo incident was already deemed a closed matter, and that the only issue for consideration was Tirazona's "ill-advised response to the Management's disposition to the Fe Balonzo incident," for which an administrative hearing was scheduled on 4 April 2002.

On 3 April 2002, Tirazona submitted a written demand[12] to PET that the Balonzo incident be included in the scheduled hearing. She further stated that since the management had already prejudged her case, she would only participate in the proceedings if the investigating panel would be composed of three employees, one each from the rank-and-file, supervisory, and managerial levels, plus a representative from the Department of Labor and Employment (DOLE).

The PET management rejected Tirazona's demands in a letter[13] and informed her that the hearing was reset to 10 April 2002, which would be presided by PET's external counsel.

On 10 April 2002, Tirazona and her counsel did not appear at the administrative hearing. The PET management informed them through a memorandum[14] dated 12 April 2002 that the hearing was carried out despite their absence. Nevertheless, Tirazona was granted a final chance to submit a supplemental written explanation or additional documents to substantiate her claims.

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[10] CA *rollo*, pp. 64-65.

[11] *Id*. at 246-249.

[12] *Id*. at 250.

[13] *Id*. at 251.

[14] *Id*. at 253.

Tirazona's written explanation[15] dated 17 April 2002 merely reiterated, without further details, her previous claims, to wit: that Balonzo's charges were unfounded and baseless; that she had been denied due process; and that she would not submit herself to an investigating panel that had already prejudged her case. Tirazona also stated that her claim for damages would be justified at the proper forum, and that she admitted to reading a confidential letter addressed to PET directors Ono and Fukuoka, containing the legal opinion of PET's counsel regarding her case.

After finding the explanations unsatisfactory, PET sent Tirazona a Notice of Termination,[16] which found her guilty of serious misconduct and breach of trust because of her demand against the company and her invasion of PET's right to privileged communication.

Tirazona then instituted with the NLRC a complaint for illegal dismissal, non-payment of salaries, and damages against PET, docketed as NLRC-CA No. 034872-03.

In the Decision[17] dated 22 January 2003, Labor Arbiter Veneranda C. Guerrero ruled in favor of Tirazona, holding that the latter's termination from employment was illegal.

The Arbiter declared that there was no breach of trust when Tirazona sent the demand letter, as the same was against Ono in his personal capacity, not against the company. The decision also ruled that PET failed to discharge the burden of proving that the alleged breach of trust was fraudulent and willful, and that the company was careless in handling its communications. The Arbiter further stated that Tirazona was deprived of her right to due process when she was denied a fair hearing.

On appeal by PET, the NLRC reversed the rulings of the Labor Arbiter in a Decision dated 30 January 2004, the dispositive portion of which reads:

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[15] *Id*. at 242.

[16] *Id*. at 61.

[17] *Id*. at 95-104.

WHEREFORE, judgment is hereby rendered SETTING ASIDE the Decision of the Labor Arbiter dated January 27, 2003 and a new one is entered DISMISSING the complaint for lack of merit.[18]

Contrary to the Labor Arbiter's findings, the NLRC concluded that Tirazona's termination from employment was in accordance with law. It ruled that Tirazona's demand letter addressed to Ono constituted a just cause for dismissal, as the same was "an openly hostile act" by a high-ranking managerial employee against the company.[19] The NLRC likewise found that PET complied with the notice and hearing requirements of due process, inasmuch as Tirazona's demand for a special panel was without any legal basis. Furthermore, petitioner breached the company's trust when she read the confidential legal opinion of PET's counsel without permission.

The Motion for Reconsideration filed by Tirazona was denied by the NLRC in a Resolution dated 31 May 2004, the dispositive portion of which reads:

WHEREFORE, in view of the foregoing, Complainant-Appellee's Motion for Reconsideration is hereby DISMISSED for lack of merit and our Decision dated 30 January 2004 is thus AFFIRMED with finality.[20]

Aggrieved, Tirazona instituted with the Court of Appeals a Special Civil Action for *Certiorari* under Rule 65, alleging grave abuse of discretion on the part of the NLRC, docketed as CA-G.R. SP No. 85065.

In a Decision dated 24 May 2005, the appellate court affirmed the NLRC and ruled thus:

WHEREFORE, in consideration of the foregoing, the petition is perforce ***dismissed***.[21]

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[18] *Id*. at 34.

[19] *Id*. at 31.

[20] *Id*. at 42.

[21] *Id*. at 45.

Her Motion for Reconsideration having been denied by the appellate court in a Resolution dated 7 September 2005, Tirazona now impugns before this Court the Court of Appeals Decision dated 24 May 2005, raising the following issues:

I.

WHETHER THERE WAS BREACH OF TRUST ON THE PART OF PETITIONER TIRAZONA WHEN SHE WROTE THE TWO MILLION PESO DEMAND LETTER FOR DAMAGES, WARRANTING HER DISMISSAL FROM EMPLOYMENT.

II.

WHETHER DUE PROCESS WAS SUFFICIENTLY AND FAITHFULLY OBSERVED BY RESPONDENTS IN THE DISMISSAL OF PETITIONER TIRAZONA FROM EMPLOYMENT.

In essence, the issue that has been brought before this Court for consideration is whether or not Tirazona was legally dismissed from employment.

Prefatorily, the Court notes that Tirazona elevated her case to this Court via a Petition for *Certiorari* under Rule 65 of the Rules of Court. The appropriate remedy would have been for Tirazona to file an appeal through a Petition for Review on *Certiorari* under Rule 45.

For a Petition for *Certiorari* under Rule 65 of the Rules of Court to prosper, the following requisites must be present: (1) the writ is directed against a tribunal, a board or an officer exercising judicial or quasi-judicial functions: (2) such tribunal, board or officer has acted without or in excess of jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction; and (3) there is no appeal or any plain, speedy and adequate remedy in the ordinary course of law.[22]

There is grave abuse of discretion "when there is a capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction, such as where the power is exercised in an arbitrary

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[22] *Manila Memorial Park Cemetery, Inc. v. Panado,* G.R. No. 167118, 15 June 2006, 490 SCRA 751, 762.

or despotic manner by reason of passion or personal hostility, and it must be so patent and gross so 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."[23]

The Petition for *Certiorari* shall be filed not later than sixty (60) days from notice of the judgment, order or resolution. In case a motion for reconsideration is timely filed, the sixty (60)-day period shall be counted from notice of the denial of the said motion.[24]

On the other hand, Rule 45 of the Rules of Court pertains to a Petition for Review on *Certiorari* whereby "a party desiring to appeal by *certiorari* from a judgment or final order or resolution of the Court of Appeals x x x may file with the Supreme Court a verified petition for review on *certiorari*. The petition shall raise only questions of law which must be distinctly set forth."[25]

The petition shall be filed within fifteen (15) days from notice of the judgment or final order or resolution appealed from, or of the denial of the petitioner's motion for new trial or reconsideration filed in due time after notice of the judgment.[26]

In the present case, the assailed Decision is the dismissal by the Court of Appeals of Tirazona's Petition for *Certiorari* under Rule 65. Said Decision partakes of the nature of a judgment or final order, thus, is reviewable only through an appeal by *certiorari* under Rule 45.

As aptly declared by the Court in *National Irrigation Administration v. Court of Appeals*[27]:

[s]ince the Court of Appeals had jurisdiction over the petition under Rule 65, **any alleged errors committed by it in the exercise of its**

[23] *Id.* at 762-763.

[24] RULES OF COURT, Rule 65, Sec. 4.

[25] RULES OF COURT, Rule 45, Sec. 1.

[26] RULES OF COURT, Rule 45, Sec. 2.

[27] 376 Phil. 362, 371 (1999) cited in *San Miguel Corporation v. Court of Appeals*, 425 Phil. 951, 955 (2002).

jurisdiction would be errors of judgment which are reviewable by timely appeal and not by a special civil action of *certiorari*. If the aggrieved party fails to do so within the reglementary period, and the decision accordingly becomes final and executory, he cannot avail himself of the writ of *certiorari*, his predicament being the effect of his deliberate inaction. [Emphasis ours.]

Even just a cursory glance at the issues raised by Tirazona before this Court readily reveals that these pertain to purported errors of judgment committed by the appellate court in its appreciation of the allegations, evidence, and arguments presented by the parties. There is no question here of the Court of Appeals acting on Tirazona's Petition in CA-G.R. No. 85065 without or in excess of jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction.

A review of the *rollo* of the Petition at bar divulges even further that Tirazona's resort to a wrong remedy was not an innocent mistake but a deliberate choice.

On 5 October 2005, Tirazona filed with this Court a Petition for Extension of Time to File a **Petition for Review on *Certiorari***.[28] Tirazona stated therein that she received the notice of the Court of Appeals Resolution denying her Motion for Reconsideration on 23 September 2005. Since she only had fifteen (15) days after the said date to file a Petition for Review on *Certiorari*, or until 8 October 2005, Tirazona prayed for an extension of thirty (30) days, with her counsel citing extreme pressures of work.

In a Resolution[29] dated 19 October 2005, the Court granted Tirazona's Motion for Extension. The extended period was to end on **7 November 2005**. However, Tirazona failed to file a Petition for Review on *Certiorari* within the said period. Instead, she filed the present Petition for *Certiorari* on 5 December 2005, seventy-three (73) days after notice of the Court of Appeals Resolution denying her Motion for Reconsideration.

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[28] *Rollo*, pp. 3-4.

[29] *Id.* at 6.

From the foregoing, it is fairly obvious that Tirazona was aware that she was supposed to file an appeal through a Petition for Review on *Certiorari* under Rule 45. That she filed the instant Petition for *Certiorari* under Rule 65 and only after an inexplicably long period of time leads to the inescapable conclusion that the same was merely an afterthought, nothing more than a desperate attempt to revive a lost appeal.

The special civil action of *certiorari* under Rule 65 is an independent action that cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that under Rule 45, especially if such loss or lapse was occasioned by one's own neglect or error in the choice of remedies.[30] It also bears to stress the well-settled principle that the remedies of appeal and *certiorari* are mutually exclusive and not alternative or successive. Under Rule 56, Sec. 5(f) of the Revised Rules of Court, a wrong or inappropriate mode of appeal merits an outright dismissal.[31]

Tirazona, in her Reply[32] before this Court, even admits that although the instant Petition is one of special civil action of *certiorari* under Rule 65, her petition is in reality an appeal under Rule 45 as her petition raises pure questions of law. Tirazona herself acknowledges the formal defects of her own Petition and attributes the same to the haste and inadvertence of her former counsel, who allegedly prepared the instant Petition without her participation.[33] She thus urges this Court to suspend the application of its own rules on grounds of equity and substantial justice, considering that it is her employment that is at stake in this case.

In this regard, it needs to be emphasized that before the Court may treat the present petition as having been filed under

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[30] *National Irrigation Administration v. Court of Appeals*, *supra* note 27, cited in *Chua v. Santos*, G.R. No. 132467, 18 October 2004, 440 SCRA 365, 373.

[31] *Chua v. Santos*, *id*.

[32] *Rollo,* pp. 121-123.

[33] *Id*. at 122.

Rule 45, the same must comply with the reglementary period for filing an appeal. This requirement is not only mandatory but also jurisdictional such that failure to do so renders the assailed decision final and executory, and deprives this Court of jurisdiction to alter the final judgment, much less to entertain the appeal.[34] Since the instant petition was filed after the lapse of the extended period for filing an appeal, the same should be dismissed outright.

Nevertheless, the Court finds it essential that we discuss the case on its merits, bearing in mind that the paramount consideration in this case is an employee's right to security of tenure, and in order to provide Tirazona the amplest opportunity to know how the Court arrived at a proper and just determination of her case.

Even if the Court were to ignore the conspicuous procedural defects committed by Tirazona and treat her Petition as an appeal under Rule 45, it still finds that the Petition must be denied for lack of merit.

Petitioner contends that, contrary to the findings of the Court of Appeals, her dismissal from employment was illegal for having lacked both a legal basis and the observance of due process.

In employee termination cases, the well-entrenched policy is that no worker shall be dismissed except for a just or authorized cause provided by law and after due process. Clearly, dismissals have two facets: first, the legality of the act of dismissal, which constitutes substantive due process; and second, the legality in the manner of dismissal, which constitutes procedural due process.[35]

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[34] *People v. Sandiganbayan,* G.R. No. 156394, 21 January 2005, 449 SCRA 205, 217.

[35] *Shoemart, Inc. v. National Labor Relations Commission*, G.R. No. 74229, 11 August 1989, 176 SCRA 385, 390, cited *in Asian Construction and Development Corporation v. National Labor Relations Commission,* G.R. No. 142407, 12 March 2007.

Under Article 282(c)[36] of the Labor Code, loss of trust and confidence is one of the just causes for dismissing an employee. It is an established principle that loss of confidence must be premised on the fact that the employee concerned holds a position of trust and confidence. This situation obtains where a person is entrusted with confidence on delicate matters, such as care and protection, handling or custody of the employer's property. But, in order to constitute a just cause for dismissal, the act complained of must be "work-related" such as would show the employee concerned to be unfit to continue working for the employer. Besides, for loss of confidence to be a valid ground for dismissal, such loss of confidence must arise from particular proven facts.[37]

Tirazona claims that her demand letter was merely an expression of indignation by a disgruntled employee against a director, not against the company and, by itself, cannot constitute a breach of trust and confidence. The company's notice of charge allegedly insinuated Tirazona's guilt in the Balonzo incident; hence, the need to defend herself. Tirazona likewise asserts that she is an ordinary rank-and-file employee as she is not vested with the powers and prerogatives stated in Article 212(m)[38] of the Labor Code. As such, her alleged hostility towards her co-workers and the PET management is not a violation of trust and confidence that would warrant her termination from employment.

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[36] Art. 282. TERMINATION BY EMPLOYER. – An employer may terminate an employment for any of the following causes:

x x x x x x x x x

c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative.

[37] *Jardine Davies, Inc. v. National Labor Relations Commission*, 370 Phil. 310, 318-319 (1999).

[38] Art. 212(m) partially states:

"Managerial employee" is one who is vested with powers or prerogatives to lay down and execute management policies and/or to hire, transfer, suspend, lay-off, recall, discharge, assign or discipline employees.

At the outset, the Court notes that the issues set forth above are factual in nature. As the Court is asked to consider the instant Petition as an appeal under Rule 45, then only pure questions of law will be entertained.[39]

A question of law arises when there is doubt as to what the law is on a certain state of facts, while there is a question of fact when the doubt arises as to the truth or falsity of the alleged facts. For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact.[40]

In the instant case, Tirazona would have the Court examine the actual wording, tenor, and contextual background of both her demand letter and the PET's notice of charge against her. Similarly, the determination of whether Tirazona is a managerial or rank-and-file employee would require the Court to review the evidence that pertains to Tirazona's duties and obligations in the company. Also, in order to ascertain whether the breach

[39] The rule that only questions of law may be raised in a petition for review under Rule 45 admits of certain exceptions, though none of which are present in the instant petition, namely: (1) the conclusion is a finding grounded entirely on speculation, surmise and conjecture; (2) the inference made is manifestly mistaken; (3) there is grave abuse of discretion; (4) the judgment is based on a misapprehension of facts; (5) the findings of fact are conflicting; (6) the CA went beyond the issues of the case and its findings are contrary to the admissions of both appellant and appellees; (7) the findings of fact of the CA are contrary to those of the trial court; (8) said findings of fact are conclusions without citation of specific evidence on which they are based; (9) the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondents; and (10) the findings of fact of the CA are premised on the supposed absence of evidence and contradicted by the evidence on record. [*Rosario v. PCI Leasing and Finance, Inc.*, G.R. No. 139233, 11 November 2005, citing *Sarmiento v. Court of Appeals*, 353 Phil. 834, 846 (1998)].

[40] *Velayo-Fong v. Velayo*, G.R. No. 155488, 6 December 2006, 510 SCRA 320, 329-330, cited in *Binay v. Odeña*, G.R. No. 163683, 8 June 2007, 524 SCRA 248, 255-256.

of trust was clearly established against Tirazona, the Court will have to sift through and evaluate the respective evidence of the parties as well. These tasks are not for the Court to accomplish.

The Court is not a trier of facts. It is not the function of this Court to analyze or weigh evidence all over again, unless there is a showing that the findings of the lower court are totally devoid of support or are glaringly erroneous as to constitute palpable error or grave abuse of discretion.[41]

In its assailed decision, the Court of Appeals affirmed the ruling of the NLRC and adopted as its own the latter's factual findings. Long established is the doctrine that findings of fact of quasi-judicial bodies like the NLRC are accorded with respect, even finality, if supported by substantial evidence. When passed upon and upheld by the Court of Appeals, they are binding and conclusive upon the Supreme Court and will not normally be disturbed.[42] Though this doctrine is not without exceptions,[43] the Court finds that none are applicable to the present case.

Thus, on the matter of Tirazona's demand letter, this Court is bound by the following findings of the Court of Appeals:

> Clearly, petitioner Tirazona's letter to respondent Ono dated 27 February 2002, as DIRECTOR of PET was addressed to an officer and representative of the corporation. The accusations in the aforesaid demand letter were directed against respondent Ono's *official act* as a representative of respondent PET. Suffice it to stress, an attack on the integrity of his (Ono) corporate act is necessarily aimed at respondent PET because a corporation can only act through its officers, agents and representatives.

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[41] *De Jesus v. Court of Appeals*, G.R. No. 127857, 20 June 2006, 491 SCRA 325, 333, citing *Potenciano v. Reynoso*, 449 Phil. 396, 405 (2003).

[42] *San Juan De Dios Educational Foundation Employees Union-Alliance of Filipino Workers v. San Juan De Dios Educational Foundation, Inc.*, G.R. No. 143341, 28 May 2004, 430 SCRA 193, 205-206.

[43] *Almendrala v. Ngo*, G.R. No. 142408, 30 September 2005, 471 SCRA 311, 322.

x x x x x x x x x

A thorough and judicious examination of the facts and evidence obtaining in the instant case as could be found in the records, would clearly show that petitioner Tirazona has absolutely no basis for a ₱2 million demand, coupled with lawsuit if the same was not paid within the five (5) days [sic] period. Her justification for the demand of money is that she was allegedly found by the respondent PET through respondent Ono guilty of the charges filed by Ms. Balonzo. As the records would indubitably show, petitioner Tirazona was never charged of any offense with respect to the Fe Balonzo's [sic] incident. She was never issued a Notice of Charge, much less a Notice of Disciplinary Action. What was issued to her by respondent Ono in his letter x x x was a gentle and sound reminder to be more circumspect in handling the incident or situation like this [sic]. As fully evidenced in the last paragraph of the said letter, it states that:

x x x x x x x x x

> Management considers this matter closed, and finds it appropriate to convey to you that it does not view with favor your notice to file legal action. Management believes that you share the idea that issues regarding employee relations are best threshed out within the Company. Resorting to legal action is unlikely to solve but on the contrary would only exacerbate such problems.

But for reasons only known to petitioner Tirazona, she treated respondent Ono's letter as an affront to her honor and dignity. This, instead of seeking a dialogue with respondent PET on her felt grievance, petitioner Tirazona through her lawyer sent the questioned demand letter to respondent Ono. Suffice it to state, this act of petitioner bared animosity in the company and was definitely not a proper response of a top level manager like her over a trivial matter.

x x x x x x x x x

In fine, the confluence of events and circumstances surrounding the petitioner Tirazona's actions or omissions affecting her employer's rights and interest, would undoubtedly show that she is no longer worthy of being a recipient of the trust and confidence of her employer. x x x. [44]

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[44] *Rollo*, pp. 38-44.

Likewise conclusive upon this Court is the Court of Appeals' pronouncement that Tirazona is in fact a managerial employee, to wit:

> The records would indubitably show that it is only now that petitioner Tirazona is asserting that she is not a managerial employee of respondent PET. From the very start, her dismissal was premised on the fact that she is a managerial and confidential employee, and she never denied that fact. It was never an issue at all before the Labor Arbiter and the public respondent NLRC. Therefore, she is estopped to claim now that she is [just a] rank and file employee of respondent PET, especially that she herself admitted in her pleading that she is a managerial employee:
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> xxx xxx xxxx
>
> If the respondent Company has to protect Respondent Mamoru Ono, the Complainant [petitioner] has also the right to be protected from the baseless accusations of a Rank and File Employee **for she [petitioner] is a part of the management like Mr. Mamoru Ono**" (par. 5, Complainant's Rejoinder [to Respondent's Reply] dated 2 September 2002 (note: unattached to the petitioner [sic]) [attached as Annex "1" hereof]. (p. 263, *Rollo*).[45]

Tirazona next argues that she was deprived of procedural due process as she was neither served with two written notices, nor was she afforded a hearing with her participation prior to her dismissal.

Tirazona's arguments are baseless.

Procedural due process is simply defined as giving an opportunity to be heard before judgment is rendered. The twin requirements of notice and hearing constitute the essential elements of due process, and neither of those elements can be eliminated without running afoul of the constitutional guaranty.[46]

The employer must furnish the employee two written notices before termination may be effected. The first notice apprises the

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[45] *Id*. at 39-40.

[46] *Cruz v. Coca-Cola Bottlers Phils., Inc.*, G.R. No. 165586, 15 June 2005, 460 SCRA 340, 351.

employee of the particular acts or omissions for which his dismissal is sought, while the second notice informs the employee of the employer's decision to dismiss him.[47]

It is fairly obvious in this case that Tirazona was served with the required twin notices. The first was embodied in the Notice of Charge dated 25 March 2002 where PET informed Tirazona that it was considering her termination from employment and required her to submit a written explanation. In the said Notice, PET apprised Tirazona of the ground upon which it was considering her dismissal: (1) her letter that contained false accusations against the company, and (2) her demand for two million pesos in damages, with a threat of a lawsuit if the said amount was not paid. The Notice of Termination dated 22 April 2002 given to Tirazona constitutes the second notice whereby the company informed her that it found her guilty of breach of trust warranting her dismissal from service.

Equally bereft of merit is Tirazona's allegation that she was not given the benefit of a fair hearing before she was dismissed.

It needs to be pointed out that it was Tirazona herself and her counsel who declined to take part in the administrative hearing set by PET 10 April 2002. Tirazona rejected the company's appointment of its external counsel as the investigating panel's presiding officer, because her own demands on the panel's composition were denied. As correctly held by the NLRC and the Court of Appeals, Tirazona's stance is without any legal basis. On the contrary, this Court's ruling in *Foster Parents Plan International/Bicol v. Demetriou*[48] is controlling:

> The right to dismiss or otherwise impose disciplinary sanctions upon an employee for just and valid cause, pertains in the first place to the employer, as well as the authority to determine the existence of said cause in accordance with the norms of due process. In the

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[47] *Pono v. National Labor Relations Commission*, 341 Phil. 615, 621 (1997), cited in *Landtex Industries v. Court of Appeals*, G.R. No. 150278, 9 August 2007, 529 SCRA 631, 652.

[48] 226 Phil. 421, 426 (1986).

very nature of things, any investigation by the employer of any alleged cause for disciplinary punishment of an employee will have to be **conducted by the employer himself or his duly designated representative; and the investigation cannot be thwarted or nullified by arguing that it is the employer who is accuser, prosecutor and judge at the same time.** x x x Of course, the decision of the employer meting out sanctions against an employee and the evidentiary and procedural bases thereof may subsequently be passed upon by the corresponding labor arbiter (and the NLRC on appeal) upon the filing by the aggrieved employee of the appropriate complaint. [Emphasis ours.]

This Court has held that there is no violation of due process even if no hearing was conducted, where the party was given a chance to explain his side of the controversy. What is frowned upon is the denial of the opportunity to be heard.[49] Tirazona in this case has been afforded a number of opportunities to defend her actions. Even when Tirazona failed to attend the scheduled hearing, PET still informed Tirazona about what happened therein and gave her the chance to submit a supplemental written explanation. Only when Tirazona again failed to comply with the same did PET terminate her employment.

As a final plea for her case, Tirazona asserts that her dismissal from employment was too harsh and arbitrary a penalty to mete out for whatever violation that she has committed, if indeed there was one.

Tirazona ought to bear in mind this Court's pronouncement in *Metro Drug Corporation v. NLRC*[50] that:

When an employee accepts a promotion to a managerial position or to an office requiring full trust and confidence, she gives up some of the rigid guaranties available to ordinary workers. Infractions which if committed by others would be overlooked or condoned or penalties

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[49] *Philippine Airlines, Inc. v. National Labor Relations Commission*, G.R. No. 87353, 3 July 1991, 198 SCRA 748, 761.

[50] 227 Phil. 121, 127 (1986), cited in *Villanueva v. National Labor Relations Commission (Third Division)*, 354 Phil. 1056, 1063 (1998).

mitigated may be visited with more severe disciplinary action. A company's resort to acts of self-defense would be more easily justified. x x x.

Tirazona, in this case, has given PET more than enough reasons to distrust her. The arrogance and hostility she has shown towards the company and her stubborn, uncompromising stance in almost all instances justify the company's termination of her employment. Moreover, Tirazona's reading of what was supposed to be a confidential letter between the counsel and directors of the PET, even if it concerns her, only further supports her employer's view that she cannot be trusted. In fine, the Court cannot fault the actions of PET in dismissing petitioner.

WHEREFORE, premises considered, the instant petition is hereby *DENIED* for lack of merit and the Decision of the Court of Appeals dated 24 May 2005 is hereby *AFFIRMED*. Costs against the petitioner.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Nachura, and *Reyes, JJ.,* concur.

THIRD DIVISION

[G.R. No. 170049. March 14, 2008]

GENEROSO A. JUABAN and FRANCIS M. ZOSA, *petitioners, vs.* **RENE ESPINA and CEBU DISCOVERY BAY PROPERTIES, INC.,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; PARTIES IN INTEREST. — Respondents' right to the subject properties is based on the 31 January 1997 Agreement to Sell and to Buy executed

between the Heirs of Bancale and respondent Espina. Hence, the said Agreement is the very source of the right, the violation of which constituted the cause of action in respondents' complaint for injunction before the court *a quo*. It was respondent Espina who entered into the Agreement, and his rights as a party to the said contract were not extinguished just because he designated his co-respondent CDPI as vendee of the subject properties, pursuant to the authority given to him in paragraph 5 thereof. Among respondent Espina's rights as a party to the Agreement is his right to the full realization of the purpose of the contract, which in this case, would be the transfer of the ownership of the subject properties from the Heirs of Bancale either to him or to his designated vendee. The public auction sale of the subject properties to petitioners would not only prevent the intended transfer of ownership under the Agreement, but would also render inutile respondent Espina's designation of respondent CDPI as a vendee. Moreover, it was undisputed that respondent Espina advanced ₱2,000.000 to the Heirs of Bancale, which formed part of the consideration for the ensuing sale of the subject properties. There was no proof that respondent Espina had already been reimbursed for the said amount. Having paid part of the purchase price for the subject properties, then respondent Espina has an interest therein.

2. ID.; ID.; FORUM SHOPPING; CERTIFICATE OF FORUM SHOPPING MAY BE SIGNED BY ONE OF THE PRINCIPAL PARTIES ONLY. — Having been established as a real party in interest, respondent Espina has not only the personality to file the complaint in Civil Case No. 4178-L, but also the authority to sign the certification against forum shopping as a plaintiff therein. We held in *Mendigorin v. Cabantog, Escorpizo v. University of Baguio* and *Condo Suite Club Travel, Inc. v. National Labor Relations Commission* that the certification against forum shopping must be signed by the *plaintiff or any of the principal parties* and not by counsel. The certificate against forum shopping is not rendered invalid by the absence of the signature of an authorized official of respondent CDPI. The signature of respondent Espina as one of the plaintiffs therein suffices.

3. ID.; ID.; ID.; FORUM SHOPPING AS A GROUND FOR DISMISSAL OF ACTIONS IS DISTINCT AND SEPARATE

FROM THE FAILURE TO SUBMIT A PROPER CERTIFICATE AGAINST FORUM SHOPPING. — Forum shopping exists where the elements of *litis pendentia* are present or where a final judgment in one case will amount to *res judicata* in the other. However, **forum shopping as a ground for the dismissal of actions is distinct and separate from the failure to submit a proper Certificate against Forum Shopping.** One need not be held liable for forum shopping for his complaint to be dismissed on the ground of an absence or a defect in the Certificate against Forum Shopping. Conversely, one can be liable for forum shopping regardless of the presence or absence of a Certification against Forum Shopping. The presence of a Certification in such a case would only have the effect of making the person committing forum shopping additionally liable for perjury. Thus, we held in *Spouses Melo v. Court of Appeals*: Indeed, compliance with the certification against forum shopping is separate from, and independent of, the avoidance of forum shopping itself. Thus, there is a difference in the treatment — in terms of imposable sanctions — between failure to comply with the certification requirement and violation of the prohibition against forum shopping. x x x.

4. ID.; APPEALS; THE DETERMINATION OF THE COURT OF APPEALS AS TO WHETHER AN APPEAL INVOLVES ONLY A QUESTION OF LAW OR BOTH QUESTIONS OF LAW AND FACT SHALL BE AFFIRMED. — In case of doubt, therefore, the determination of the Court of Appeals of whether an appeal involves only questions of law or both questions of law and fact shall be affirmed. As explained by the Court of Appeals, it was only after the appellate court's painstaking review of the facts surrounding the dispute that the "immoral, devious and patently illegal" acts which attended the transfer of the subject properties to petitioners were brought to light. This Court finds no error or grave abuse of discretion on the part of the Court of Appeals in making the aforesaid finding. No less than this Court, in the second case, A.M. No. P-02-1580, found that Sheriff Gato "showed manifest partiality in favor of Attys. Juaban and Zosa, giving them unwarranted benefit, advantage and preference and that, with evident bad faith, he caused undue injury to complainants [Espina and CDPI]." Irrefragably, respondents' appeal before the Court of Appeals involved not only questions of law, because for the determination thereof, the appellate court was first called upon

to make its own findings of facts which were significant to its complete and judicious resolution of the appeal.

5. ID.; EVIDENCE; JUDICIAL NOTICE; COURTS MAY TAKE JUDICIAL NOTICE OF PROCEEDINGS IN OTHER CASES THAT ARE CLOSELY RELATED TO THE MATTER IN CONTROVERSY; APPLICATION.— We find that the circumstances in Case No. 1 (Civil Case No. 2309-L) are too closely interwoven and so clearly interdependent with those in Case No. 3 (Civil Case No. 4178-L). Petitioners and respondents are claiming the very same subject properties. Case No. 3, the case at bar, calls for a determination of who has the superior right to the subject properties, petitioners or respondents. Petitioners are the ones who actually rely on Case No. 1 because their right to the subject properties is rooted in the proceedings therein. It should be recalled that they served as the counsels of the Heirs of Bacale in Case No. 1; they had the subject properties sold at a public auction to satisfy the award in their favor of attorney's fees; and they were the successful bidders at the auction. Petitioners cannot insist on their right to the subject properties, yet prevent the Court of Appeals from looking into the basis or source of said right, as well as the circumstances surrounding their acquisition of the same. They cannot invoke orders, rulings or findings of the trial court in Case No. 1 which are supportive of their right to the subject properties but suppress those which are damaging. Even assuming for the sake of argument that the proceedings in Case No. 1 cannot be stated in our narration of facts on the ground that said proceedings have not yet been terminated, there is certainly nothing that prevents us from consulting Case No. 2 (A.M. No. P-02-1580) wherein Sheriff Gato was suspended by this Court for acting with "grave abuse of official functions and manifest partiality amounting to grave misconduct and conduct prejudicial to the administration of justice" in selling to petitioners the subject properties at a public auction despite respondents' third-party claim. It bears to emphasize that Case No. 2 has already been decided with finality by this Court.

6. ID.; PLEADINGS AND PRACTICE; PRAYER; WHEN ISSUANCE OF A PERMANENT INJUNCTION IS DEEMED INCLUDED IN A PRAYER FOR SUCH ORDERS AS MAY BE JUST AND EQUITABLE UNDER THE CIRCUMSTANCES. — We hold that

the issuance by the Court of Appeals of a permanent injunction prohibiting petitioners from exercising acts of ownership is included in respondent's prayer for *such orders as may be just and equitable under the circumstances.* Such a prayer in the complaint justifies the grant of a relief not otherwise specifically prayed for. More importantly, we have ruled that it is the allegations in the pleading which determine the nature of the action and the Court shall grant relief warranted by the allegations and proof even if no such relief is prayed for. It is the material allegations of the fact in the complaint, not the legal conclusions made in the prayer, that determine the relief to which the plaintiff is entitled. If respondents were seeking to enjoin the sale of the subject properties, in effect, to prevent the transfer of ownership of the subject properties to others, then such prayer must be deemed to logically and reasonably include the prayer to enjoin others from exercising rights of ownership over the subject properties, for if the ownership of the subject properties are not transferred to any one else, then no one else has the right to exercise the rights appurtenant thereto.

APPEARANCES OF COUNSEL

Zosa & Quijano Law Offices for petitioners.
Castillo Lamantan Pantaleon & San Jose for respondents

D E C I S I O N

CHICO-NAZARIO, *J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court filed by the late Generoso A. Juaban (Juaban), now substituted by his heirs, and Francis M. Zosa (Zosa), assailing the Decision[1] dated 31 January 2005 of the Court of Appeals in CA-G.R. CV No. 60721, wherein the appellate court (1) made permanent the Writ of Preliminary Injunction it had earlier issued, enjoining petitioners from

[1] Penned by Associate Justice Vicente L. Yap with Associate Justices Mercedes Gozo-Dadole and Pampio A. Abarintos, concurring; *rollo*, pp. 24-31.

exercising rights of ownership over Lots No. 6720-C-2 and 6720-B-2, respectively, covered by Transfer Certificates of Title (TCTs) No. 36425 and No. 36426 of the Registry of Deeds of Lapu-Lapu City; (2) set aside the Decision of the Lapu-Lapu City Regional Trial Court (RTC), Branch 54, in Civil Case No. 4871-L which ordered the dismissal of the case; and (3) directed the RTC to undertake further proceedings in Civil Case No. 4871-L insofar as the issue of damages was concerned.

The present Petition stems from the proceedings in Civil Case No. 4871-L before the Lapu-Lapu City RTC, Branch 54, but is still directly related to two other cases, particularly, Civil Case No. 2309-L before the Lapu-Lapu RTC, Branch 27, and (2) A.M. No, P-02-1580 before this Court, which we cannot simply overlook. The direct antecedent of the present petition, Civil Case No. 4871-L before the Lapu-Lapu City RTC, Branch 54, is the last of the three cases we are presenting hereunder:

CASE No. 1: *Bancale v. Paras*, Civil Case No. 2309-L, Lapu-Lapu City RTC, Branch 27

The Heirs of Conrado Bancale filed before the Lapu-Lapu City RTC, Branch 27, a case for the recovery of the properties subject of the present Petition against a certain Eva Paras and other persons, which was docketed as Civil Case No. 2309-L. On 22 January 1996, petitioners Juaban and Zosa entered their appearance as counsels for the Heirs of Bancale.

The Heirs of Bancale later entered into a 31 January 1997 Agreement to Sell and to Buy with respondent Rene Espina (Espina), paragraph 5 of which states:

> That after the title is transferred to their names, the First Party [Heirs of Bancale] will execute an absolute deed of sale in favor of the second party [herein respondent Rene Espina] or whoever will be designated by him as the vendee for the consideration mentioned in paragraph 2 hereof. The amount of ₱2,000,000.00 advanced by the Second Party shall form part of said consideration.[2]

[2] *Rollo*, p. 142.

In accordance with said Agreement, respondent Espina paid petitioners ₱2,000,000.00 as an advance on the purchase price for the subject properties for the benefit of the Heirs of Bancale. Respondent Espina then designated the other respondent in this case, Cebu Bay Discovery Properties, Inc. (CDPI), as the vendee of the said properties.

Later, on 1 September 1997, respondents learned that petitioners, counsels Juaban and Zosa, had filed on 26 August 1997, at around 1:10 p.m., a Motion to fix their attorney's fees in Civil Case No. 2309-L. They also learned that the Lapu-Lapu City RTC, Branch 27, had issued an Order on the very same date of 26 August 1997, at around 2:20 p.m., granting the motion and fixing petitioners' attorney's fees in the amount of ₱9,000,000.00. The Heirs of Bancale filed a Motion for Reconsideration, but the same was denied in an Order dated 22 September 1997. The Heirs of Bancale received a copy of the Order denying their Motion for Reconsideration on 9 October 1997, after which they filed a Notice of Appeal dated 15 October 1997. However, without waiting for the expiration of the period to appeal of the Heirs of Bancale, the Lapu-Lapu City RTC, Branch 27, issued on 10 October 1997 an Order, which states:

> Considering that the Order of this Court dated 26 August 1997 has already become final and executory, not having been appealed, the motion for execution is hereby GRANTED.
>
> Let a Writ of Execution issue to satisfy the Order dated August 26, 1997 to enforce the same fixing the attorney's fees.
>
> Sheriff Juan A. Gato of this Branch is hereby directed to implement the Writ.[3]

The Heirs of Bancale filed another Motion for Reconsideration, this time, of the 10 October 1997 Order. Without directly ruling on this Motion, the Lapu-Lapu City RTC, Branch 27, issued on 14 October 1997 a Writ of Execution directing Sheriff Juan A. Gato (Gato) to satisfy the judgment for attorney's fees in the amount of ₱9,000,000.00 in favor of petitioners.

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[3] *Id*. at 195.

On 23 October 1997, Sheriff Gato served notice that the rights, shares, interests and participation of the Heirs of Bancale in the subject properties were being levied on execution to satisfy the Writ of Execution dated 14 October 1997. This was done despite the fact that the Writ of Execution issued by the trial court specifically directed that the attorney's fees were "to be taken from the money due from the buyer to the sellers under the agreement to buy and sell." Thereafter, Sheriff Gato issued a Notice of Sale on Execution dated 24 October 1997, announcing that the subject properties were to be sold at a public auction on 28 November 1997 at 2:00 p.m.

On 18 November 1997, respondents filed a Third Party Claim with the office of Sheriff Gato. On motion of petitioners, the Lapu-Lapu City RTC, Branch 27 fixed the sheriff's indemnity bond at ₱500,000.00.

On 28 November 1997, the subject properties were sold at public auction to petitioners for ₱9,000,000.00. The sale was registered on 3 December 1997.

On 1 December 1998, the Lapu-Lapu City RTC, Branch 27, under a new presiding judge, issued an Order resolving the Motions of the Heirs of Bancale seeking reconsideration of the previous Orders of the same court dated 22 September 1997 and 10 October 1997, and disposing thus:

> WHEREFORE, in view of the foregoing premises, this Court hereby sets aside the order issued in this case on October 10, 1997 which considered as final and executory the August 26, 1997 order and, in its stead, hereby gives due course to the appeal filed by the [Heirs of Bancale] from the order issued in this case on September 22, 1997, which in effect is an appeal from the said August 26, 1997 order.[4]

This 1 December 1998 Order is currently on appeal with the Nineteenth Division of the Court of Appeals, where it is docketed as CA- G.R. CEB CV No. 61696. The Court of Appeals Resolutions granting due course to said appeal were elevated

[4] *Id.* at 253.

via a Petition for *Certiorari*, docketed as G.R. No. 156011, still pending before this Court.

On 27 January 1999, petitioners wrote a letter to Sheriff Gato requesting him to execute a final deed of sale in their favor since no redemption of the subject properties was made. Sheriff Gato, in a letter dated 4 February 1999, answered that he no longer had any authority to issue the final deed of sale by virtue of the 1 December 1998 Order of the Lapu-Lapu City RTC, Branch 27. Nonetheless, in direct contravention of the contents of his letter, Sheriff Gato still transmitted to petitioners the final Deed of Conveyance without the approval of the trial court.

CASE No. 2: *Espina v. Gato*, A.M. No. P-02-1580, Supreme Court

The second case is an administrative complaint filed against Sheriff Gato by respondents, for allegedly acting with manifest bias and partiality in Civil Case No. 2309-L while it was still pending with the Lapu-Lapu City RTC, Branch 27. On 9 April 2003, this Court, speaking through Associate Justice Adolfo Azcuna, held:

> Firstly, the haste with which respondent levied upon the plaintiffs' property is unexplained. Furthermore, despite a third-party claim filed by complainant Espina for CDPI on November 18, 1997, the property was sold at public auction to Attys. Juaban and Zosa on November 28, 1997. It is true that sheriffs are responsible for the prompt service and implementation of writs and other orders issued by the court. They cannot afford to be inefficient in the work assigned to them. However, prompt service and efficiency should not be reasons to compromise the integrity of the court and the proper administration of justice. By the very nature of their duties, sheriffs perform a very sensitive function in the dispensation of justice. Thus, their conduct must, at all times, be above suspicion.
>
> Secondly, as stated earlier, the trial court ordered in the writ of execution that the ₱9 million to be paid to Attys. Juaban and Zosa as attorneys' fees "be taken from the money due from the buyer to the sellers under the agreement to buy and sell." Nevertheless, respondent levied upon the aforementioned property in blatant

disregard of this order. It is a well-settled rule that the duty of a sheriff is merely ministerial. When a writ is placed in the hands of the sheriff, it is his ministerial duty to proceed to execute in accordance with the terms of its mandate.

Thirdly, when Attys. Juaban and Zosa requested respondent to issue a Final Deed of Conveyance to them, respondent already knew that he no longer had authority to issue the same. He had already been appraised of the fact that a subsequent order, dated December 1, 1998, set aside the orders that were the basis of the writ of execution. This was admitted by him in his letter to Attys. Juaban and Zosa. Despite this knowledge, he still issued a final deed of sale in favor of the said lawyers without the approval of the court.

From all these facts, it is clear that respondent showed manifest partiality in favor of Attys. Juaban and Zosa, giving them unwarranted benefit, advantage and preference and that, with evident bad faith, he caused undue injury to complainants. Respondent thereby failed to comply with the strict standards required of public officers and employees.

WHEREFORE, respondent Sheriff Juan Gato is found GUILTY of grave abuse of official functions and manifest partiality amounting to grave misconduct and conduct prejudicial to the administration of justice, and is hereby SUSPENDED FROM SERVICE FOR THREE (3) MONTHS WITHOUT PAY, with the warning that repetition in the future of the same or similar misconduct will be dealt with more severely.[5]

CASE No. 3: *Espina v. Gato*, Civil Case No. 4871-L, Lapu-Lapu City RTC, Branch 54

On 28 November 1997, respondents filed a complaint for injunction and damages with an application for the issuance of a temporary restraining order to enjoin, at whatever stage, the sale in a public auction of the subject properties by Sheriff Gato. Said complaint was docketed as Civil Case No. 4871-L before the Lapu-Lapu City RTC, Branch 54. Respondents claim that they were, as of the institution of said case, unaware that the subject properties had already been sold at a public auction.

[5] *Espina v. Gato,* 449 Phil. 7,13-15 (2003).

On 19 December 1997, petitioners filed a Motion to Dismiss, which was granted by the Lapu-Lapu City RTC, Branch 54, in an Order dated 30 July 1998. On 2 September 1998, respondents filed a Notice of Appeal, which was given due course by the Lapu-Lapu City RTC, Branch 54, in an Order dated 7 September 1998.

Respondents' appeal before the Court of Appeals was docketed as CA-G.R. CV No. 60721. Respondents filed therein an Urgent Motion for Issuance of a Temporary Restraining Order and Writ of Preliminary Injunction dated 19 October 1998. On 26 November 1998, the Court of Appeals issued a Resolution granting respondents' application for the issuance of a temporary restraining order, restraining Sheriff Gato from consolidating ownership over the subject properties in favor of petitioners.

On 1 December 1998, respondents filed an Urgent Manifestation/Motion dated 1 December 1998 wherein they tendered the amount of ₱10,962,347.20 as payment for the redemption price of the subject properties, on the condition that if the application for preliminary injunction was denied or if the case is finally resolved in favor of petitioners, the said amount shall be considered as valid tender of the redemption price of the subject properties retroacting to the date of the filing of the Manifestation/Motion. In a comment dated 17 December 1998, petitioners interposed no objection to the deposit of said amount, but excepted to respondents' claim that the tender would stop the running of interest on the redemption price.

On 15 June 1999, the Court of Appeals issued a Resolution stating that respondents' application for a writ of preliminary injunction to enjoin Sheriff Gato from consolidating ownership over the subject properties in favor of petitioners had been rendered moot in view of the 1 December 1998 Order by the Lapu-Lapu City RTC, Branch 27, in Civil Case No. 2309-L setting aside its Order dated 10 October 1997 and giving due course to respondents' appeal therein.

In the meantime, petitioners were able to acquire the Definite Deed of Sale of the subject properties from Sheriff Gato. Hence, respondents filed a Motion for Clarification and/or Reconsideration to Cite [Petitioners] in Contempt. Petitioners, however, proceeded to register the Definite Deed of Sale issued by Sheriff Gato with the Register of Deeds in Lapu-Lapu City.

In a Resolution dated 30 September 1999, the Court of Appeals granted respondents' application for a writ of preliminary injunction and enjoined petitioners from exercising rights of ownership over the subject properties, such as alienating or encumbering the same.

On 31 January 2005, the Court of Appeals rendered the assailed Decision, the dispositive portion of which reads:

> WHEREFORE, the Order dated July 30 1998 issued by the Regional Trial Court, Branch 54, Lapu-Lapu City, in Civil Case No. 4871-L dismissing the complaint, is hereby REVERSED and SET ASIDE.
>
> The Writ of Preliminary Injunction issued pursuant to the Court's resolution promulgated on September 30, 1999, subject to the conditionalities therein, is hereby made PERMANENT.
>
> The Regional Trial Court, Branch 54, Lapu-Lapu City is directed to undertake further proceedings in Civil Case No. 4871-L sofar as the issue on damages is concerned.
>
> Costs against appellees.[6]

Petitioners' Motion for Reconsideration of the foregoing decision was denied in a Resolution dated 20 September 2005. Hence, the present recourse, wherein petitioners bring forth the following issues for this Court's consideration:

1. Whether or not Rene Espina had a cause of action to file the Injunction and Damages Case against petitioners;

2. Whether or not the trial court acquired jurisdiction over the complaint and over CDPI in said case;

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[6] *Rollo*, p. 30.

3. Whether or not only questions of law were raised in respondents' appeal, which allegedly required the Court of Appeals to dismiss said appeal;

4. Whether or not the Court of Appeals erred in taking cognizance of the records in another case which were not offered and admitted as evidence as basis for its findings of facts;

5. Whether or not the Court of Appeals erred in issuing a permanent injunction against petitioners considering that there was allegedly no prayer in the complaint therefor.

We find no merit in the present Petition.

Authority of Rene Espina to File the Case and the Jurisdiction of the RTC

Only respondent Espina signed the Verification and Certification of Non-Forum Shopping attached to the complaint in the third case, Civil Case No. 4178-L, before the Lapu-Lapu City RTC, Branch 54; and apart from him, there was no signatory of the Verification and Certification of Non-Forum Shopping on behalf of respondent CDPI. Petitioners claim that the complaint should have been dismissed by the trial court since (1) respondent Espina had no more personal interest in the case, having assigned his rights to the subject properties to respondent CDPI; and (2) there was no authority or board resolution authorizing respondent Espina to file the complaint on behalf of his co-respondent CDPI.

Sec. 2, Rule 3 of the Rules of Court requires that parties to a civil case must be real parties in interest, to wit:

SEC. 2. *Parties in interest*.—A real party in interest is the party who stands to be benefited or injured by the judgment in the suit, or the party entitled to the avails of the suit. Unless otherwise authorized by law or these Rules, every action must be prosecuted or defended in the name of the real party in interest.

We quote with approval the following ruling of the Court of Appeals on the issue of respondent Espina's personality to institute Civil Case No. 4178-L:

> The personality of appellant Rene Espina to sue in his personal capacity finds basis in the Agreement to Sell and to Buy. It is readily apparent in the Agreement that he has been designated as the "Second Party", in his personal capacity, and not as agent or representative of a corporate entity. On the other hand, the Deed of Sale which was subsequently executed, is based on the aforesaid Agreement. Therefore, there is no gainsaying that appellant Rene Espina has a personal interest in the case.[7]

Respondents' right to the subject properties is based on the 31 January 1997 Agreement to Sell and to Buy executed between the Heirs of Bancale and respondent Espina. Hence, the said Agreement is the very source of the right, the violation of which constituted the cause of action in respondents' complaint for injunction before the court *a quo*. It was respondent Espina who entered into the Agreement, and his rights as a party to the said contract were not extinguished just because he designated his co-respondent CDPI as vendee of the subject properties, pursuant to the authority given to him in paragraph 5 thereof. Among respondent Espina's rights as a party to the Agreement is his right to the full realization of the purpose of the contract, which in this case, would be the transfer of the ownership of the subject properties from the Heirs of Bancale either to him or to his designated vendee. The public auction sale of the subject properties to petitioners would not only prevent the intended transfer of ownership under the Agreement, but would also render inutile respondent Espina's designation of respondent CPDI as a vendee. Moreover, it was undisputed that respondent Espina advanced ₱2,000.000 to the Heirs of Bancale, which formed part of the consideration for the ensuing sale of the subject properties. There was no proof that respondent Espina had already been reimbursed for the said amount. Having paid part of the purchase price for the subject properties, then respondent Espina has an interest therein.

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[7] *Id.* at 30.

Having been established as a real party in interest, respondent Espina has not only the personality to file the complaint in Civil Case No. 4178-L, but also the authority to sign the certification against forum shopping as a plaintiff therein. We held in *Mendigorin v. Cabantog,*[8] *Escorpizo v. University of Baguio*[9] and *Condo Suite Club Travel, Inc. v. National Labor Relations Commission*[10] that the certification against forum shopping must be signed by the *plaintiff or any of the principal parties* and not by counsel.[11] We have also held in *Cua v. Vargas*,[12] that:

> The general rule is that the certificate of non-forum shopping must be signed by all the plaintiffs or petitioners in a case and the signature of only one of them is insufficient. Nevertheless, the rules on forum shopping, which were designed to promote and facilitate the orderly administration of justice, should not be interpreted with such absolute literalness as to subvert their own ultimate and legitimate objective. Strict compliance with the provisions regarding the certificate of non-forum shopping merely underscores its mandatory nature in that the certification cannot be altogether dispensed with or its requirements completely disregarded. Under justifiable circumstances, the Court has relaxed the rule requiring the submission of such certification considering that although it is obligatory, it is not jurisdictional.
>
> Thus, when all the petitioners share a common interest and invoke a common cause of action or defense, the signature of only one of them in the certification against forum shopping substantially complies with the rules.

In *Bases Conversion and Development Authority v. Uy*,[13] we held:

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[8] 436 Phil. 483, 491 (2002).

[9] 366 Phil. 166, 175 (1999).

[10] 380 Phil. 660, 667 (2000).

[11] See also *San Miguel Corporation v. Aballa*, G.R. No. 149011, 28 June 2005, 461 SCRA 392, 411; *Estribillo v. Department of Agrarian Reform*, G.R. No. 159674, 30 June 2006, 494 SCRA 218, 228.

[12] G.R. No. 156536, 31 October 2006, 506 SCRA 374, 389-390.

[13] G.R. No. 144062, 2 November 2006, 506 SCRA 524, 535-536.

Signature of a principal party sufficient for verification and certification

Anent the assailed verification and certification of non-forum shopping, it is shown that it substantially complied with the requirements of the Rules. Dismissal of appeals that is purely on technical grounds is frowned upon. While only petitioner Ramon P. Ereneta signed the verification and certification of non-forum shopping such is not fatal to the instant petition. In *Calo*, we agreed with petitioners that the signature of only one petitioner in the verification and certification of non-forum shopping satisfies the requirement under Section 2, Rule 42 of the Revised Rules on Civil Procedure. In *Calo*, we relied on *Condo Suite Club Travel, Inc., v. NLRC*— where we ruled that the certification of non-forum shopping may be signed not only by the petitioners but also any of the principal parties. In the instant case, Mr. Ramon P. Erenta, a member of the Investment Committee of the Heritage Park Management Corporation, is a principal party in the instant case having been impleaded in Civil Case No. 99-0425 pending in the RTC.

More so, in *Calo*, we also cited *Cavile, et al. v. Heirs of Clarita Cavile, et al.*— where we held that there was substantial compliance with the Rules when only petitioner Thomas George Cavile, Sr. signed in behalf of all the other petitioners of the certificate of non-forum shopping as the petitioners, being relatives and co-owners of the properties in dispute, shared a common interest in them, had a common defense in the complaint for partition, and filed the petition as a collective, raising only one argument to defend their rights over the properties in question. We reasoned that there was sufficient basis for Cavile, Sr., to speak for and in behalf of his co-petitioners, stating that they had not filed any action or claim involving the same issues in another court or tribunal, nor was there other pending action or claim in another court or tribunal involving the same issues. In the same vein, this is also true in the instant case where petitioners have filed their petition as a collective, sharing a common interest and having a common single defense.

Thus, the certificate against forum shopping is not rendered invalid by the absence of the signature of an authorized official of respondent CDPI. The signature of respondent Espina as one of the plaintiffs therein suffices.

Furthermore, the allegation concerning the defect in the Certificate against Forum Shopping was raised for the first time on appeal. The Motion to Dismiss filed by petitioners was based only on the following grounds:

> I — That the claim or demand set forth in the plaintiff's pleading has been paid, waived, abandoned, or otherwise extinguished;
>
> II — That there is another cause of action pending between the parties for the same cause;
>
> III — That plaintiff Rene Espina has no legal capacity to sue.[14]

The grounds alleged by petitioners and ruled upon by the trial court are thus (1) extinguishment, (2) *litis pendentia*, and (3) lack of legal capacity to sue on the part of Rene Espina. Of these grounds, only *litis pendentia* is *related* to the present allegation of petitioners concerning the defect in the Certification against Forum Shopping. Forum shopping exists where the elements of *litis pendentia* are present or where a final judgment in one case will amount to *res judicata* in the other. However, **forum shopping as a ground for the dismissal of actions is distinct and separate from the failure to submit a proper Certificate against Forum Shopping.** One need not be held liable for forum shopping for his complaint to be dismissed on the ground of an absence or a defect in the Certificate against Forum Shopping. Conversely, one can be liable for forum shopping regardless of the presence or absence of a Certification against Forum Shopping. The presence of a Certification in such a case would only have the effect of making the person committing forum shopping additionally liable for perjury. Thus, we held in *Spouses Melo v. Court of Appeals:*[15]

> Indeed, compliance with the certification against forum shopping is separate from, and independent of, the avoidance of forum shopping itself. Thus, there is a difference in the treatment — in terms of imposable sanctions — between failure to comply with the

[14] Petitioners' Motion to Dismiss, Records, p. 19.

[15] 376 Phil. 204, 213 (1999).

certification requirement and violation of the prohibition against forum shopping. x x x.

There being no allegation of a defect in the Certification against Forum Shopping on the part of respondents, neither the RTC nor the Court of Appeals was able to rule thereon. Both courts only ruled on the issue concerning *litis pendentia*, on which the Court of Appeals correctly held that:

Litis pendentia is not present in this case *vis-à-vis* Civil Case No. 2309-L. The requisites of *litis pendentia* are: (a) identity of parties, or at least such parties who represent the same interest in both actions; (b) identity of rights asserted and relief prayed for, the relief being founded on the same facts; (c) identity with respect to the two (2) preceding particulars in the two (2) cases is such that any judgment that may be rendered in the present case, regardless of which party is successful, would amount to *res judicata* in another case.

The appellants herein are not parties in Civil Case No. 2309-L. There is no identity of rights asserted and reliefs prayed for. Civil Case No. 2309 is for recovery of ownership and possession; while the instant case is for injunction and damages. The judgment in one will not be a bar to the other case. These cases were conjoined only because of the incident in Civil Case No. 2309-L, *i.e*. the fixing of the attorney's fees and the subsequent execution on the subject properties which were, in the meantime, sold to and purchased by the appellants pursuant to an Agreement to Sell and to Buy.

Appellees' charge that appellants are guilty of forum shopping is without legal basis. It has been held that "where the elements of *litis pendentia* are not present or where final judgment in one will not amount to *res judicata* in the other, there is no forum shopping.[16]

Propriety of the Mode of Appeal

Petitioners also claim that since only questions of law were raised in respondents' appeal to the Court of Appeals, the proper remedy should have been a Petition for Review filed directly with this Court under Rule 45 of the Rules of Court.

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[16] *Rollo*, p. 29.

Petitioners cite the Assignment of Errors raised by respondents before the Court of Appeals in CA-G.R. CV No. 60721:

ASSIGNMENT OF ERRORS

I. The court *a quo* erred in dismissing the complaint on the ground of *litis pendentia*.

II. The court *a quo* erred in dismissing the complaint on the ground that the appellant Rene Espina has no legal capacity to sue.

III. The court a quo should have issued a temporary restraining order, and after due hearing should have issued an injunction to enjoin appellee Sheriff Gato from erroneously levying on and selling at public auction the Subject Property to satisfy the Writ of Execution dated 14 October 1997 issued by the Trial Court in Civil Case No. 2309-L.

Petitioners contend that since no evidence was presented by the parties in the lower court, the complaint having been dismissed on the timely motion by the petitioners, the appeal of the dismissal of the complaint required no determination by the appellate court of the probative value of the evidence presented by the parties.

The Court of Appeals addressed this issue, thus:

Appellees [Juaban and Espina] contend that since the assignment of errors raises only questions of law, the proper course of action is a Petition for Review direct to the Supreme Court in accordance with Rule 45, Revised Rules of Court. The appellees unduly limit themselves to the assignment of errors in the appeal and close their eyes to the glaring fact that, from the narration of facts above, certain acts taken by RTC Br. 27 before then Presiding Judge Risos, which are immoral, devious, and patently illegal, has constrained the Court to take a second look at the circumstances which gave rise to the instant appeal. As succinctly observed by the Court in its Resolution on appellant's prayer for the issuance of a writ of preliminary injunction,

> However, inspite full knowledge that the appeal has been given due course and that therefore there is no more basis for further action on the execution sale, appellees Zosa and Juaban caused the consolidation of ownership and the issuance of new titles in their names. Said appellees are even aware that the

redemption money for the properties in the sum of ₱10,962,347.20 has been deposited with this Court by the appellants. In fact, appellees when asked to comment on the deposit, manifested that they have no objection to the deposit although they disagreed that interest or the redemption price would stop running.

"It is therefore without legal basis that notwithstanding those circumstances, the appellees, upon expiration of the temporary restraining order issued by this Court, immediately asked for the execution of a deed of sale in their favor 'since no redemption has been made' and managed to obtain titles in their names. Such consolidation of ownership is patently erroneous as the decision granting them attorney's fees is not yet final and executory and is in fact the subject of appeal in this Court under CA-GR CV No. 61696."[17]

We have held in *Microsoft Corporation v. Maxicorp, Inc.*[18] and *Morales v. Skills International Company*,[19] that:

The distinction between questions of law and questions of fact is settled. A question of law exists when the doubt or difference centers on what the law is on a certain state of facts. A question of fact exists if the doubt centers on the truth or falsity of the alleged facts. Though this delineation seems simple, determining the true nature and extent of the distinction is sometime problematic. For example, it is incorrect to presume that all cases where the facts are not in dispute automatically involve purely questions of law.

There is a question of law if the issue raised is capable of being resolved without need of reviewing the probative value of the evidence. The resolution of the issue must rest solely on what the law provides on a given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. If the query requires a re-evaluation of the credibility of witnesses, or the existence or relevance of surrounding circumstances and their relation to each other, the issue in that query is factual.

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[17] *Id.* at 28.

[18] G.R. No. 140946, 13 September 2004, 438 SCRA 224, 230-231.

[19] G.R. No. 149285, 30 August 2006, 500 SCRA 186, 194.

In the fairly recent case of *First Bancorp Inc. v. Court of Appeals*,[20] we discussed the implications of the allegation by a party of the lack of jurisdiction of the Court of Appeals based on the ground that the appeal was based solely on questions of law:

> If the aggrieved party appeals by writ of error under Rule 41 of the Rules of Court to the CA and it turns out, from the brief of appellant, that only questions of law are raised, the appeal shall be dismissed:
>
> > Sec. 2. *Dismissal of improper appeal to the Court of Appeals.* – An appeal under Rule 41 taken from the Regional Trial Court to the Court of Appeals raising only questions of law shall be dismissed, issues purely of law not being reviewable by said court. Similarly, an appeal by notice of appeal instead of by petition for review from the appellate judgment of a Regional Trial Court shall be dismissed.
> >
> > An appeal erroneously taken to the Court of Appeals shall not be transferred to the appropriate court but shall be dismissed outright.
>
> The nature of the issues to be raised on appeal can be gleaned from the appellant's notice of appeal filed in the trial court and in his or her brief as appellant in the appellate court.
>
> The provision relied upon by respondent, Section 15, Rule 44 of the Rules of Court, reads:
>
> > Sec. 15. *Questions that may be raised on appeal.* – Whether or not the appellant has filed a motion for new trial in the court below, he may include in his assignment of errors any question of law or fact that has been raised in the court below and which is within the issues framed by the parties.
>
> This rule, however, does not relate to the nature of the issues that may be raised on appeal by the aggrieved party, whether issues of fact or issues of law, or the mode of appeal of the aggrieved party from a final order or resolution of the trial court in the exercise of its original jurisdiction; it merely provides the nature of the issues appellant may include in his assignment of error incorporated in his Brief as

[20] G.R. No. 151132, 22 June 2006, 492 SCRA 221, 236-238.

appellant. It may happen that the appellant may have raised in the trial court errors of fact or law or both, and need not include all said issues in his appeal in the appellate court. The appellant has the right to choose which issues of law he or she may raise in the CA in addition to factual issues already raised.

A question of fact exists when a doubt or difference arises as to the truth or falsity of alleged facts. If the query requires a reevaluation of the credibility of witnesses or the existence or relevance of surrounding circumstances and their relation to each other, the issue in that query is factual. On the other hand, there is a question of law when the doubt or difference arises as to what the law is on certain state of facts and which does not call for an existence of the probative value of the evidence presented by the parties-litigants. In a case involving a question of law, the resolution of the issue rests solely on what the law provides on the given set of circumstances. **Ordinarily, the determination of whether an appeal involves only questions of law or both questions of law and fact is best left to the appellate court. All doubts as to the correctness of the conclusions of the appellate court will be resolved in favor of the CA unless it commits an error or commits a grave abuse of discretion.**

In case of doubt, therefore, the determination of the Court of Appeals of whether an appeal involves only questions of law or both questions of law and fact shall be affirmed. As explained by the Court of Appeals, it was only after the appellate court's painstaking review of the facts surrounding the dispute that the "immoral, devious and patently illegal" acts which attended the transfer of the subject properties to petitioners were brought to light. This Court finds no error or grave abuse of discretion on the part of the Court of Appeals in making the aforesaid finding. No less than this Court, in the second case, A.M. No. P-02-1580, found that Sheriff Gato "showed manifest partiality in favor of Attys. Juaban and Zosa, giving them unwarranted benefit, advantage and preference and that, with evident bad faith, he caused undue injury to complainants [Espina and CDPI]."[21] Irrefragably, respondents' appeal before the Court of Appeals involved not only questions of law, because for the

[21] *Espina v. Gato, supra* note 5.

determination thereof, the appellate court was first called upon to make its own findings of facts which were significant to its complete and judicious resolution of the appeal.

Taking Cognizance of Records in Another Case

Petitioners claim that the Court of Appeals, in resolving CA-G.R. CV No. 60721, the appeal of the dismissal of Civil Case No. 4178-L by Lapu-Lapu City RTC, Branch 54, erred in taking cognizance of the records in another case as basis for its findings of facts. According to petitioners, the Court of Appeals based its findings of facts on the records of the first case, Civil Case No. 2309-L, pending before another Branch (Branch 27) of the RTC of Lapu-Lapu City.

In *Bongato v. Malvar*,[22] we held:

> Second, as a general rule, courts do not take judicial notice of the evidence presented in other proceedings, even if these have been tried or are pending in the same court or before the same judge. There are exceptions to this rule. Ordinarily, an appellate court cannot refer to the record in another case to ascertain a fact not shown in the record of the case before it, yet, it has been held that it may consult decisions in other proceedings, in order to look for the law that is determinative of or applicable to the case under review. **In some instances, courts have also taken judicial notice of proceedings in other cases that are closely connected to the matter in controversy. These cases "may be so closely interwoven, or so clearly interdependent, as to invoke" a rule of judicial notice.**

We find that the circumstances in Case No. 1 (Civil Case No. 2309-L) are too closely interwoven and so clearly interdependent with those in Case No. 3 (Civil Case No. 4178-L). Petitioners and respondents are claiming the very same subject properties. Case No. 3, the case at bar, calls for a determination of who has the superior right to the subject properties, petitioners or respondents. Petitioners are the ones who actually rely on Case No. 1 because their right to the subject properties is rooted in the proceedings therein. It should be recalled that they served as the counsels

[22] 436 Phil. 109, 117-118 (2002).

of the Heirs of Bacale in Case No. 1; they had the subject properties sold at a public auction to satisfy the award in their favor of attorney's fees; and they were the successful bidders at the auction. Petitioners cannot insist on their right to the subject properties, yet prevent the Court of Appeals from looking into the basis or source of said right, as well as the circumstances surrounding their acquisition of the same. They cannot invoke orders, rulings or findings of the trial court in Case No. 1 which are supportive of their right to the subject properties but suppress those which are damaging.

Even assuming for the sake of argument that the proceedings in Case No. 1 cannot be stated in our narration of facts on the ground that said proceedings have not yet been terminated, there is certainly nothing that prevents us from consulting Case No. 2 (A.M. No. P-02-1580) wherein Sheriff Gato was suspended by this Court for acting with "grave abuse of official functions and manifest partiality amounting to grave misconduct and conduct prejudicial to the administration of justice" in selling to petitioners the subject properties at a public auction despite respondents' third-party claim. It bears to emphasize that Case No. 2 has already been decided with finality by this Court.

Lack of Prayer for the Issuance of a Permanent Injunction

Petitioners argue that the respondents did not make any allegation in their Complaint that they were the owners of the disputed properties and there was no prayer in their Complaint for the issuance of a permanent injunction against petitioners prohibiting them from exercising acts of ownership.

An inspection of respondents' Complaint, however, reveals that petitioners actually alleged ownership of the property in dispute:

> The defendants are doing, threatening, and/or attempting to conduct the said public auction sale which is in violation of the rights of the plaintiffs, *as the property sought to be sold now belong to the plaintiffs*, and not of Concordia Bancale, *et al*., and this tends

to render whatever favorable judgment the Honorable Court may grant to the plaintiffs ineffectual.[23]

As regards the alleged lack of prayer for the court to issue a permanent injunction prohibiting petitioners from exercising acts of ownership, it is necessary to examine the actual Prayer made by the respondents in their Complaint, which reads:

WHEREFORE, plaintiffs most respectfully pray this Honorable Court, that upon filing of this complaint, a temporary restraining order be issued enjoining defendants from proceeding with the auction sale, or at whatever stage it is, of Lot 6720-C-2 of the subdivision plan Psd-07-05-012144, containing an area of 13,677 sq. meters and covered by Transfer Certificate of Title No. 36425 and Lot No. 6720-B-2 of the same subdivision plan, containing an area of 4,560 sq. meters and covered by Transfer Certificate of Title No. 36426, all located at Lapulapu City, and upon notice to all the concerned, to issue the writ of preliminary injunction for the same purpose;

After trial on the merits to make the injunction permanent, and to order the defendants, jointly and severally:

1. To reimburse the plaintiffs, jointly and severally the sum of ₱35,000,000.00 representing the purchase price of the properties, subject matter of this case, which were already paid by the plaintiffs to the Bancales;

2. To pay the plaintiffs the sum of ₱5,000,000.00 for moral damages;

3. To reimburse plaintiffs the sum of ₱20,000.00 for attorney's fees, plus the sum of ₱2,000.00 per court appearance, and the sum of ₱20,000.00 for litigation expenses;

Plaintiffs further pray for such orders as may be just, appropriate and equitable under the premises.[24]

We hold that the issuance by the Court of Appeals of a permanent injunction prohibiting petitioners from exercising acts of ownership is included in respondent's prayer for *such orders*

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[23] Complaint, Civil Case No. 4871-L; *rollo*, p. 273.

[24] *Rollo*, pp. 278-279.

as may be just and equitable under the circumstances. Such a prayer in the complaint justifies the grant of a relief not otherwise specifically prayed for.[25] More importantly, we have ruled that it is the allegations in the pleading which determine the nature of the action and the Court shall grant relief warranted by the allegations and proof even if no such relief is prayed for.[26] It is the material allegations of the fact in the complaint, not the legal conclusions made in the prayer, that determine the relief to which the plaintiff is entitled.[27] If respondents were seeking to enjoin the sale of the subject properties, in effect, to prevent the transfer of ownership of the subject properties to others, then such prayer must be deemed to logically and reasonably include the prayer to enjoin others from exercising rights of ownership over the subject properties, for if the ownership of the subject properties are not transferred to any one else, then no one else has the right to exercise the rights appurtenant thereto.

WHEREFORE, the Petition is *DENIED*. The Decision dated 31 January 2005 of the Court of Appeals in CA-G.R. CV No. 60721 is *AFFIRMED*. Costs against petitioners.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Nachura, and *Reyes, JJ.,* concur.

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[25] *Primelink Properties and Development Corporation v. Lazatin-Magat*, G.R. No. 167379, 27 June 2006, 493 SCRA 444, 466.

[26] *Banco Filipino Savings and Mortgage Bank v. Court of Appeals*, 388 Phil. 27 (2000).

[27] *Arroyo, Jr. v. Taduran*, 466 Phil. 173 (2004).

THIRD DIVISION

[G.R. No. 171351. March 14, 2008]

METROPOLITAN WATERWORKS AND SEWERAGE SYSTEM, *petitioner, vs.* **GENARO C. BAUTISTA, MAMERTO G. ACLASA, ANGEL P. ADONIS, CARLOS G. AGUSTIN, BERNARDITA A. ALANO, GERMAN A. ALCARAZ, CESAR B. ALCOBA, ARIEL ALLADO, LEMUEL B. ALEGADO, ADONIS R. ALLESANDRO, DANILO C. ALMACEN, JOSE L. ALMACEN, LUIS C. ALOB, LAUREL C. ALTAVAS, MYRLA S. ALTAVAS, FILIMON T. ALVARES, WILLIAM A. ANAGARAN, LUISITO C. ANDAL, BEN T. ANDRADE, ANGELITO D. ANGELES, EDUARDO A. ANGELES, MARIO H. ANGELES, MELENCIO V. ANGELES, NOEL M. ANGELES, FELICIDAD ANTONIO, RICARDO R. ANTONIO, ROSALINO A. ANURAN, ROBERTO A. AQUINO, RODOLFO AQUINO, ROLANDO AQUINO, LAURO R. ARCIAGA, RENATO ARCILLA, RENATO ARCILLA, ROBERTO O. ARGALES, WENEFREDO F. ARROYO, FELICIANO ASIATICO, EDUARDO R. DE ASIS, VIRGILIO DE ASIS, MARTIN A. ASUNCION, BIENVENIDO C. ASUNCION, MARCELO A. ASUNCION, ARTEMIO ATIENZA, MELCHOR O. ATIENZA, BUEN V. AVENIDO, ZALDY AYONES, BENIGNO C. AYSON, JR., NESTOR BACANI, SR., ALFREDO B. BACAY, ARNEL B. BACAY, MANUEL M. BADAJOS, MARIA C. BADIANGO, HERNANDO BAGUI, ROLANDO D. BALIBER, ALBERTO BALMORI, MIGUEL BALOBO, ALICIA M. BANAAG, ARMANDO S. BANDILLA, ZACARIA N. BANSUAN, JHONIE BARCAS, MERCEDES L. BARCELONA, RODOLFO BARIOLO, COLASITO A.**

BARRUGA, REX BATALLEPP, WILFREDO BATHAIN, BASILIO BATONGBAKAL, LAMBERTO S. BATUMBAKAL, ARIEL L. BAUTISTA, FERNANDO H. BAUTISTA, GODY NORMAN BAYOG, ANACLETO B. BELDA, DANILO R. BENARDO, GILBERTO BENITO, EDUARDO T. BERGONIA, ANTOLIN T. BERNOS, VICENTE BINARAO, JR., AVELINO BORJA, FERNANDO BORJA, JESUS V. BORJA, MARIO B. BORJA, BENJAMIN M. BORREO, ARMANDO P. BORSIGUE, VICENTE G. BRIONES, NORMA A. BRONOLA, RUBEN BUENAVENTURA, ROGELIO V. BUNAG, JOSE F. BUSTARDE, EDGAR G. CABRERA, HERMIE G. CABRERA, GUALBERTO CADAJAS, NELSON L. CADLENTO, TELESFORO CALDIAN, CAMILO V. CALLEJO, IGNACIO P. CAMPO, BONIFACIO CAMPOS, CARLITO J. CANETE, JOEL S. CANETE, WILFREDO C. CAREB, DANILO P. CARIAGA, CRISTELISA E. CARIÑO, ANTONIO M. CARPIO, ARMANDO H. CASTILLO, APOLONIO CASTRO, JR., ROGELIO CATACUTAN, BAYANI M. CAYAS, ROMMELDO B. CENTENO, FLORENCIO V. CERU, ROMEO G. CERVANTES, ROSALIO S. CHIDO, JR., FRANCISCO CINCO, RICARDO CINCO, JESUS O. CISNEROS, ELIZALDE F. CLARION, LUCIANO C. CLEMENTE, COSME V. CONDICION II, ROLANDO A. CORONADO, ALBERTO M. CORPUZ, MANUEL A. CORTEZ, ROMULO CRISOSTOMO, ALBERTO C. CRUZ, ARIEL C. CRUZ, CRISOSTOMO O. CRUZ, DENNIS A. CRUZ, FLORENCIA V. CRUZ, LEONILA M. CRUZ, MANUEL A. CRUZ, NAPOLEON B. CRUZ, REYNALDO M. CRUZ, RICARDO A. CRUZ, RONALD M. CRUZ, TEOTIMO C. CRUZ, VIRGILIO CRUZ, RAMILO S. CRUZAT, CATALINO B. CULTIVO,

FLORENCIO G. CUNANAN, ROGELIO CURA, RICO L. DABAY, LORENZO C. DALIVA, BERNARDINO DAYAO, EFIPANIO DAYO, JULIAN N. DE BORJA, ROBERTO A. DE CASTRO, DANILO C. DE GUZMAN, ELVIRA L. DE GUZMAN, REYMUNDO P. DE GUZMAN, REYNALDO B. DE GUZMAN, ROMEO S. DE LEON, ROMEO DE LEON, ROMEO C. DE LEON, VIRGILIO C. DE LUNA, DONATO C. DE VERA JR., NASSER DEL FIERRO, EDUARDO M. DEL MUNDO, DANILO R. DEL ROSARIO, CARLITO DEL ROSARIO, ROMEO DEL ROSARIO, SEVERINO JOSE A. DELA CRUZ, ROGELIO C. DELA CRUZ, ALFREDO DELA CRUZ, BENJAMIN B. DELA CRUZ, CRISPINO R. DELA CRUZ, ENRIQUE M. DELA CRUZ, FRANCISCO DELA CRUZ, JOSEPH G. DELA CRUZ, JUANITO S. DELA CRUZ, MANUEL V. DELA CRUZ, MARCELINO DELA CRUZ, MARIO JAKE DELA CRUZ, NICOLAS M. DELA CRUZ, RAMON DELA CRUZ, ROSENDO DELA CRUZ, VIRGILIO DELA PEÑA, HIPOLITO DELA VERGES, CARLOS C. DELFIN, NICOLAS S. DELFIN, RENATO P. DELGADO, CRISPIN B. DELGADO, CRISPINO DELOS REYES, ROLANDO N. DELOS REYES, WILFREDO C. DELOS SANTOS, ANGELES DELOS SANTOS, DANILO L. DELOS SANTOS, FIDELINO DELOS SANTOS, MANOLITO DETABLAN, DOMINGO D. DIAZ, BENJAMIN B. DIPAS, FLORENCIO DOMINGO, ROBERTO S. DOMINGO, RODOLFO P. DOMINGO, DANILO DORAKOSIO, LUIS B. DORIA, NOEL V. DRAPEZA, RENATO A. DUDERO, LEONARDO DUMBRIQUE, ARTURO M. DURAN, ROGELIO P. DURAN, PIOQUINTO S. ENRIQUEZ, ENRIQUE D. ENRIQUEZ, EMMANUEL S. ERA, ALEXON A. ESCALADA,

ROLANDO E. ESCALANTE, RODOLFO ESCOBEDO, EDUARDO E. ESCONAR, ALEX B. ESGUERRA, EXCELLENTISEMO ESGUERRA, JUANITO S. ESGUERRA, MARIO P. ESPEJO, RUDY G. ESPIMOS, DANILO V. ESPINO, BRIXCIO ESPINOL, VIRGILIO ESTRELLA, SJ., NOLASCO P. ESTRELLA, ENRESTO P. EUGENIO, RICARDO EUGENIO, RICARDO EUGENIO, JOSELITO M. EVANGELISTA, BOBBY F. FABELLA, BERNARDO FALLORINA, CHRISTIAN E. FELIPE, HENRY A. FERNANDEZ, ROBERTO T. FERNANDEZ, WILLY FERNANDEZ, FELIX D. FERNANDO, ROBERTO T. FERNANDO, ESTELITO O. FLORES, ROMEO P. FORCA, DANILO D. FORTES, DANILO G. FORTEZ, ROBERTO J. FRANCISCO, BERNARDO C. FRIAS, ARMANDO V. GALANZA, ERWIN JOY V. GALLEVO, CESAR B. GAMET, CESAR E. GAMET, CALIXTO D. GARCIA, ERNESTO A. GARCIA, NOEL G. GARCIA, RAMON T. GARCIA, REYNALDO R. GARCIA, RONALDO C. GARCIA, VIRGILIO N. GARCIA, JR., ALBERTO GARDIOLA, RODRIGO E. GARDOSE, EFREN M. GENER, EDUARDO P. GERNALE, RAQUEL M. GIMAN, JUAN E. GIPOLEO, JR., BONIFACIO S. GOMENTIZA, ORLANDO C. GOMEZ, REYNALDO S. GONZAGA, JOHNNY T. GONZALES, NESTOR E. GONZALES, MIGUEL D. GRUTA, ARTURO I. GUARIN, JR., ERNETO GUATAO, ESMAEL V. GUERRERO, JOSEFINO R. GUETA, TARCISIO T. GUTANG, ALFREDO GUTIERREZ, SIXTO P. GUTIERREZ, SIXTO P. GUTIERREZ, FRANCISCO HAPA, EDUARDO HERNANDEZ, JR., NICANOR M. HERNANDEZ, ROGELIO C. HERNANDEZ, FARAON HILARIO, GENARO S. HIPOLITO, JR.,

ANGELITO B. IGNACIO, LUISITO IGNACIO, EFREN ILDEFONSO, ROBERTO S. INES, TOMAS M. INFANTE, EMMANUEL P. INOCENCIO, WILLIAM IRANGA, GERARDO E. ISAIAS, MA. LORNA P. JACLA, JOVITO M. JASA, RONILO F. JAVELLONAR, BAYANI B. JAVIER, EMITERIO T. JAVIER, CARMENCITA M. JIMENEZ, JOSE C. JOVE, JOVIE M. JUGULLON, SEVERINO LABAY, JR., ELISEO M. LABUGUEN, MARCELINO LAGMAN, ROBERTO P. LAGRIMAS, SABENIANO F. LAGUDA, MARIO V. LANSANG, RAY F. LANSANGAN, WARLITO C. LANSAOM, ROSALIO A. LAPINIG, ESTELA C. LAPUZ, DARIO ABESIA LARGO, ESMERALDO LAURENTE, HENRY A. LAZALITA, FRANCISCO I. LAZARO, MANUEL D. LEE, CESAR LEGASPI, ROLANDO J. LEIS, LEOPOLDO L. LEUTERIO, ARNOLD M. LIM, LEO C. LOMBOY, RAFAEL LOMBOY, JR., CESAR LONTOC, CESAR B. LOPEZ, ALFREDO C. LOTO, RAMON F. MACALANDA, NOEL Q. MACALISANG, HERMAN C. MACARAIG, CEZARIO S. MACATANTAN, VENANCIO G. MADRIAGO, DANTE D. MAGANA, SALVADOR S. MAGBANUA, VICTOR MAGNO, FIDELINO B. MAGRO, RAMON L. MAGTIRA, JESUS V. MALABANAN, MELCHOR S. MALABANAN, GERARDO C. MALAD, ROBERTO MALAVEGA, MANUEL S. MALIT, ERNESTO T. MALONGA, JAIMELITO E. MALUBAY, ALEJANDRO B. MAMAUAG, RODOLFO M. MANAHAN, REYNALDO MANANGHAYA, ALEXANDER MANAOL, CONSORCIO A. MANDAL, RICARDO D. MANGALINDAN, JOAQUIN S. MANGANAY, DAVID MANGIBUNONCE, ALFREDO L. MANIMBO, RAMOS J. MANUEL, EDILBERTO A. MARASIGAN, JR., RONALD

L. MASAYON, ALBERTO F. MATANGUIHAN, EDUARDO D. MATEO, ORLANDO S. MEDEL, ALVIR B. MEDER, JOSELITO S. MEDILO, FLORENCIA L. MEDINA, RENATO V. MEDINA, AMADO MENDOZA, JR., BAYANI O. MENDOZA, ERNESTO T. MENDOZA, GLORIA MENDOZA, HERMINIO E. MENDOZA, BONIFACIO B. MENIL, HELIODORO D. MERCADO, MARIO V. MERCADO, NORBERTO O. MERCED, JAIME O. MESINA, JOHN VICENTE MIDERTY, ROBERTO MIGUEL, VALENTINO MOJICA, ENGR. PERFECTO MOLO, SUSAN MOLO, RUBEN MONDEJAR, JOSE MOLATO MONSANTO, VICENTE MONTERO, RODOLFO A. MORENO, ERNESTO MORGADO, BALTAZAR M. MULLERA, ROBERTO S. MUNEZ, ROGER NARIO, MARIO N. NAVALESCA, VICTOR R. NEGAPATAN, ALEJANDRO NEPOMUCENO, RAUL S. NEPOMUCENO, JERRY V. NONA, PEDRITO NOVENO, CATALINO O. OBGALES, ALEXANDER O. OCAMPO, NOEL OCAMPO, EDGARDO P. ODUCA, MIGUEL P. OLANIDES, MARIO B. OLVIDA, OSCAR ONDOY, FRANCISCO B. OPILAS, GILBERT M. ORTILLA, RITO P. ORTOJAN, ABRAHAM C. OTRERA, DAVID C. OTRERA, ANTONIO N. PADRIQUE, OLIVER B. PADRON, TERESITA L. PALAPOS, ANTONIO A. PARAYAOAN, ALESANDRO PARMO, HOMOBONO P. PARTA, ORLANDO M. PARTIDO, EFREN D. PASCO, MIGUEL L. PASCO, DANILO L. PASTRANA, RICARDO S. PATINDOL, DOMINADOR M. PAYOYO, CLAUDIA B. PELAEZ, GUILLERMO PEPANIO, LOURDES PEPANIO, ABDEL R. PEREZ, EDGARDO H. PEREZ, MARCELO L. PINEDA, FRANCISICO B. PINON, NOMERIANO C. PISCASIO,

PRUDENCIO PITA, FROILAN G. POLIQUIT, RUBEN C. DEL POZO, CRISOLOGO C. PROAGORA, RICARDO E. PUASO, ENRIQUE N. PULUMBARIT, OLIVER PUTURTA, DANTE N. QUILO, DANILO RAFAEL, CARLITO B. RAFAELA, ROGELIO R. RAMILO, EDNA RAMIREZ, SONNY RAMOS, BENJAMIN C. RAPOSA, FELIX B. RAYMUNDO, LEONARDO F. RAYO, ROMAN A. RAZON, RUBEN A. RAZON, JESUS Y. REBLORA, DIEGO S. REPOLLO, ANGEL S. REYES, CRISTOBAL NOEL REYES, DANILO C. REYES, EDMON P. REYES, GREGORIO C. REYES, RAMON REYES, ROMER REYES, REYNALDO RICALDE, FALCON L. RICARDO, SOTERO P. RIVERA, JR., JOSE M. ROBAS, RAMON ROMERO, JOSE CIELITO RONA, TRINIDAD R. RONCAL, EMMANUEL ROQUE, GILBERT S. ROQUE, WILFREDO B. ROSARDA, ROMEO M. RUIZ, RODRIGO R. SAGUN, EFREN SALAZAR, BERNABE A. SALES, NENITA S. SALINAS, REYNALDO B. SALON, JESUS C. SALUDES, LEONORA C. SALUDES, TITO SALUTA, ROGELIO M. SALVADOR, DANILO B. SAMANTE, VICTORIA SAMBRANO, PEDRO M. SAMSON, ROMEO D. SAMSON, JR., ROBERTO R. SAN JOSE, ROBERTO R. SAN JOSE, ALBERTO F. SAN JUAN, ANGELO P. SAN LUIS, LAURIANO T. SANCHEZ, ARSENIO SANTIAGO, BENJAMIN B. SANTOS, FERNANDO A. SANTOS, GENEROSO C. SANTOS, JACINTO N. SANTOS, MEDEL G. SANTOS, NELIA M. SANTOS, PATRICIO SANTOS, RENATO A. SANTOS, EDWIN S. SAPOPO, JAIME G. SERDINIO, HOSPICIO SEVILLE, JOSE A. SEXON, SAGAP E. SILONGAN, MARCO C. SIONILO, ROBERTO D. SOLINAP, RODOLFO F. SOLINAP,

ROLANDO O. SOMBRANO, SELOWYN S. SONQUIT, ARMANDO M. SUAREZ, ENGELBERT D. SUBA, FEDERICO SUGATAN, RAMON M. SUMBULAN, BENJAMIN SUPAN, ROGELIO M. TAGULISO, ABDULLAH M. TAHIN, JOSE P. TEVES, SANTIAGO TINAO, OSCAR TINGCO, FREDERICK TOLENTINO, ANDRES R. TOLIBAS, DANTE TOPACIO, CONRADO C. TORIO, ORLANDO F. TORIO, ISIDORO B. TORRES, CORNELIO L. TRINIDAD, PRUDENCIO TUIRAN, LUIS TUSI, MARICANO C. UGABARE, SR., RODERICO E. UMILDA, DOMINADOR M. VALDEZ, GREGORIO VALENCIA, RODOLFO VALENCIA, RUFINO VALENCIA, VIRGILIO D. VALERIO, NESTOR C. VASQUEZ, ROBERTO Q. VELASQUEZ, ROMEO Q. VELASQUEZ, TRINIDAD A. VERZOSA, RICARDO G. VICTORIA, BERTITO J. VILBAR, PONCIANO H. VILLALOBOS, ANTONIO D. VILLAMOR, NICASIO F. VILLAMOR, ISAIAS P. VILLANCIO, LEOVIGILDO E. VILLANO, ABEL G. VILLANUEVA, FERNANDO B. VILLANUEVA, EFREN VILLAR, RICARDO VILLARIZO, ROGELIO VILLEGAS, BENEDICTO VILLEGAS, EDDIE S. VILLEGAS, FELIPE VILLONA, JR., ARTURO VINLUAN, BRIGIDO YEBRA, EDUARDO YUMANG, LORETO D. YLAGAN, RUDY ZEMA, *respondents.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; STATUTES; SALARY STANDARDIZATION LAW (R.A. NO. 6758) IN RELATION TO DBM CIRCULAR NO. 10, CONSTRUED; RULING IN *DE JESUS V. COA* AND *PPA V. COA*, REITERATED; SINCE COLA OF GOVERNMENT EMPLOYEES FROM 1989 TO 1999 WAS NOT DEEMED INTEGRATED INTO THEIR SALARIES, IT IS, THEREFORE, A LEGALLY

DEMANDABLE AND ENFORCEABLE RIGHT. — In the *En banc* case of *De Jesus v. Court of Appeals*, DBM Circular No. 10 was declared ineffective for lack of publication. Being ineffective, DBM Circular No. 10 cannot affect government employees' entitlement to fringe benefits, allowances and COLA from 1989 to 1999. Thus, in *De Jesus*, the Local Water Utilities Administration was ordered to pay the honoraria of petitioners which were disallowed by the Circular. *De Jesus* was affirmed in the recent case of *Philippine Ports Authority (PPA) Employees Hired After July 1, 1989 v. Commission on Audit (COA)* where this Court held that the COLA of government employees from 1989 to 1999 was not "deemed integrated into their salaries." This means that the COLA during that period is a legally demandable and enforceable right. The ruling in *De Jesus* and *PPA* is clear. Employees of government-owned and controlled corporations, whether incumbent or not, are entitled to the COLA from 1989 to 1999 as a matter of right. The argument of MWSS that private respondents have not proven any clear legal right to the allowance and that they need prior DBM approval is without merit.

2. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *MANDAMUS*, PROPER REMEDY TO COMPEL MWSS TO PAY THE COLA OF ITS EMPLOYEES. — We also agree with the CA that *mandamus* is a proper remedy to compel MWSS to pay the COLA balance. Payment of the allowance is a mere ministerial duty. In *De Jesus* and *PPA*, the Local Water Utilities Administration and the Philippine Ports Authority, respectively, were ordered to pay the honoraria and COLA of employees of government-owned and controlled corporations which were discontinued by DBM Circular No. 10. Private respondents are similarly situated. We find no compelling reason to deny them their legal entitlement to the allowance.

3. ID.; RULES OF COURT, RULE 138; COMPENSATION OF ATTORNEYS; POWER OF THE COURT TO AWARD AND REDUCE ATTORNEY'S FEES, DISCUSSED. — Jurisprudence on the court's power to award and reduce attorney's fees and litigation expenses is well settled. Tersely put, irrespective of the contractual agreement between the lawyer and the client, the lawyer is entitled only to a reasonable compensation for services rendered. The courts have plenary power to reduce the compensation due a lawyer if it is unreasonable and unconscionable. The power of the courts to reduce

unconscionable attorney's fees is based on the basic principle that the legal profession is not a commercial enterprise where profit maximization is a paramount consideration. The legal profession is imbued with public interest. We deliver justice, not a simple commercial service.

4. ID.; ID.; ID.; AGREEMENT OF THE PARTIES AS TO TEN PERCENT (10%) ATTORNEY'S FEES, UPHELD. — We do not find anything unjust or inequitable in the 10% agreement between private respondent Bautista and other respondent employees. The percentage and the corresponding amount to be deducted from each employee is only minimal when compared to the benefits that they will derive from the payment of the COLA. The 10% fee is also a customary charge for similar legal services. Under the Labor Code, a 10% agreement for payment of attorney's fees based on the monetary claim of an employee is valid and binding. The agreement between Bautista and the other respondents conforms to that allowed under the Labor Code.

5. ID.; ID.; ID.; ID.; ONLY EMPLOYEES WHO SIGNED THE AGREEMENT ARE LIABLE TO PAY ATTORNEY'S FEES; REASON. — We note, however, that the RTC and the CA erred in ruling that all MWSS employees eligible to receive COLA are liable to pay attorney's fees and/or litigation expenses to respondent Bautista. Records disclose that only 522 out of the more than 7000 MWSS employees signed such agreement. Other MWSS employees signed similar contracts, agreements or arrangements with their own respective agents/lawyers, which are similarly recognized as valid and binding. It is basic that only parties to a contract are bound by its terms. This is based on the principle of relativity of contracts which provides that contracts take effect only between the parties, their assigns and heirs. It cannot favor or prejudice third persons. Applying this principle, only private respondents are bound by the terms of their agreement with respondent Bautista. Those who have signed similar contracts with their own agents/lawyers are bound by their own contracts. *Res inter alios acta alteri nocere non debet* – a third party may not be prejudiced by the act, declaration or omission of another.

APPEARANCES OF COUNSEL

Office of the Government Corporate Counsel for petitioner.
Reyno Tiu Domingo & Santos, Magcalas Ipac Encarnacion Macapagal & Diaz, and *L.B. Alegado & Partners* for respondents.

D E C I S I O N

REYES, R.T., *J.*:

THIS is a sequel to the cases of *De Jesus v. Commission on Audit*[1] and *Philippine Ports Authority (PPA) Employees Hired After July 1, 1989 v. Commission on Audit (COA)*[2] involving, yet again, the obstinate refusal of another government-owned and controlled corporation to pay its employees their Cost of Living Allowance (COLA) from 1989 to 1999.

Before Us is a petition for review on *certiorari* of the Amended Decision[3] of the Court of Appeals (CA), which affirmed with modification the Decision[4] of the Regional Trial Court (RTC) in Quezon City ordering petitioner Metropolitan Waterworks and Sewerage System (MWSS) to pay private respondents the 95% balance of their COLA from November 16, 1989 up to March 16, 1999.

Facts

Petitioner MWSS is a government-owned and controlled corporation organized under Republic Act (R.A.) No. 6234. Private respondents are incumbent and former employees of MWSS.[5]

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[1] G.R. No. 109023, August 12, 1998, 294 SCRA 152.

[2] G.R. No. 160396, September 6, 2005, 469 SCRA 397.

[3] *Rollo,* pp. 65-69. Penned by Associate Justice Jose L. Sabio, Jr., with Associate Justices Jose C. Mendoza and Arturo G. Tayag, concurring.

[4] *Id.* at 78-81.

[5] *Id.* at 11-12.

Prior to November 1, 1989, private respondents have been receiving allowances, fringe benefits and COLA. They were receiving COLA equivalent to forty percent of their basic monthly salary or ₱300.00 a month, whichever is higher. These benefits were discontinued under R.A. No. 6758 entitled "An Act Prescribing a Revised Compensation and Position Classification System in Government and for other Purposes," otherwise known as the Salary Standardization Law.[6]

Implementing R.A. No. 6758, the Department of Budget and Management (DBM) issued Corporate Circular No. 10 (DBM Circular No. 10) which provided, among others, the discontinuance without qualification of all allowances and fringe benefits, including COLA, of government employees over and above their basic salaries starting November 1, 1989.[7]

In *De Jesus v. Commission on Audit*,[8] this Court declared DBM Circular No. 10 ineffective for lack of publication. The DBM later remedied the fatal defect when it published the Circular in the March 1999 issue of the Official Gazette.[9]

After vigorous complaints and requests from government employees, the Office of the Government Corporate Counsel (OGCC) issued a Memorandum opining that employees of government-owned and controlled corporations, whether incumbent or non-incumbents, are entitled to the payment of COLA during the period that it was suspended under DBM Circular No. 10. The OGCC summarized its opinion, thus:

> In recapitulation, we are of the opinion; relative to the questions/ issues raised herein, that:
>
> 1. Employees in government-owned and controlled corporations are entitled to the payment of Cost of Living Allowance and Amelioration Allowance without need of any prior determination by the DBM of whether or not

[6] *Id.* at 51-52, 156.

[7] *Id.* at 51.

[8] *Supra* note 1.

[9] *Rollo,* p. 51.

these allowances have, indeed, been integrated into the standardized salaries.

2. The incumbents, as well as non-incumbents, including those hired in corporations established after the passage of RA 6758, are entitled to avail of these benefits from the time said benefits were disallowed, discontinued or withdrawn up to fifteen (15) days from publication in the Official Gazette of DBM CCC No. 1.[10]

MWSS, however, granted only 5% COLA to its employees in a Board Resolution[11] issued on May 23, 2003, which reads:

RESOLVED, further, to APPROVE and CONFIRM the initial payment of COLA to former employees for the period 1989 to July 1997, equivalent to FIVE PERCENT (5%), amounting to ONE HUNDRED FIVE MILLION PESOS (₱105,000,000.00), chargeable against free cash of the System (Annex "A" hereof), which will be available upon recovery of the ₱2.372 Billion advances made to Maynilad Water Services, Inc. (MWSI), to be derived from the US$100 Million loan releases from the Deutsche Bank expected to be released by June 2002.

It is understood that payment hereof shall be subject to the guidelines to be issued by Management and the usual accounting and auditing rules and regulations.[12]

Shortchanged, private respondents demanded the 95% balance of their COLA. MWSS denied their request. MWSS Administrator Orlando Hondrade informed private respondents in a letter dated September 24, 2003 that MWSS was willing to pay the 95% balance, but it opted to defer payment because of the dismissal of a similar claim by the RTC, Branch 96, Quezon City in "*Erlich Barraquias, et al. v. Metropolitan Waterworks and Sewerage System.*" MWSS further averred that it had no available funds to pay the balance.[13]

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[10] *Id.* at 164.

[11] *Id.* at 14-15.

[12] *Id.*

[13] *Id.* at 52.

Aggrieved, private respondents filed a petition for *mandamus*[14] with the RTC in Quezon City to compel MWSS to pay the balance of their COLA. During the proceedings, other aggrieved MWSS employees represented by Joaquin Pacis, *et al*. moved to intervene but their motion was denied.[15]

RTC Disposition

On August 17, 2004, the RTC rendered a Decision[16] granting the petition, with a *fallo* reading:

> WHEREFORE, premises considered, judgment is hereby rendered in favor of the petitioners ordering respondent Metropolitan Waterworks and Sewerage System (MWSS), its Administrator and Board of Trustees:
>
> 1. To pay petitioners and other employees who are similarly situated, whether incumbents or non-incumbents, the balance in the amount equivalent to ninety-five (95%) of their Cost of Living Allowance (COLA) from the date it was discontinued up to the present if employment with the MWSS has continued, or up to the time of their separation from MWSS, and to restore the same to the salary of the incumbent employees.
>
> 2. To segregate the amount equivalent to ten percent (10%) of the amount payable to each petitioner, and others who are similarly benefited, as and by way of litigation expenses. Said amount shall be paid directly to their attorney-in-fact, Genaro C. Bautista, pursuant to the Special Power of Attorney executed by petitioners in favor of the latter.
>
> SO ORDERED.[17]

In granting the petition, the RTC ratiocinated:

> This case revolves around the following legal issues, *viz.*:
>
> 1. Whether or not petitioners are entitled to the payment of the COLA from the time it was discontinued up to the present or from the time they were separated/retired from service; and

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[14] *Id*. at 83-104.
[15] *Id*. at 72-73.
[16] *Id*. at 70-77.
[17] *Id*. at 76-77.

2. Whether or not *mandamus* lies under the facts set forth in the petition.

The Court answers both issues in the affirmative and will be discussed *in seriatem* (*sic*).

First. Republic Act No. 6758 entitled "An Act Prescribing a Revised Compensation and Position Classification System in the Government and for Other Purposes," otherwise known as "Salary Standardization Law," was passed into law on July 1, 1989. Section 12 of said law provides for the consolidation of allowances and additional compensation into the standardized salary rates.

x x x x x x x x x

No court has, as yet, declared the payment of COLA to government employees/offices as violative of R.A. 6758. In fact, several government-owned and controlled corporations have restored the grant of said allowance to its employees, the payment of the same having been clarified in an Inter-Office Memorandum dated March 20, 2002 issued by the Office of the Government Corporate Council.

In addition, respondent is estopped from claiming the illegality of the grant of COLA. In a letter dated September 24, 2003, addressed to Mr. Genaro C. Bautista (Annex "D", petition), respondent admitted that petitioners are entitled to the payment of said benefit.

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Second. It is the Court's opinion that *mandamus* is proper in the case at bench.

x x x Petitioners have shown that they are entitled to avail of this remedy. Records will bear that on two occasions, petitioner Genaro Bautista requested respondent MWSS, through its Administrator and Board of Trustees, for the release of their COST OF LIVING ALLOWANCE (COLA) but the same proved futile. Thus, petitioners have no resource but to seek the intervention of the Court, there being no plain, speedy and adequate remedy in the ordinary course of law.

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Considering that respondent MWSS has recognized petitioners' entitlement to the subject COLA and inasmuch as the payment of the same is supported by law and jurisprudence, respondent has the legal duty and obligation to grant the same. Otherwise, petitioners and others similarly situated, would be unjustifiably denied of their

right to the allowance to which they are entitled by reason of their employment.[18]

The RTC later amended its decision to include interest and 5% attorney's fees. The *fallo* of the amended decision reads:

WHEREFORE, premises considered, judgment is hereby rendered in favor of the petitioners ordering respondent Metropolitan Waterworks and Sewerage System (MWSS), its Administrator and Board of Trustees:

1. To pay petitioners and other employees who are similarly situated, whether incumbents or non-incumbents, the balance in the amount equivalent to ninety-five (95%) of their Cost of Living Allowance (COLA) beginning November 1989 when it was discontinued up to the present, if employment with the MWSS continues or up to the time of their separation from MWSS, with legal rate of interest at six (6%) percent per annum beginning August 1998 when DBM CCC No. 10 was declared as without force and effect. The monetary judgment shall earn interest at twelve (12%) percent per annum from the date of finality of the decision until satisfaction;

2. To pay attorney's fees equivalent to five (5%) percent of the total claims of petitioners;

3. To segregate the amount equivalent to ten percent (10%) of the amount payable to each petitioner, and others who are similarly benefited, as and by way of litigation expenses. Said amount shall be paid directly to their attorney-in-fact, Genaro C. Bautista, pursuant to the Special Power of Attorney executed by petitioners in favor of the latter.

SO ORDERED.[19]

MWSS appealed to the CA.

On October 13, 2004 and May 26, 2005, MWSS issued two Board Resolutions[20] granting additional 20% COLA to incumbent and non-incumbent employees of MWSS. The 20% was in addition to the 5% earlier paid to private respondents.

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[18] *Id*. at 75-76.

[19] *Id*. at 80-81.

[20] *Id*. at 18-19. Board Resolution No. 2004-262 and Board Resolution No. 2005-117.

CA Disposition

On August 17, 2004, the CA rendered a decision affirming with modification the RTC amended decision, disposing as follows:

> WHEREFORE, in the light of the foregoing disquisitions, the appealed decision is hereby **MODIFIED**. The grant of litigation expenses, equivalent to ten percent (10%) of the amount payable to each petitioner, and others who are similarly benefited payable to Genaro Bautista as appellees' attorney-in-fact, is hereby **DELETED**. A fixed amount of Five Hundred Thousand Pesos (Php500,000.00) is, instead, granted to the appelees's attorney-in-fact. We AFFIRM in all other respects.
>
> SO ORDERED.[21]

In affirming the RTC decision, the CA stated:

> In the case at bench, appellees have convincingly shown that they satisfied the requisites of a *mandamus* proceeding. First, only specific legal rights may be enforced by *mandamus* if they are clear and certain. If the legal rights of the appellees are not well-defined, clear, and certain, the petition must be dismissed, however, the contrary is obtaining. Appellees have shown that they are legally entitled to their accrued COLA as a matter of right. The Supreme Court, in the case of *De Jesus v. COA*, made the pronouncement that DBM CCC No. 10 was ineffective because of its lack of publication. In the said decision, the Court ordered the Commission to pass on audit the honoraria of therein petitioners. Precipitated by the above-mentioned ruling, the herein appellees filed a petition before the court *a quo* claiming for the return of COLA and back payment of the said allowance from the time it was discontinued.
>
> A review of the records of this case would reveal that the Office of the Government Corporate Counsel (OGCC), Department of Justice issued Opinion No. 086 dated May 21, 2001. In the said opinion, the OGCC opined that employees in all government-owned and controlled corporations are entitled to the payment of Cost of Living Allowance and Amelioration Allowance without a need of any prior determination by the DBM of whether or not these allowances have, indeed, been integrated into the standardized salaries. Furthermore,

[21] *Id*. at 62.

in the same opinion, the OGCC explained that both the incumbent and non-incumbent employees are entitled to these benefits.

More importantly, in the recent case of *Philippine Ports Authority Employees v. Commission on Audit*, the High Court made an imprimatur regarding the employees' entitlement to COLA and amelioration allowances. The Court said that during the period that DBM CCC No. 10 was in legal limbo, the COLA and the amelioration allowance were not effectively integrated into the standardized salaries. x x x

Consequently, no less than the High Court made this declaration as to the employees' entitlement to COLA and other allowances. We find no cogent reason to rule otherwise. It bears stressing too, that appellant MWSS recognizes the right of herein appellees to the said allowances evidenced by the letter sent by appellant's Administrator, Orlando C. Hondrade. However, appellant made it clear that it could not effect the immediate payment because of the dismissal of an earlier case filed by Barraquias and the unavailability of funds. In other words, while appellant acknowledges appellees' legal right to COLA, it is prevented from making the payments because of those two (2) predicaments.

Second, the writ will not issue to compel an official to do anything, which is not his duty to do, or which is his duty not to do, or give to the applicant anything to which he is not entitled by law. The writ neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed.

x x x x x x x x x

In the case at bar, the payment of the appellees' allowances does not require appellant to fulfill contractual obligations or to compel a course of conduct, nor to control or review the exercise of discretion. If judgment is, at all, necessary in this case, it would only be the determination as to whether the appellees are employees of MWSS or not, nothing more, nothing less. A purely ministerial act on the part of the appellant is, therefore, availing in the instant case.[22]

In modifying the RTC decision and fixing the grant of litigation expenses at ₱500,000.00, the CA ratiocinated:

[22] *Id*. at 55-59.

As regards the last issue, we, however, are inclined to overturn the ruling of the lower court with respect to the segregation of the amount equivalent to 10% of the amount payable to each petitioner as payment to the appellees' attorney-in-fact. The general rule is that attorney's fees and litigation expenses cannot be recovered as part of damages because of the policy that no premium should be placed on the right to litigate. In short, the grant of attorney's fees as part of damages is the exception rather than the rule; counsel's fees are not awarded every time a party prevails in a suit. It can be awarded only in the cases enumerated in Article 2208 of the Civil Code, and in all cases, it must be reasonable.

We cannot give our affirmance to the segregation of an amount equivalent to ten percent (10%) of the amount payable to each petitioner, and others who are similarly benefited by way of litigation expenses, in favor of Genaro Bautista, as appellees' attorney-in-fact. Under Article 2208, while it may allow the courts to grant litigants an award of attorney's fees and litigation expenses, the same must be reasonable. It is true that appellee Genaro Bautista was authorized to deduct, collect, and receive the sum equivalent to ten percent (10%) of the total amount of differential that each appellee may receive. Sadly, we are of the considered view, however, that the amount is unconscionable considering the number of employees involved in the instant case, and considering the amount that each employee may receive by way of back payment. We, therefore, deem it appropriate to grant a fixed amount of Five Hundred Thousand Pesos (PhP500,000.00) to the appellees' attorney-in-fact, Genaro Bautista, by way of attorney's fees and litigation expenses. The reduction of unreasonable attorney's fees is within the regulatory powers of the courts (*Taganas v. NLRC,* 248 SCRA 133).[23]

On January 31, 2006, the CA issued an Amended Decision on motion for reconsideration of both parties, with the following *fallo*:

WHEREFORE, the instant Motion for Reconsideration is **PARTIALLY GRANTED**. Our decision promulgated on October 5, 2005, which is the subject of the instant motion, is hereby **AMENDED**, such that the judgment shall now read as follows:

[23] *Id.* at 60-61.

"WHEREFORE, in the light of the foregoing disquisitions, the appealed decision is hereby **MODIFIED**. Appellant MWSS is ordered to pay appellees and other employees who are similarly situated, whether incumbents or non-incumbents, the balance in the amount equivalent to ninety-five percent (95%) percent of their Cost of Living Allowance (COLA) beginning November 1989, when it was discontinued up to March 16, 1999, the date of the effectivity of DBM CCC No. 10. The award of attorney's fees equivalent to five (5%) percent of the total claims of appellees is **DELETED**. The award of interests, over and above the COLA is, likewise, **DELETED** for lack of basis. We **AFFIRM** in all other respects.

SO ORDERED."[24]

In granting reconsideration, the appellate court held as valid the agreement between private respondent Bautista and the other respondents segregating 10% of their monetary claims as payment for litigation expenses and attorney's fees, *viz.*:

The 10% litigation expenses in favor of Bautista has (*sic*) for its basis the Special Power of Attorney executed by the appellees. As borne by the records, the contract was freely and voluntarily executed by the appellees in favor of Bautista. Thus, the segregation of an amount equivalent to 10% of the amount due each appellee, and others who are similarly benefited, payable to Genaro C. Bautista is well-founded.

Anent the award of attorney's fees, in the absence of any stipulation, it can be awarded only in the cases enumerated in Article 2208 of the Civil Code, none of which is present in the case at bar. It bears stressing that the SPA provided that Genaro C. Bautista is authorized and empowered to deduct, collect, and receive the sum equivalent to 10% of the total amount of differential that each appellee may receive, to be paid to the lawyer/legal counsel, as and by way of attorney's fees and litigation expenses. Thus, the segregated amount taken from each employee necessarily includes both the attorney's fees and litigation expenses. Undeniably, the award of attorney's fees equivalent to 5% of the total claims of the appellees must, therefore, be deleted.[25]

[24] *Id.* at 68-69.

[25] *Id.* at 66-67.

MWSS then filed the present petition with this Court.

On December 15, 2005, MWSS issued another board resolution granting an additional 5% COLA to private respondents. To date and on record, MWSS had paid 30% of the COLA of private respondents from 1989-1999.

Issues

Petitioner MWSS, through the OGCC, assigns twin errors to the CA in the following tenor:

I.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN DISREGARDING HEREIN PETITIONER'S ARGUMENT THAT THE FILING OF A *MANDAMUS* CASE TO ENFORCE IMMEDIATE AND FULL PAYMENT OF COLA IS IMPROPER.

II.

THE APPELLATE COURT ERRED IN AWARDING ATTORNEY'S FEES AND LITIGATION EXPENSES TO RESPONDENTS.[26] (Underscoring supplied)

Our Ruling

The petition is partly meritorious.

MWSS raises two issues for Our consideration. The first is the substantive issue of private respondents' entitlement to the balance of their COLA from 1989-1999, when DBM Circular No. 10 was ineffective. The second involves attorney's fees and litigation expenses.

We shall deal with the issues *in seriatim*.

Private respondents are entitled to COLA from 1989 to 1999 in line with this Court's decision in De Jesus and PPA.

MWSS insists that private respondents are not entitled to the 95% balance of their COLA from 1989 to 1999. It argues

[26] *Id*. at 23, 34.

that they have not proven any clear right to the allowance because it was already deemed integrated into their salaries.[27] MWSS avers that it issued four (4) board resolutions, granting a total of 30% COLA to private respondents, as a mere act of generosity to them,[28] not in payment of a legally enforceable right. MWSS also argues that it needs to obtain prior DBM approval before it can pay the balance.[29]

We do not agree. This Court had long settled the issues hoisted by MWSS. We find no cogent reason to deviate, much less modify, settled jurisprudence.

In the *En banc* case of *De Jesus v. Court of Appeals*,[30] DBM Circular No. 10 was declared ineffective for lack of publication, thus:

> On the need for publication of subject DBM CCC No. 10, we rule in the affirmative. Following the doctrine enunciated in Tanada, publication in the Official Gazette or in a newspaper of general circulation in the Philippines is required since DBM CCC No. 10 is in the nature of an administrative circular the purpose of which is to enforce or implement an existing law. Stated differently, to be effective and enforceable, DBM CCC No. 10 must go through the requisite publication in the Official Gazette or in a newspaper of general circulation in the Philippines.
>
> In the present case under scrutiny, it is decisively clear that DBM CCC No. 10, which completely disallows payment of allowances and other additional compensation to government officials and employees, starting November 1, 1989, is not a mere interpretative or internal regulation. It is something more than that. And why not, when it, tends to deprive government workers of their allowances and additional compensation sorely needed to keep body and soul together. At the very least, before the said circular under attack may be permitted to substantially reduce their income, the government officials and employees concerned should be apprised and alerted by the publication

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[27] *Id*. at 30.

[28] *Id*. at 27, 29.

[29] *Id*. at 25.

[30] *Supra* note 1.

of subject circular in the Official Gazette or in a newspaper of general circulation in the Philippines – to the end that they be given amplest opportunity to voice out whatever opposition they may have, and to ventilate their stance on the matter. This approach is more in keeping with democratic precepts and rudiments of fairness and transparency.

Being ineffective, DBM Circular No. 10 cannot affect government employees' entitlement to fringe benefits, allowances and COLA from 1989 to 1999. Thus, in *De Jesus*, the Local Water Utilities Administration was ordered to pay the honoraria of petitioners which were disallowed by the Circular.

Contrary to its present posturing, the OGCC itself issued a Memorandum, entitled "*Opinion and Guidelines on the Payment of Cost of Living Allowance (COLA), Amelioration Allowance and other Forms of Allowance*," opining that employees of government-owned and controlled corporations are entitled to COLA from 1989 to 1999 even without prior determination from DBM on whether or not the COLA was deemed integrated into their salaries. We are surprised that the OGCC now argues for a position totally inconsistent with its earlier opinion. Worse, MWSS unnecessarily passes the buck to the DBM when it had earlier opined that no prior DBM approval is required.

De Jesus was affirmed in the recent case of *Philippine Ports Authority (PPA) Employees Hired After July 1, 1989 v. Commission on Audit (COA)*[31] where this Court held that the COLA of government employees from 1989 to 1999 was not "deemed integrated into their salaries." This means that the COLA during that period is a legally demandable and enforceable right. This Court stated:

A reading of the first sentence of this provision readily reveals that all allowances are "deemed included" or integrated into the prescribed standardized salary rates, except the following: (a) representation and transportation allowances, (b) clothing and laundry allowances, (c) subsistence allowances of marine officers and crew

[31] *Supra* note 2.

on board government vessels, (d) subsistence allowances of hospital personnel, (e) hazard pay, (f) allowances of foreign service personnel stationed abroad, and (g) such other additional compensation not otherwise specified in Section 12. These additional "non-integrated benefits" (item g) were to be determined by the Department of Budget and Management (DBM) in an appropriate issuance.

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In other words, during the period that DBM CCC No. 10 was in legal limbo, the COLA and the amelioration allowance were not effectively integrated into the standardized salaries.

Hence, it would be incorrect to contend that because those allowances were not effectively integrated under the first sentence, then they were "non-integrated benefits" falling under the second sentence of Section 12 of RA 6758. Their characterization must be deemed to have also been in legal limbo, pending the effectivity of DBM CCC No. 10. Consequently, contrary to the ruling of the COA, the second sentence does not apply to the present case. By the same token, the policy embodied in the provision – the non-diminution of benefits in favor of incumbents as of July 1, 1989 – is also inapplicable.

The parties fail to cite any law barring the continuation of the grant of the COLA and the amelioration allowance during the period when DBM CCC No. 10 was in legal limbo.

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To stress, the failure to publish DBM CCC No. 10 meant that the COLA and the amelioration allowance were not effectively integrated into the standardized salaries of the PPA employees as of July 1, 1989. The integration became effective only on March 16, 1999. Thus, in between those two dates, they were still entitled to receive the two allowances.

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As pointed out by the OSG, until and unless the DBM issued those Implementing Rules categorically excluding the COLA and the amelioration allowance, there could not have been any valid notice to the government employees concerned that, indeed, those allowances were deemed included in the standardized salary rates. Consequently, there was no reason or basis to distinguish or classify PPA employees into two categories for purposes of determining their entitlement to the back payment of those unpaid allowances during the period in dispute.

Hence, in consonance with the equal-protection clause of the Constitution, and considering that the employees were all similarly situated as to the matter of the COLA and the amelioration allowance, they should all be treated similarly. All – not only incumbents as of July 1, 1989 – should be allowed to receive back pay corresponding to the said benefits, from July 1, 1989 to the new effectivity date of DBM CCC No. 10 – March 16, 1999.[32]

The ruling in *De Jesus* and *PPA* is clear. Employees of government-owned and controlled corporations, whether incumbent or not, are entitled to the COLA from 1989 to 1999 as a matter of right. The argument of MWSS that private respondents have not proven any clear legal right to the allowance and that they need prior DBM approval is without merit.

MWSS has a ministerial duty to pay the COLA; mandamus is a proper remedy to compel MWSS to perform its ministerial duty.

We also agree with the CA that *mandamus* is a proper remedy to compel MWSS to pay the COLA balance. Payment of the allowance is a mere ministerial duty. In *De Jesus* and *PPA*, the Local Water Utilities Administration and the Philippine Ports Authority, respectively, were ordered to pay the honoraria and COLA of employees of government-owned and controlled corporations which were discontinued by DBM Circular No. 10. Private respondents are similarly situated. We find no compelling reason to deny them their legal entitlement to the allowance.

We quote with approval the CA decision on this point, thus:

Second, the writ will not issue to compel an official to do anything, which is not his duty to do, or which is his duty not to do, or give to the applicant anything to which he is not entitled by law. The writ neither confers powers nor imposes duties. It is simply a command to exercise a power already possessed and to perform a duty already imposed.

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[32] *Rollo,* pp. 404-407.

A purely ministerial act, as distinguished from a discretionary act, is one which an officer or tribunal performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or exercise of his own judgment upon the propriety or impropriety of the act done. The duty is ministerial only when the discharge of the same requires neither the exercise of official discretion nor judgment.

In the case at bar, the payment of the appellees' allowances does not require appellant to fulfill contractual obligations or to compel a course of conduct, nor to control or review the exercise of discretion. If judgment is, at all, necessary in this case, it would only be the determination as to whether the appellees are employees of MWSS or not, nothing more, nothing less. A purely ministerial act on the part of the appellant is, therefore, availing in the instant case.[33]

The 10% agreement between Bautista and other respondents is valid. But the agreement is binding only on private respondents, not all MWSS employees.

MWSS also questions the agreement between private respondent Bautista and other respondents which provided for the segregation of 10% of their COLA claims in payment of litigation expenses and attorney's fees. MWSS claims that such agreement is unconscionable and scandalous.[34] It avers that the agreement is similar to the "get-rich-quick schemes" wherein private respondents' lawyers receive a windfall from "a simple case entailing no substantial expense or extraordinary legal service."[35]

Private respondents counter that the 10% agreement is fair and reasonable. They contend that the agreement is binding only on private respondents, not MWSS. As such, MWSS will not suffer any loss because it is private respondents who will shoulder the litigation expenses and attorney's fees. In short, MWSS will pay no more than the COLA due them.[36]

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[33] Id. at 59.
[34] *Id*. at 36.
[35] *Id*.
[36] *Id*. at 235.

Jurisprudence on the court's power to award and reduce attorney's fees and litigation expenses is well settled. Tersely put, irrespective of the contractual agreement between the lawyer and the client, the lawyer is entitled only to a reasonable compensation for services rendered. The courts have plenary power to reduce the compensation due a lawyer if it is unreasonable and unconscionable. Section 24, Rule 138 of the Rules of Court provides:

> SEC. 24. *Compensation of attorneys, agreement as to fees*. – An attorney shall be entitled to have and recover from his client no more than a reasonable compensation for his services, with a view to the importance of the subject matter of the controversy, the extent of the services rendered, and the professional standing of the attorney. x x x A written contract for services shall control the amount to be paid therefor unless found by the court to be unconscionable or unreasonable.

The power of the courts to reduce unconscionable attorney's fees is based on the basic principle that the legal profession is not a commercial enterprise where profit maximization is a paramount consideration. The legal profession is imbued with public interest. We deliver justice, not a simple commercial service. In *Canlas v. Court of Appeals*,[37] this Court stated:

> x x x The Court finds the occasion fit to stress that lawyering is not a moneymaking venture and lawyers are not merchants, a fundamental standard that has, as a matter of judicial notice, eluded not a few law advocates. The petitioner's efforts partaking of a "shakedown" of his own client are not becoming of a lawyer and certainly, do not speak well of his fealty to his oath to "delay no man for money."
>
> It is true that lawyers are entitled to make a living, in spite of the fact that the practice of law is not a commercial enterprise; but that does not furnish an excuse for plain lust for material wealth, more so at the expense of another. Law advocacy, we reiterate, is not capital that yields profits. The returns it births are simple rewards for a job done or service rendered. It is a calling that, unlike mercantile pursuits which

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[37] G.R. No. 77691, August 8, 1988, 164 SCRA 160.

enjoy a greater deal of freedom from government interference, is impressed with a public interest, for which it is subject to State regulation. x x x[38]

Here, We do not find anything unjust or inequitable in the 10% agreement between private respondent Bautista and other respondent employees. The percentage and the corresponding amount to be deducted from each employee is only minimal when compared to the benefits that they will derive from the payment of the COLA. The 10% fee is also a customary charge for similar legal services. Under the Labor Code, a 10% agreement for payment of attorney's fees based on the monetary claim of an employee is valid and binding.[39] The agreement between Bautista and the other respondents conforms to that allowed under the Labor Code.

We note, however, that the RTC and the CA erred in ruling that all MWSS employees eligible to receive COLA are liable to pay attorney's fees and/or litigation expenses to respondent Bautista. Records disclose that only 522 out of the more than 7000 MWSS employees signed such agreement. Other MWSS employees signed similar contracts, agreements or arrangements[40] with their own respective agents/lawyers, which are similarly recognized as valid and binding.

It is basic that only parties to a contract are bound by its terms. This is based on the principle of relativity of contracts which provides that contracts take effect only between the parties, their assigns and heirs.[41] It cannot favor or prejudice third persons. Applying this principle, only private respondents are bound by the terms of their agreement with respondent Bautista. Those who have signed similar contracts with their own agents/

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[38] *Canlas v. Court of Appeals, id*. at 173-174.

[39] Labor Code of the Philippines, Art. 111.

[40] Motion for Reconsideration in *Messrs. Joaquin C. Pacis v. Judge Ofelia Marquez, Genaro Bautista and MWSS,* CA-G.R. SP No. 86046.

[41] Civil Code, Art. 1311 provides:

Contracts take effect only between the parties, their assigns and heirs, except in case where the rights and obligations arising from the contract are not transmissible by their nature, or by stipulation or by provision of law.

lawyers are bound by their own contracts. *Res inter alios acta alteri nocere non debet* – a third party may not be prejudiced by the act, declaration or omission of another.[42]

WHEREFORE, the Court of Appeals Amended Decision is *AFFIRMED WITH MODIFICATION* in that:

1. Petitioner Metropolitan Waterworks and Sewerage System is ordered to pay respondents and other employees who are similarly situated, whether incumbents or non-incumbents, the balance in the amount equivalent to ninety-five percent (95%) of their Cost of Living Allowance beginning November 1989, when it was discontinued up to March 16, 1999, the date of the effectivity of DBM Circular No. 10.

2. The agreement between respondent Genaro Bautista and the other respondents to segregate ten percent (10%) of the amount payable to each of respondents, as and by way of litigation expenses and attorney's fees, is declared valid and binding. Similar contracts, agreements or arrangements signed by other MWSS employees with their respective agents/lawyers are also declared valid and binding.

3. Only respondent employees are liable to pay litigation expenses and attorney's fees to respondent Bautista. Other MWSS employees who signed similar contracts, agreements or arrangements with their respective agents/lawyers are bound by their own contracts.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Nachura, JJ.,* concur.

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[42] *People v. Ciobal,* G.R. No. 86220, April 20, 1990, 184 SCRA 464, 471.

THIRD DIVISION

[G.R. No. 171487. March 14, 2008]

ERMIN DACLES *y* OLEDO, *petitioner, vs.* PEOPLE OF THE PHILIPPINES, *respondent.*

SYLLABUS

1. REMEDIAL LAW; CRIMINAL PROCEDURE; APPEALS; PETITIONER IS LEGALLY ALLOWED TO RAISE AN ISSUE WHICH WAS NOT RAISED BEFORE THE TRIAL COURT. — We deal first with the argument raised by the Office of the Solicitor General that it is too late for petitioner to raise the issue on the identity of the confiscated *shabu*. The long-standing precept is that an appeal in a criminal case throws the whole case wide open for review. The reviewing tribunal can correct errors though unassigned in the appeal, or even reverse the trial court's decision on grounds other than those the parties raised as errors. In *People v. Dorimon,* appellant was convicted by the trial court of the crime of Illegal Possession of Firearm. On appeal before the Court, appellant failed to raise the issue of failure of the prosecution to prove his non-possession of a license to possess a firearm. Notwithstanding this, the Court took cognizance of the issue. Likewise, in *People v. Galigao,* appellant was found by the trial court guilty of rape on three counts. On automatic review, appellant raised for the first time before the Court the defense of insanity. The Court addressed the issue consistent with the dictum that an appeal in a criminal case throws the whole case open for review and the reviewing court may correct errors even if they have not been assigned. With these cases as guideposts, petitioner is legally allowed to raise an issue which was not raised before the RTC or the Court of Appeals.

2. ID.; EVIDENCE; CREDIBILITY OF WITNESSES; FINALITY OF THE FACTUAL FINDINGS OF THE TRIAL COURT THEREON. — The bone of contention in this case is the credibility of the parties and their witnesses. This Court will not disturb the judgment of the trial court in assessing the credibility of the witnesses, unless there appears in the records some facts or

circumstances of weight and influence which have been overlooked or the significance of which has been misinterpreted by the trial court. This is because the trial judge has the unique opportunity, denied to the appellate court, to observe the witnesses and to note their demeanor, conduct and attitude under direct and cross-examination. In this case, the evidence in the records fully supports the trial court's finding that petitioner violated Section 27, Article IV of Republic Act No. 6425. Petitioner and his companions were sniffing *shabu* inside the Tamaraw FX parked in a street inside Rubyville Subdivision. PO2 Jessie Caranto was able to observe from a distance of two meters what petitioner and his cohorts were doing inside the vehicle, as the vehicle had transparent glass windows and considering that the vehicle was parked within five meters of a lit Meralco post. When PO2 Caranto and his companions took custody of the suspects, they obtained from the latter two sachets of *shabu* and the paraphernalia used in the pot session.

3. ID.; ID.; PRESUMPTIONS; DISPUTABLE PRESUMPTIONS; THE PRESUMPTION THAT OFFICIAL DUTY HAS BEEN REGULARLY PERFORMED PREVAILS. — As has been repeatedly held, credence shall be given to the narration of the incident by the prosecution witnesses especially when they are police officers who are presumed to have performed their duties in a regular manner, unless there be evidence to the contrary. Moreover, in the absence of proof of motive to falsely impute such a serious crime to petitioner, the presumption of regularity in the performance of official duty, as well as the findings of the trial court on the credibility of witnesses, shall prevail over appellant's self-serving and uncorroborated claim of having been framed. This Court, of course, is not unaware that in some instances law enforcers resort to the practice of planting evidence to extract information or even to harass civilians. But the defense of frame-up in drug cases requires strong and convincing evidence because of the presumption that the law enforcement agencies acted in the regular performance of their official duties.

4. ID.; ID.; MOTIVE, ; NO EVIDENCE OF ANY IMPROPPER MOTIVE IN CASE AT BAR. — In the case under consideration, there is no evidence of any improper motive on the part of the police officers who apprehended petitioner and his companions. The defense witnesses even admitted that they did not know

the apprehending police officers and that they had no quarrel with said law enforcers.

5. ID.; ID.; PROOF BEYOND REASONABLE DOUBT; ESTABLISHED. — We are convinced that in the evening of 10 December 1998, an honest-to-goodness apprehension of the petitioner and his friends for sniffing *shabu* was made by the police officers composed of PO2 Caranto and his colleagues. The positive identification made by the police officers and the laboratory report, not to mention the incredible defense of frame-up to which petitioner resorted, sufficiently proved beyond reasonable doubt that he committed the crime charged.

APPEARANCES OF COUNSEL

Public Attorney's Office for petitioner.
The Solicitor General for respondent.

D E C I S I O N

CHICO-NAZARIO, *J.*:

This petition for review on *certiorari* under Rule 45 of the Rules of Court assails the Decision[1] dated 19 August 2005 of the Court of Appeals in CA-G.R. CR No. 25188 which affirmed the Decision[2] dated 31 January 2001 of the Regional Trial Court (RTC) of Caloocan City, Branch 120, finding petitioner Ermin O. Dacles guilty of the crime of violation of Section 27, Article IV of Republic Act No. 6425, as amended, otherwise known as the Dangerous Drugs Act of 1972.

On 14 December 1998, petitioner, together with co-accused Federico Cleofas *y* Mateo, Virgilio Cardenas *y* Gercan, Marcelino Dueñas *y* Yabut and Maria Fe Mendoza *y* Pascual, was charged before the RTC with violating Section 27, Article IV of Republic

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[1] Penned by Associate Justice Marina L. Buzon with Associate Justices Mario L. Guariña III and Santiago Javier Ranada, concurring; *rollo,* pp. 68-77.

[2] Penned by Judge Victorino S. Alvaro; *rollo,* pp. 41-46.

Act No. 6425 in Criminal Case No. C-55283. The accusatory portion of the Information reads:

> That on or about the 10th day of December, 1998 in Caloocan City, Metro Manila and within the jurisdiction of this Honorable Court, the above-named accused, grouping themselves together did then and there willfully, unlawfully and feloniously use and sniff and pass to one another METHAMPHETAMINE HYDROCHLORIDE, without the corresponding prescription therefore and knowing the same to be a regulated drug.[3]

When arraigned, petitioner and co-accused pleaded not guilty. Thereafter, trial ensued.

The prosecution presented three witnesses: PO2 Jessie Caranto, Senior Inspector Juanita D. Siason of the Philippine National Police-Crime Laboratory, and PO3 Romulo Aquino.

Prosecution witness PO2 Jessie Caranto of the District Intelligence Unit (DIU) Northern Police District Office, Larangay Street, Kaunlaran Village, Caloocan City, testified that on 10 December 1998 at around 8:30 in the evening, while he and his two co-police operatives, SPO2 Pascua and PO3 Romulo Aquino, were conducting a surveillance operation along Rubyville Subdivision, Caloocan City, they noticed a Toyota Tamaraw FX utility vehicle bearing Plate No. WDP-587 parked along the side of the street. In order for them not to be noticed, they slowly and cautiously approached the vehicle where they saw five persons engaging in a pot session. The team introduced themselves as police officers and then arrested the suspects. PO2 Caranto gathered the two small transparent plastic sachets containing white crystalline substance believed to be *shabu,* including drug paraphernalia such as aluminum foil, *tubo* or pipe and a disposable lighter obtained from the suspects. The suspects and the vehicle were brought to the police headquarters at Larangay Street, Kaunlaran Village, Caloocan City. The confiscated items were turned over to SPO1 Rolando Pascua. PO2 Caranto said it was SPO1 Pascua who gave the confiscated

[3] Records, p. 1.

items to the police investigator, SPO2 Marlon Orquia, and that the latter was the one who put the markings on the confiscated materials. The recovered crystalline substance was brought to the PNP-Crime Laboratory at Camp Crame, Quezon City for examination. During the investigation conducted by the police officers, the suspects gave their names as Ermin Dacles, Virgilio Cardenas, Marcelino Dueñas, Federico Cleofas and Marie Fe Mendoza.

PO3 Romulo Aquino, a member of the team conducting surveillance operation in Sta. Quiteria, Caloocan City, said he and a certain PO1 Soreta stayed outside the Rubyville Subdivision while SPO1 Rolando Pascua, PO2 Jessie Caranto and some members of the Bantay Bayan were the ones who entered the subdivision. He admitted that he did not see the suspects inside the Tamaraw FX engaging in pot session as he was far from the said vehicle.[4]

Upon examination by the forensic analyst, Senior Inspector Juanita D. Siason of the Philippine National Police-Crime Laboratory, the contents of the two plastic heat-sealed transparent sachets were positive for methamphetamine hydrochloride or "*shabu.*"

The prosecution dispensed with the testimony of SPO2 Marlon Orquia and in lieu thereof, it entered into stipulations with the counsel of the accused the following facts: (1) that SPO2 Marlon Orquia was the investigator of the case; and (2) that SPO2 Orquia was the one who prepared the letter requesting a forensic examination of the contents of the two plastic sachets.[5]

The defense, on the other hand, presented Federico Cleofas, Virgilio Cardenas and appellant Ermin Dacles. All of them put up a defense of denial and frame-up.

Accused Federico Cleofas (Federico) testified that at around 7:30 in the evening of 10 December 1998, while he was in the store of his nephew located inside Rubyville Subdivision, Caloocan

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[4] TSN, 31 May 1999, p. 6.

[5] Records, p. 203.

City, drinking a bottle of softdrink and having a chat with his nephew, a Toyota Tamaraw FX which was driven by accused Marcelo Dueñas, arrived.[6] Accused Virgilio Cardenas and Ermin Dacles were on board the vehicle together with four armed police officers wearing civilian clothes. As the policemen alighted from the vehicle and were going to his direction, Federico, scared of the unfamiliar-looking policemen, ran towards the house of his childhood buddy named *Aboy*, also a police officer, for help. Before the pursuing police officers could arrest Federico, Aboy took him under his care. After the police officers and *Aboy* introduced themselves to each other, *Aboy* allowed the arresting officers to take with them his friend with the assurance that Federico would not be hurt.[7] Federico was then escorted to the Tamaraw FX where he was handcuffed.[8] The arresting officers thereafter asked him of the exact location of his house, but before they arrived at the site Federico indicated, the police officers punched him in the abdomen, suspecting that he was lying about the exact location of his house. Federico also testified that SPO2 Pascua tried to exact from him Twenty Thousand Pesos (₱20,000.00) and Ten Thousand Pesos (₱10,000.00) from Ermin Dacles and Virgilio Cardenas. When Federico told the police officers that he had no money, PO2 Aquino hit him on the head with a *batuta*.[9] Thereafter, they were brought to Valenzuela, specifically E. De Leon Street, where the vehicle stopped in front of a store. SPO2 Pascua ordered Federico to call up a relative. Thereupon he contacted Natividad Cleofas, his sister, whom he apprised of his situation. SPO2 Pascua then grabbed the telephone and instructed Natividad Cleofas to proceed to the Langaray Police Station and bring with her ₱20,000.00 in exchange for Federico's liberty.[10] After the call, they boarded the Tamaraw FX and, while on their way, the

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[6] TSN, 11 August 1999, p. 4.

[7] *Id*. at 6-8.

[8] *Id*. at 9.

[9] *Id*. at 10-11.

[10] *Id*. at 12.

police officers picked up accused Ma. Fe Mendoza before finally proceeding to the police station.[11] When Federico was physically examined by a physician, he did not divulge to the doctor that he had a contusion in the head caused by the *batuta*.

Virgilio Cardenas (Virgilio) also denied the allegations of the prosecution. He testified that on 10 December 1998, at around 7:00 to 8:00 o'clock in the evening, while waiting for a ride home at Sta. Quiteria, Caloocan City, a Tamaraw FX stopped in front of him with its occupants beckoning him inside.[12] Virgilio boarded and saw Marcelino Dueñas and Ermin Dacles inside the vehicle.[13] When they passed through the police checkpoint at the Tullahan Road, the policemen manning the checkpoint flagged them down.[14] Police officer Pascua, who was in uniform, frisked the three of them. Police officer Pascua informed them that he was actually looking for a certain person and Marcelino Dueñas volunteered that he knew the person the police officer was looking for.[15] The police officers thus boarded the Tamaraw FX. Upon reaching Rubyville subdivision, he saw the person the policemen were looking for running away from the police officers. The police officers caught him and brought him inside the Tamaraw FX. Thereafter, they proceeded to Valenzuela where the police officers arrested a certain Fe Mendoza. All of the accused were brought to the Langaray Police Headquarters.

Ermin Dacles (Ermin) declared that in the evening of 10 December 1998, he was at Sta. Quiteria Street, Caloocan City, waiting for a tricycle ride.[16] Marcelino Dueñas gave Ermin a ride in the former's Tamaraw FX. When Ermin boarded the vehicle, he noticed that Marcelino Dueñas was with Virgilio Cardenas. Along the way, three police officers, two of whom

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[11] *Id*. at 14.

[12] TSN, 15 September 1999, p. 3.

[13] *Id*.

[14] *Id*. at 4.

[15] *Id*. at 5.

[16] TSN, 30 May 2000, p. 4.

Ermin recognized as PO3 Romulo A. Aquino and PO2 Jessie Caranto, stopped and searched the vehicle and then eventually boarded it. The group then proceeded to Rubyville Subdivision where the police officers chased and arrested Federico Cleofas.[17] The police officers and the arrested individuals thereafter went to Valenzuela. There the police officers picked up Fe Mendoza. The police then brought all of them to the Larangay Police Headquarters, Caloocan City. While on their way to the police station, SPO1 Pascua demanded from Ermin and the rest of the apprehended men inside the vehicle the amount of ₱50,000.00. For his part, Ermin replied he had no money.[18]

After weighing the evidence presented by the parties, the RTC was of the belief that the prosecution mustered the requisite quantum of evidence to prove the guilt of the petitioner and other accused of the crime charged. It gave full credence to the version of the prosecution and brushed aside the defenses of denial and frame-up interposed by the appellant and his companions. Thus, it convicted all of them of the offense charged and imposed upon them the indeterminate penalty of 6 months and 1 day as minimum to 6 years as maximum, and to pay the fine of ₱100.00 each, *viz*:

> WHEREFORE, judgment is hereby rendered finding accused ERMIN DACLES *y* OLEDO, VIRGILIO CARDENAS *y* GERCAN, MARCELINO DUEÑAS *y* YABUT, FEDERICO CLEOFAS *y* MATEO and MA. FE MENDOZA *y* PASCUAL GUILTY of the offense charged and sentencing them to suffer a penalty of six (6) months and one (1) day as minimum to six years each as maximum of *prision correccional*.
>
> The Court orders all the accused to pay ₱100.00 each as fine to OCC, RTC, Caloocan City.[19]

Only petitioner Ermin Dacles and Federico Cleofas filed a notice of appeal.[20] The RTC ordered the transmittal of the entire records of the case to the Court of Appeals.

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[17] *Id*. at 7.

[18] *Id*. at 11.

[19] *Rollo,* p. 46.

[20] Records, p. 360.

The Court of Appeals, on 19 August 2005, promulgated its Decision affirming the judgment of the RTC convicting appellant and the other accused therein.[21] It, however, modified the penalty by reducing the same to 6 months of *arresto mayor*, as minimum, to 4 years and 2 months of *prision correccional* as maximum. It deleted the fine of ₱100.00. The dispositive part of the decision reads:

> WHEREFORE, the Decision appealed from is AFFIRMED with MODIFICATION by REDUCING the penalty to six (6) months of *arresto mayor*, as minimum, to four (4) years and two (2) months of *prision correccional*, as maximum, and DELETING the fine of ₱100.00.[22]

On 9 September 2005, Ermin Dacles and Federico Cleofas filed a motion for reconsideration which was denied by the Court of Appeals in a Resolution dated 7 February 2006.

Hence, the instant petition filed by Ermin Dacles.

In his Memorandum, the petitioner raises a single issue:

> WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE REGIONAL TRIAL COURT FINDING THE PETITIONER GUILTY BEYOND REASONABLE DOUBT FOR VIOLATION OF SECTION 27, ARTICLE IV OF REPUBLIC ACT NO. 6425.[23]

Petitioner faults the RTC and the Court of Appeals in giving full credence to the testimony of PO2 Caranto who testified that he saw petitioner and his companions engaged in a pot session. Petitioner stresses that PO2 Caranto's testimony should not have been believed since said testimony was not even corroborated by prosecution witness PO2 Romulo Aquino. Petitioner argues that the RTC and the Court of Appeals cannot use the presumption of regularity in the performance of official functions in convicting petitioner since the said principle cannot

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[21] *Rollo*, pp. 68-77.

[22] *Id*. at 76.

[23] *Id*. at 123-124.

prevail over the constitutional presumption of innocence of the accused. He insists that although the defense of alibi and denial are weak, it is still the duty of the prosecution to prove the guilt of the accused beyond reasonable doubt to support a judgment of conviction.

He also maintains that he deserves an acquittal since there exists a doubt as to whether the items confiscated from them, assuming *arguendo* that the prosecution's theory were true, were the same specimens submitted for laboratory examination and which tested positive for methamphetamine hydrochloride. According to petitioner, there is a possibility that switching of evidence could occur and that the specimens seized from them were not the same items subjected to laboratory examination.

The Office of the Solicitor General avers that the questions involving the alleged testimonial veracity or credibility are inappropriate in the instant petition as only questions of law may be raised in a petition for review. It also assails appellant's belated attempt of raising as an issue for the first time the identity of the confiscated items. It states that the identity of the *shabu* should have been questioned at the trial stage to afford the prosecution reasonable opportunity to meet such objection. Since this issue was not raised before the RTC nor before the Court of Appeals, appellant cannot raise the same before this Court.

We deal first with the argument raised by the Office of the Solicitor General that it is too late for petitioner to raise the issue on the identity of the confiscated *shabu*. The long-standing precept is that an appeal in a criminal case throws the whole case wide open for review.[24] The reviewing tribunal can correct errors though unassigned in the appeal, or even reverse the trial court's decision on grounds other than those the parties raised as errors.[25]

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[24] *People v. Jubail*, G.R. No. 143718, 19 May 2004, 428 SCRA 478, 491.

[25] *People v. Miranda*, G.R. No. 174773, 2 October 2007, 534 SCRA 552, 563-564.

In *People v. Dorimon,*[26] appellant was convicted by the trial court of the crime of Illegal Possession of Firearm. On appeal before the Court, appellant failed to raise the issue of failure of the prosecution to prove his non-possession of a license to possess a firearm. Notwithstanding this, the Court took cognizance of the issue. Likewise, in *People v. Galigao,*[27] appellant was found by the trial court guilty of rape on three counts. On automatic review, appellant raised for the first time before the Court the defense of insanity. The Court addressed the issue consistent with the dictum that an appeal in a criminal case throws the whole case open for review and the reviewing court may correct errors even if they have not been assigned. With these cases as guideposts, petitioner is legally allowed to raise an issue which was not raised before the RTC or the Court of Appeals. Despite this ruling, however, the Court finds no compelling reason to acquit petitioner in the instant case.

The bone of contention in this case is the credibility of the parties and their witnesses. This Court will not disturb the judgment of the trial court in assessing the credibility of the witnesses, unless there appears in the records some facts or circumstances of weight and influence which have been overlooked or the significance of which has been misinterpreted by the trial court. This is because the trial judge has the unique opportunity, denied to the appellate court, to observe the witnesses and to note their demeanor, conduct and attitude under direct and cross-examination. In this case, the evidence in the records fully supports the trial court's finding that petitioner violated Section 27, Article IV of Republic Act No. 6425. Petitioner and his companions were sniffing *shabu* inside the Tamaraw FX parked in a street inside Rubyville Subdivision. PO2 Jessie Caranto was able to observe from a distance of two meters what petitioner and his cohorts were doing inside the vehicle, as the vehicle had transparent glass windows and considering that the vehicle was parked within five meters of a lit Meralco post. When PO2 Caranto and his companions took custody of

[26] 378 Phil. 660 (1999).

[27] 443 Phil. 246 (2003).

the suspects, they obtained from the latter two sachets of *shabu* and the paraphernalia used in the pot session. PO2 Caranto unwaveringly narrated the incident as follows:

A: When we conducted a surveillance at Rubyville Subdivision, Caloocan City sir we found one (1) Tamaraw FX Van bearing Plate No. WDP-587 parked along the street, sir.

Q: Where is this located?

A: At Rubyville Subdivision, Caloocan City, sir.

Q: Now, you mentioned about one Tamaraw FX Van WDP-587, what is this Tamaraw FX doing?

A: There were unidentified male persons on board that Tamaraw FX engaged in pot session sir.

Q: The first time you saw this van or this Tamaraw FX vehicle, where were you Mr. Witness?

A: I am near the Tamaraw FX maybe two (2) meters away, sir.

x x x x x x x x x

Q: This Tamaraw FX has glasses on the sidings?

A: Transparent, sir.

Q: So you can easily identify the persons inside the Tamaraw FX?

A: Yes, sir.

x x x x x x x x x

Q: What did you do when you saw the parked Tamaraw FX?

A: We introduced ourselves as law men and assigned at the DIU and arrested them.

x x x x x x x x x

Q: With this two (2) meters distance, what were these persons doing at that time?

A: x x x they were using drugs known as *shabu*.

x x x x x x x x x

Q: After seeing the persons sniffing the prohibited drugs you mentioned, what did your team do next?

A: We arrested them x x x.

xxx xxx xxx

Q: And what did they do?

A: They opened the door of the vehicle sir.

Q: And after they opened the vehicle what did you see inside?

A: We saw the paraphernalias and we confiscated all the evidence.

xxx xxx xxx

Q: And, where did you gather the evidence?

A: Paraphernalias, sir.

Q: Will you describe these paraphernalias Mr. Witness?

A: Two (2) small transparent plastic sachets containing white crystalline substance suspected to be *shabu*, aluminum foil, *tubo* or pipe, lighter.

xxx xxx xxx

Q: So there are only two (2) plastic sachets allegedly containing *shabu*?

A: Yes, sir.

Q: And you were the one who retrieved the paraphernalias from the five (5) persons?

A: Yes, sir.

Q: And police officers Pascua and Chua what were they doing then?

A: They brought the other accused to our office for further investigation.

Q: How about the vehicle the Tamaraw FX?

A: It is already impounded, sir.

Q: Were you able to know the persons brought to your station Mr. Witness?

A: Yes, sir.

Q: Will you tell us the names of these persons if you can remember?

A: I cannot remember their names, sir.

Q: Can you recall their faces Mr. Witness?

A: Yes, sir.

Q: Can you identify them if you see them? Are they inside the courtroom this morning?

A: Yes, sir.[28]

On cross-examination, PO2 Caranto described the relative positions of the suspects inside the vehicle when they were arrested:

Q: Mr. Witness can you tell us who were [seated] at the back, in the middle and front portion of the vehicle?

A: The four of them and the other one is the driver. Ermin Dacles is [seated] at the middle portion of the vehicle.

Q: What about Cardenas, where was he [seated]?

A: In the middle portion sir.

Q: What about Maria Fe Mendoza where was she [seated]?

A: At the back portion sir.

Q: So what about Cleofas?

A: I saw him with Maria Fe Mendoza sir.

Q: So, what about Dueñas?

A: He is the driver sir.

Court: Where did you come from, behind the parked Tamaraw FX or in front of the parked Tamaraw FX?

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[28] TSN, 4 May 1999, pp. 3-9.

A: From the front portion of the vehicle sir.

Q: And despite the fact you came from the front side you were [not] noticed by Dueñas in the driver's seat?

A: No, sir he was "*nakayuko*."

Q: While you chanced upon the parked Tamaraw FX vehicle and doing some surveillance who among the accused in this case that you noticed which lead you to approach the vehicle?

A: The four (4) of them.

Q: Mr. Witness, who among the accused did you notice that made you approached the vehicle?

A: The four (4) of them were [seated] at the back.

Q: Was the FX parked in a dark place?

A: It was lighted sir.

Q: How far from the Meralco post if there was a Meralco post?

A: About five (5) meters away.

Q: And will you describe what was their respective positions?

A: Yes, sir.

Q: What were they doing?

A: "*Gumagamit sila*." "*May hinihithit na tubo*," sir.

Q: You were not noticed when you approached them?

A: No, sir because they were surprised.[29]

PO3 Romulo Aquino corroborated the testimony of PO2 Caranto that indeed there was a police surveillance conducted inside Rubyville Subdivision. Although PO3 Aquino admitted that he was stationed outside the subdivision and therefore was not with PO2 Caranto when the latter arrested the suspects, he confirmed that petitioner and his companions were arrested

[29] TSN, 4 May 1999, pp. 16-18.

inside the Rubyville Subdivision. In fact, PO3 Aquino accompanied the arrested suspects to the police station.

The version depicted by the prosecution, through the testimonies of PO2 Caranto and PO3 Aquino, could only be described by people who actually witnessed the event that took place on the night of 10 December 1998. Only trustworthy witnesses could have narrated with such detail and realism what really happened on the date referred to.

As has been repeatedly held, credence shall be given to the narration of the incident by the prosecution witnesses especially when they are police officers who are presumed to have performed their duties in a regular manner, unless there be evidence to the contrary. Moreover, in the absence of proof of motive to falsely impute such a serious crime to petitioner, the presumption of regularity in the performance of official duty, as well as the findings of the trial court on the credibility of witnesses, shall prevail over appellant's self-serving and uncorroborated claim of having been framed.

This Court, of course, is not unaware that in some instances law enforcers resort to the practice of planting evidence to extract information or even to harass civilians. But the defense of frame-up in drug cases requires strong and convincing evidence because of the presumption that the law enforcement agencies acted in the regular performance of their official duties. Moreover, the defense of denial or frame-up, like alibi, has been viewed by the court with disfavor for it can just as easily be concocted and is a common and standard defense ploy in most prosecutions for violation of the Dangerous Drugs Act.

In the case under consideration, there is no evidence of any improper motive on the part of the police officers who apprehended petitioner and his companions. The defense witnesses even admitted that they did not know the apprehending police officers and that they had no quarrel with said law enforcers.[30] With this admission by the defense, it is readily clear that the claim of frame-up is baseless.

[30] TSN, 30 May 2000, p. 11.

A scrutiny of the version of the petitioner reveals incredulous specifics and details which are far from ordinary human experience. Also, the testimonies of the defense witnesses failed to dovetail with each other on significant points. Petitioner testified that he did not know Federico Cleofas, nor had he seen the latter prior to their arrest on 10 December 1998.[31] Federico Cleofas, on the other hand, declared that he had known petitioner for about a year prior to 10 December 1998, as they used to play basketball in Valenzuela.[32] Another disturbing inconsistency of the defense was the statement given by petitioner that when he boarded the Tamaraw FX, Virgilio Cardenas was already inside and was seated at the middle passenger portion of the vehicle.[33] But Virgilio Cardenas contradicted this when he testified that petitioner was there before he boarded the vehicle.[34]

At one point, petitioner averred that after he and his companions were wrongfully arrested in Caloocan City, the arresting police officers proceeded to Valenzuela where the latter arrested Maria Fe Mendoza. This is incredible because the only persons who could have known the whereabouts of Maria Fe Mendoza were the petitioner and his co-accused, since they were the ones who knew Maria Fe. The police officers, as the defense witnesses admitted, were strangers to them. Clearly, the police officers could not have known where Maria Fe was. The story of the defense is simply implausible.

Petitioner insists that the *shabu* confiscated from them was not established by the prosecution. Records disprove this. PO2 Caranto positively identified in court the two plastic sachets containing *shabu* which were confiscated from petitioner and his cohorts. Although he did not place his initials on the sachets of *shabu* after the confiscation, he was able to identify the

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[31] *Id.* at 7-8.

[32] TSN, 11 August 1999, p. 20.

[33] TSN, 30 May 2000, pp. 4, 11.

[34] TSN, 16 September 1999, pp. 3, 4.

same, since he testified that it was the police investigator who placed identifying marks thereon; thus:

Q: If I show you again the two plastic sachets of *shabu* hich you retrieved from all the accused in this case, will you be able to identify it?

A: Yes, sir.

Q: I am showing to you two (2) plastic sachets of shabu, will you please go over the same and tell us what is the relation of two plastic sachets to the one you confiscated?

A: Yes, sir.

Q: What is the relation of this Mr. Witness?

A: This is the same sir.

Court: Why are you certain that these are the same you picked up inside the Tamaraw FX?

A: I know it, the other plastic is longer than the other one.

xxx xxx xxx

Q: Now Mr. Witness just a while ago you were being asked by the Honorable Court whether you can identify the two (2) sachets as a matter of fact it was presented to you and you already identified the same?

A: Yes, sir.

Q: Do you confirm to this Honorable Court that you [did] not put any marking?

A: It is our investigator who placed marking there sir.[35]

Undoubtedly, the identity of the *corpus delicti* has been duly established by the prosecution in this case.[36]

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[35] TSN, 4 May 1999, pp, 11-12, 14.

[36] *People v. Miranda*, *supra* note 25 at 568; *People v. Manalo*, G.R. No. 107623, 23 February 1994, 230 SCRA 309, 318.

We are convinced that in the evening of 10 December 1998, an honest-to-goodness apprehension of the petitioner and his friends for sniffing *shabu* was made by the police officers composed of PO2 Caranto and his colleagues. The positive identification made by the police officers and the laboratory report, not to mention the incredible defense of frame-up to which petitioner resorted, sufficiently proved beyond reasonable doubt that he committed the crime charged.

The Court of Appeals imposed on petitioner the indeterminate penalty of 6 months of *arresto mayor*, as minimum, to 4 years and 2 months of *prision correccional* as maximum. In *Teodosio v. Court of Appeals,*[37] which cited *People v. Simon*,[38] the Court spelled out the proper penalties for drug-related crimes under Republic Act No. 6425, as amended by Republic Act No. 7659. The appropriate penalty is *reclusion perpetua* if the quantity of the drug weighs 750 grams or more. If the drug weighs less than 250 grams, the penalty to be imposed is *prision correccional*; from 250 grams to 499 grams, *prision mayor*; and, from 500 grams to 749 grams, *reclusion temporal*.

In the instant case, the Reports of Forensic Analyst Juanita D. Sioson show that the two plastic sachets contained the total weight of 0.19 gram. Since the quantity of the *shabu* weighs less than 250 grams, the proper penalty should be no more than *prision correccional*. There being neither generic mitigating nor aggravating circumstances, the penalty of *prision correccional* shall be imposed in its medium period. And applying the Indeterminate Sentence Law, the minimum period shall be within the range of the penalty next lower in degree which is *arresto mayor*. Thus, the imposition of the penalty of 6 months of *arresto mayor*, as minimum to 4 years and 2 months of *prision correccional* as maximum is proper. No fine is imposable in this case because petitioner's penalty is not *reclusion perpetua* or death.[39]

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[37] G.R. No. 124346, 8 June 2004, 431 SCRA 194, 209.

[38] G.R. No. 93028, 29 July 1994, 234 SCRA 555.

[39] *Teodosio v. Court of Appeals*, *supra* note 37.

WHEREFORE, the Decision of the Court of Appeals in CA-G.R. CR No. 25188 which affirmed the Decision of the Regional Trial Court Caloocan City, Branch 120, convicting petitioner Ermin Dacles *y* Oledo for violation of Section 27, Article IV of Republic Act No. 6425, as amended by Republic Act No. 7659, and sentencing him to suffer an indeterminate penalty from 6 months of *arresto mayor*, as minimum to 4 years and 2 months of *prision correccional* as maximum, is *AFFIRMED in toto*.

SO ORDERED.

*Ynares-Santiago (Chairperson), Austria-Martinez, Corona,** and *Reyes, JJ.,* concur.

EN BANC

[G.R. No. 172868. March 14, 2008]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **ROBERTO AGUILAR,** *appellant.*

SYLLABUS

1. REMEDIAL LAW; CRIMINAL PROCEDURE; PLEA; GUIDELINES ON THE MANNER IN WHICH SEARCHING INQUIRY SHOULD PROCEED WHEN ACCUSED PLEADS GUILTY TO A CAPITAL OFFENSE, REITERATED. — The Court has in several cases prescribed the following guidelines on the manner in which a searching inquiry should proceed: (1) Ascertain from the accused himself (a) how he was brought into the custody of the law; (b) whether he had the assistance of a competent counsel during the custodial and preliminary investigations; and (c) under what conditions he was detained and interrogated

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* Justice Renato C. Corona was designated to sit as additional member replacing Justice Antonio Eduardo B. Nachura per Raffle dated 10 September 2007.

during the investigations. This is intended to rule out the possibility that the accused has been coerced or placed under a state of duress either by actual threats of physical harm coming from malevolent quarters or simply because of the judge's intimidating robes. (2) Ask the defense counsel a series of questions as to whether he had conferred with, and completely explained to, the accused the meaning and consequences of a plea of guilty. (3) Elicit information about the personality profile of the accused, such as his age, socio-economic status, and educational background, which may serve as a trustworthy index of his capacity to give a free and informed plea of guilty. (4) Inform the accused of the exact length of imprisonment or nature of the penalty under the law and the certainty that he will serve such sentence. For not infrequently, an accused pleads guilty in the hope of a lenient treatment or upon bad advice or because of promises of the authorities or parties of a lighter penalty should he admit guilt or express remorse. It is the duty of the judge to ensure that the accused does not labor under these mistaken impressions because a plea of guilty carries with it not only the admission of authorship of the crime proper but also of the aggravating circumstances attending it, may increase punishment. (5) Inquire if the accused knows the crime with which he is charged and to fully explain to him the elements of the crime which is the basis of his indictment. Failure of the court to do so would constitute a violation of his fundamental right to be informed of the precise nature of the accusation against him and a denial of his right to due process. (6) All questions posed to the accused should be in a language known and understood by the latter. (7) The trial judge must satisfy himself that the accused, in pleading guilty, is truly guilty. The accused must be required to narrate the tragedy or reenact the crime or furnish its missing details.

2. ID.; EVIDENCE; PROOF BEYOND REASONABLE DOUBT, ESTABLISHED. — Nevertheless, as did the appellate court, the Court finds that appellant's conviction must be sustained, not on the basis of his plea of guilt which he affirmed on the witness stand but on the basis of the evidence presented by the prosecution showing the guilt beyond reasonable doubt of appellant which, by choice, he failed to rebut. x x x Undoubtedly, AAA's testimony, which was corroborated by her sister CCC, proves beyond reasonable doubt that appellant had carnal knowledge of his minor daughter AAA.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Public Attorney's Office for accused-appellant.

D E C I S I O N

CARPIO-MORALES, *J.*:

On petition for review is the Court of Appeals' decision[1] of August 31, 2005 which affirmed with modification that of Branch 69 of the Regional Trial Court of Pasig convicting appellant, Roberto Aguilar, of Qualified Rape.[2]

The inculpatory portion of the information, docketed as Criminal Case No. 125621-H charging appellant with Qualified Rape of his daughter, reads:

> That on or about the 4th day of May, 2003 in Taguig, Metro Manila, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, taking advantage of his moral authority and ascendancy and by means of force and intimidation did, then and there willfully, unlawfully and feloniously have carnal knowledge of [AAA][3] against her will and consent, the said crime having been attended by the qualifying circumstances of relationship and minority, the said accused being the father of the said victim, a 15-year old minor at the time of the commission of the crime, and that the said rape was committed in full view of the sister of the victim, thereby raising the crime to a [*sic*] QUALIFIED RAPE, which is aggravated by the circumstances of treachery, evident premeditation, abuse of superior strength, nighttime and dwelling, to the damage and prejudice of said victim.

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[1] CA-G.R. CR.-H.C. No. 01298; penned by Associate Justice Jose Catral Mendoza and concurred in by Presiding Justice Romeo A. Brawner and Associate Justice Edgardo P. Cruz; *rollo*, pp. 3-14.

[2] Criminal Case No. 125621-H; records, pp. 67-75.

[3] The names of the victim and the immediate family members of the victim were withheld pursuant to *People v. Cabalquinto*, G.R. No. 167693, September 19, 2006, 502 SCRA 419.

CONTRARY TO LAW.[4] (Underscoring supplied)

The following facts were not disputed by appellant.

The private complainant, AAA, daughter of appellant and his wife BBB, was born on January 22, 1989,[5] and was thus 14 years old on May 4, 2003, the date the offense is alleged to have been committed.

At the time of the commission of the offense, AAA's mother BBB was working in Pakistan, leaving the custody and care of their three children to her husband-appellant.

Around 2:00 o'clock in the morning of May 4, 2003, while AAA was sleeping with her younger sister CCC at their house in Purok 6, Tuktukan, Taguig, Metro Manila, she was roused from her sleep as she felt someone undressing her. She quickly recognized her father, herein appellant, who was removing her short pants and later also removed his. He soon lay atop her, inserted his penis in her vagina, and proceeded to perform a push and pull motion.

The noise produced by the push and pull motion of appellant awakened CCC who, overtaken by fear, feigned to be asleep albeit she made sure she witnessed the incident.

Later that day, the siblings' aunt DDD, sister of their mother BBB, visited their home. CCC at once reported to DDD what she had witnessed earlier. AAA confirmed the report. After consulting her husband about the incident, DDD, together with AAA proceeded to the Taguig Police Station and filed a complaint against appellant.

On examination of AAA at the Philippine National Police Laboratory by Medico-legal Officer Paul Ed C. Ortiz, the following findings, quoted *verbatim*, were noted:

Hymen: With pressure if shallow healed lacerations at 2, 3, 6 & 9 o'clock and a deep healed laceration at 11 o'clock position.

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[4] Records, p. 15.

[5] Certificate of Live Birth, *id*. at 51.

x x x x x x x x x

CONCLUSION: Subject is non-virgin state physically. There are no external signs of application of any form of trauma.[6]

On his scheduled date of arraignment on June 23, 2003, appellant's counsel *de oficio* informed the trial court that appellant intended to plead guilty to the charge. To afford appellant time to reflect on his intended plan and its consequences, however, the trial court postponed the arraignment to July 6, 2003, and later to July 21, 2003.

On arraignment on July 21, 2003, appellant pleaded guilty to the charge. The trial court thereupon conducted a searching inquiry to determine the voluntariness of appellant's plea and his full comprehension of the consequences thereof. On being convinced that appellant indeed voluntarily admitted his guilt and fully understood its consequences, the trial court directed the prosecution to present evidence "to prove the guilt of [appellant] and [the] exact degree of culpability."

The prosecution thus presented as witnesses AAA, CCC, and DDD.

After the prosecution rested its case, when asked by the trial court "What can you say, are you going to testify," appellant answered in the negative.[7]

By decision of October 10, 2003, the trial court convicted appellant and imposed the death penalty on him, disposing as follows:

WHEREFORE, finding accused Roberto Aguilar guilty beyond reasonable doubt of Qualified Rape, this court hereby sentences accused to suffer the Death penalty and to pay offended party [AAA] ₱50,000.00 as moral damages, ₱50,000.00 as civil indemnity and ₱25,000.00 as exemplary damages.

SO ORDERED.[8]

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[6] *Id*. at 49.

[7] TSN, August 5, 2003, p. 38.

[8] Records, p. 75.

The case was thereupon elevated for automatic review to this Court, appellant faulting the trial court on the sole ground that in convicting him, it failed to comply with Section 3, Rule 116 of the Rules of Court which reads:

> SEC. 3. *Plea of guilty to capital offense; reception of evidence.* — When the accused pleads guilty to a capital offense, the court shall conduct a searching inquiry into the voluntariness and full comprehension of the consequences of his plea and shall require the prosecution to prove his guilt and the precise degree of culpability. The accused may present evidence in his behalf.

Following *People v. Mateo*,[9] the Court transferred the case to the Court of Appeals for intermediate review.

By Decision of August 31, 2005, the Court of Appeals, finding the evidence for the prosecution to have proved beyond reasonable doubt the guilt of appellant, affirmed the decision of the trial court with modification by increasing the award of civil indemnity, disposing thus:

> WHEREFORE, the October 10, 2003 Decision of the Regional Trial court, Branch 69, Pasig City, in Criminal Case No. 125621-H, is hereby MODIFIED to read as follows:
>
> WHEREFORE, finding accused Roberto Aguilar guilty beyond reasonable doubt of Qualified Rape, this court hereby sentences accused to suffer the Death Penalty and to pay offended party [AAA] ₱50,000.00 as moral damages, **₱75,000.00** as civil indemnity and ₱25,000.00 as exemplary damages.
>
> SO ORDERED.[10] (Emphasis supplied)

The case is back before this Court.

The parties were, by Resolution of July 11, 2006, required by the Court to submit Supplemental Briefs if they so desired.[11] Both parties manifested that they no longer intended to submit the same.[12]

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[9] G.R. Nos. 147678-87, July 7, 2004, 433 SCRA 640.

[10] *Rollo*, pp. 13-14.

[11] *Id.* at 15.

[12] *Id.* at 16-19.

The above-quoted provision of Sec. 3 of Rule 116 provides the procedure to be observed when an accused pleads guilty to a capital offense in order to safeguard his rights.

The Court has in several cases prescribed the following guidelines on the manner in which a searching inquiry should proceed:

(1) Ascertain from the accused himself (a) how he was brought into the custody of the law; (b) whether he had the assistance of a competent counsel during the custodial and preliminary investigations; and (c) under what conditions he was detained and interrogated during the investigations. This is intended to rule out the possibility that the accused has been coerced or placed under a state of duress either by actual threats of physical harm coming from malevolent quarters or simply because of the judge's intimidating robes.

(2) Ask the defense counsel a series of questions as to whether he had conferred with, and completely explained to, the accused the meaning and consequences of a plea of guilty.

(3) Elicit information about the personality profile of the accused, such as his age, socio-economic status, and educational background, which may serve as a trustworthy index of his capacity to give a free and informed plea of guilty.

(4) Inform the accused of the exact length of imprisonment or nature of the penalty under the law and the certainty that he will serve such sentence. For not infrequently, an accused pleads guilty in the hope of a lenient treatment or upon bad advice or because of promises of the authorities or parties of a lighter penalty should he admit guilt or express remorse. It is the duty of the judge to ensure that the accused does not labor under these mistaken impressions because a plea of guilty carries with it not only the admission of authorship of the crime proper but also of the aggravating circumstances attending it, that increase punishment.

(5) Inquire if the accused knows the crime with which he is charged and to fully explain to him the elements of the crime which is the basis of his indictment. Failure of the court to do so would constitute a violation of his fundamental right to be informed of the precise nature of the accusation against him and a denial of his right to due process.

(6) All questions posed to the accused should be in a language known and understood by the latter.

(7) The trial judge must satisfy himself that the accused, in pleading guilty, is truly guilty. The accused must be required to narrate the tragedy or reenact the crime or furnish its missing details.[13]

The trial court attempted to observe these guidelines as reflected in the following excerpt of the proceedings taken on July 21, 2003:

COURT:

> Make it of record that accused admitted complete responsibility to Criminal Case No. 125621 duly assisted by counsel for qualified rape. Question: *Alam mo ba na sa pag-amin mo sa kasong qualified rape bibigyan ka ng parusang lethal injection or life sentence depende sa testimony ng complainant, nalalaman mo ba ito?*

ACCUSED:

> *Opo.*

COURT:

> ***Bakit mo naman inamin itong kaso laban sa iyo?***

ACCUSED:

> ***Dahil ginawa ko po kase talaga*** *at naaawa ako sa asawa ko na nagpapakagastos pa sa kaso at saka umaabsent pa eskwela ang anak ko sa pagpunta punta dito.*

COURT:

> *Ito ba ay napagisipan mong mabuti bago ka umamin?*

ACCUSED:

> *Opo, mula pa noong July 7. Noon ko unang sinabi na aamin ako.*

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[13] *People v. Gumimba*, G.R. No. 174056, February 27, 2007, 517 SCRA 25, 35-36; *People v. Tonyacao*, G.R. Nos. 134531-32, July 7, 2004, 433 SCRA 513, 522-523; *People v. Pastor*, 428 Phil. 976, 987 (2002); *People v. Aranzado*, 418 Phil. 125 (2001); *People v. Chua*, 418 Phil. 565 (2001); *People v. Alicando*, 321 Phil. 657 (1995); *People v. Albert*, 321 Phil. 500 (1995).

COURT:

Ilang taon ka na ngayon?

ACCUSED:

Forty-five *po.*

COURT:

Anong natapos mo?

ACCUSED:

First year high school *po.*

COURT:

Ano ang trabaho mo bago nangyari ang insidenteng ito?

ACCUSED:

Isa po akong smoked-fish vendor.

COURT:

Ano ang religion mo?

ACCUSED:

Roman Catholic po.

COURT:

How about your daughter?

A- *Opo*.

COURT:

Kasal ka ba sa iyong asawa?

A- *Opo*.

COURT:

Kailan?

ACCUSED:

May 19.

COURT:

Alam mo ba kung ilang taon si [AAA]?

ACCUSED:

Fifteen *po sa* January 22.

COURT:

Pinagsisisihan mo ba ang ginawa mo sa anak mo?

ACCUSED:

Opo.

COURT:

Bibistahan ko pa rin ito at saka kita bibigyan ng kaukulang parusa matapos kong marining [sic] ang testimony ng iyong anak at ng kanyang testigo.

ACCUSED:

Opo.[14] (Emphasis and underscoring supplied)

From the above-quoted transcript of the proceedings, the Court finds that the trial court failed to fully observe the above-enumerated guidelines.

Nevertheless, as did the appellate court, the Court finds that appellant's conviction must be sustained, not on the basis of his plea of guilt which he affirmed on the witness stand but on the basis of the evidence presented by the prosecution showing the guilt beyond reasonable doubt of appellant which, by choice, he failed to rebut.

Consider the following testimony of AAA:

Prosecutor Deza —

x x x x x x x x x

Q- **When did this alleged molestation of the accused to you happened? [*sic*]**

A- **May 4, 2003 Sir.**

[14] TSN, July 21, 2003, pp. 3-6.

Q- **And where did it occur?**

A- **In our residence in Purok 6, Tuktukan, Taguig, Metro Manila Sir.**

Q- **What time did it occur?**

A- **Two o'clock in the morning Sir.**

Q- **Will you please inform the Honorable Court how did the alleged rape started? [*sic*]**

A- **I was sleeping at around seven o'clock in the evening when I was awakened because somebody was undressing me.**

Q- And who were your companion [*sic*] or rather persons, if any, sleeping with you on that night of May 4, 2003?

A- My sister was sleeping beside me.

Q- Who else if any?

A- Only the two of us were sleeping while the others were sleeping outside Sir.

Q- How about your father? Where was he supposed to sleep then?

A- Outside of the room Sir.

Q- **So what time if you can remember were you awakened when somebody was undressing you?**

A- **About two o'clock.**

Q- **And when you were awakened because you were being undressed do [*sic*] you recognize who was undressing you?**

A- **Yes Sir.**

Q- **And who was he?**

A- **Roberto Aguilar Sir.**

Q- When you open [*sic*] your eyes and you saw Roberto Aguilar undressing you was he undressed or dressed?

A- He was dressed when he removed my short pants and then he also undressed himself.

x x x x x x x x x

Q- **So what happen [*sic*] after he undressed himself and you were also undressed?**

A- **He put himself on top of me and he inserted his organ part [sic] to my private part.**

Q- **You said he inserted his organ to yours. Did you see it?**

A- **Yes Sir.**

Q- **What was he actually doing when he was on top of you?**

A- **"Niyuyugyug po niya ako, kinakabayo po niya ako."**

Court —

Make it of record that the witness was crying while narrating her story.

Prosecutor Deza —

Q- **Can you remember how long did this "*niyuyugyug ka niya*" last?**

A- **Three (3) minutes *po*.**

Q- **Did you feel his organ to [sic] your organ?**

A- **Yes Sir.**

Q- And how did you feel?

A- It was painful Sir.

Q- Did you ever attempt to prevent him from doing so?

A- I pushed him but he was strong Sir.

Q- Aside from his acts did he say anything while he was doing such molestation to you?

A- He told me not to make any noise because somebody might hear us, "*tapos minura pa niya ako.*"

Q- Were you afraid with [sic] your father?

A- Yes Sir.

Q- At that time that [*sic*], when your father bad mouth or "*minura ka*" was that enough to make you afraid?

A- Yes Sir and he was threatening me Sir.

Court (to the witness) —

Q- How did he threaten you?

A- He said that he will kill me Your Honor. He told me that if I will shout or do something against him he will kill me.

Prosecutor Deza —

Q- Did he have the influence or the means to kill you at that time?

A- Yes Sir because he has a knife with him and he can stab me anytime.

Q- Did you see the knife?

A- Yes Sir.

Court (to the witness) —

Q- When did you see the knife?

A- When I was last used he pointed the knife at me Your Honor.

Prosecutor Deza —

Q- When you said your last used when was that last used? [*sic*] Were you referring to this one May 4?

A- Yes Sir.[15] (Emphasis and underscoring supplied)

Undoubtedly, AAA's testimony, which was corroborated by her sister CCC, proves beyond reasonable doubt that appellant had carnal knowledge of his minor daughter AAA.

It bears reiterating at this juncture that in the earlier-quoted transcript of his testimony during the searching inquiry conducted by the trial court after he pleaded guilty to the charge, appellant, when asked why he made such plea, answered, "*Dahil ginawa ko po kase talaga,*" and that after the prosecution rested its case, appellant opted not to present evidence in his defense.

With the passage, however, on June 24, 2006 of R.A. No. 9346, "An Act Prohibiting the Imposition of Death Penalty in the Philippines," the penalty of death cannot be imposed.

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[15] TSN, July 28, 2003, pp. 5-10.

Accordingly, the penalty imposed upon appellant is reduced to *reclusion perpetua*, without eligibility for parole.[16]

WHEREFORE, the challenged August 31, 2005 decision of the Court of Appeals is *MODIFIED* in that appellant, Roberto Aguilar, is sentenced to suffer, *reclusion perpetua,* without eligibility for parole. In all other respects, the appellate court's decision is *AFFIRMED*.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Reyes, and *Leonardo-de Castro, JJ.,* concur.

Nachura, J., no part. Signed pleading as Solicitor General.

EN BANC

[G.R. No. 174063. March 14, 2008]

PEOPLE OF THE PHILIPPINES, *appellee, vs.* **EDGARDO MALOLOT and ELMER MALOLOT,** *appellants*.

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; FACTUAL FINDINGS OF THE TRIAL COURT THEREON, ACCORDED RESPECT. — Findings and conclusions of trial courts on the credibility of witnesses enjoy, as a rule, a badge of respect, for trial courts have the advantage of observing the demeanor of witnesses as they testify. Appellants have

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[16] Sec. 3. Persons convicted of offenses punished with *reclusion perpetua*, or whose sentences will be reduced to *reclusion perpetua*, by reason of this Act, shall not be eligible for parole under Act No. 4103, otherwise known as the Indeterminate Sentence Law, as amended.

not, however, cited material facts that might have been overlooked by the trial court to affect the outcome of the cases.

2. ID.; ID.; ID.; INCONSISTENCIES IN THE TESTIMONY DO NOT DIMINISH CREDIBILITY OF THE WITNESS. — The inconsistencies in the testimony of Bernadette on what transpired after the hacking of her sons, and her testimony that Concepcion was present during the said hacking which was denied by Concepcion, do not diminish Bernadette's credibility as they pertain to peripheral matters which do not dent the proven elements of the crimes.

3. ID.; ID.; CONSPIRACY; MERE PRESENCE AT THE SCENE OF THE CRIME AT THE TIME OF COMMISSION NOT ENOUGH TO CONSTITUTE CONSPIRACY; APPLICATION. — Elmer did not participate in hacking Jovelyn. From Concepcion's testimony, Elmer was in the same place where he happened to be when Edgardo boxed Jerusalem. While Elmer did not restrain Edgardo, there is no sufficient evidence that Elmer, by his presence, provided moral assistance to Edgardo as the latter hacked Jovelyn. Conspiracy requires the same degree of proof required to establish the crime – proof beyond reasonable doubt. Mere presence at the scene of the crime at the time of its commission without proof of cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy.

4. ID.; ID.; ID.; CIRCUMSTANCES SHOWING EXISTENCE OF CONSPIRACY. — To the Court, however, Edgardo's hacking of Junbert and the fatal hacking of Jonathan were motivated by his and Elmer's common unlawful purpose. The following circumstances indicate so: 1. Elmer entered Bernadette and Jerusalem's house, together with Edgardo, shortly after the latter was frustrated from entering Concepcion's house where she hid Jovelyn and Juvy; 2. Elmer's hacking of Jonathan was simultaneous to or immediately after Edgardo's hacking of Junbert; and 3. Following the hacking of both Jonathan and Junbert, one of appellants remarked that *they* had already taken *their* revenge.

5. CRIMINAL LAW; QUALIFYING CIRCUMSTANCES; TREACHERY; ILLEGAL ATTACK OF A CHILD CONSTITUTES TREACHERY. — When an adult illegally attacks a child, treachery exists even if the mode of attack is not proved

by the prosecution because a child of tender years could not be expected to put up a defense, hence, is at the mercy of the assailant. That the victims of the Attempted Murder, Frustrated Murder and Murder – Jovelyn, Junbert and Jonathan, respectively – were minors at the time of the incident has been proven.

6. ID.; AGGRAVATING CIRCUMSTANCES; DISREGARD OF AGE NOT APPRECIATED AS THE SAME IS ABSORBED IN TREACHERY; DWELLING, APPRECIATED. — The allegation in each of the three informations of disregard of the age of the victim cannot, however, be appreciated as an additional aggravating circumstance in the commission of the crimes as the same is absorbed in the qualifying circumstance of treachery. That leaves dwelling in the frustrated murder of Junbert and the murder of Jonathan as the aggravating circumstance in the commission thereof.

APPEARANCES OF COUNSEL

The Solicitor General for appellee.
Public Attorney's Office for appellants.

D E C I S I O N

CARPIO-MORALES, *J.*:

Three informations — Criminal Case Nos. 98-627, for attempted murder; 98-628, for frustrated murder; and 98-629, for murder — were filed before the Regional Trial Court (RTC) of Misamis Oriental against herein brother-appellants Edgardo Malolot (Edgardo) and Elmer Malolot (Elmer). The victims in the cases are siblings and minors all.

The information in Criminal Case No. 98-627 (for Attempted Murder) alleged that:

x x x x x x x x x

[1] Records (Criminal Case No. 98-627), p. 2.

On June 23, 1998, at about 6:30 o'clock [*sic*] in the evening, at Barangay Himaya, El Salvador, Misamis Oriental which is within the jurisdiction of the Honorable Court, the above-named accused, with intent to kill and **with treachery**, conspiring, confederating with and mutually helping each other and each armed with a bolo with which they previously provided themselves, did, then and there, willfully, unlawfully, and feloniously attack, assault, and hack with said bolos one **Jovelyn Mabelin, 7 years old,** thereby inflicting a wound on the right scapular area of said victim. Thus, the accused had commenced the commission of a felony directly by overt acts but did not perform all the acts of execution which would have produced the felony of murder because they thought that the victim was already dead.

The following aggravating circumstances attended the commission of the crime, namely:

1. The crime was committed in the dwelling of the victim;
2. The crime was committed with **insult or in disregard of the respect due the victim on the account of [her] age.**[1] (Underscoring in the original, emphasis supplied)

x x x x x x x x x

The information in Criminal Case No. 98-628 (for Frustrated Murder) alleged that:

x x x x x x x x x

On June 23, 1998 at about 6:30 o'clock [*sic*] in the evening, at Barangay Himaya, El Salvador, Misamis Oriental which is within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill and **treachery**, conspiring, confederating with and mutually helping each other and each armed with a bolo with which they previously provided themselves, did, then and there, willfully, unlawfully, and feloniously attack, assault, and hack with said bolos one **Junbert**[2] **Mabelin, 4 years old,** thus, inflicting multiple mortal wounds upon the person of said victim who, however, survived because of prompt medical treatment. Thus, the accused had performed all the acts of execution which would have produced the felony of murder if not for a cause independent of their will, that is for the reason aforestated.

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[2] Sometimes spelled "Johnbert."

The following aggravating circumstances attended the commission of the crime, namely:

1. The crime was committed in the **dwelling** of the victim;
2. The crime was committed with **insult or in disregard of the respect due the victim on account of his age**.[3] (Underscoring in the original; emphasis supplied)

x x x x x x x x x

The information in Criminal Case No. 98-629 (for Murder) alleged that:

x x x x x x x x x

On June 23, 1998, at about 6:30 o'clock (sic) in the evening, at Barangay Himaya, El Salvador, Misamis Oriental, which is within the jurisdiction of this Honorable Court, the above-named accused, with intent to kill and **with treachery**, conspiring and confederating with and mutually helping each other and each armed with a bolo with which they previously provided themselves, did, then and there, willfully, unlawfully, and feloniously attack, assault, and hack with said bolos one Jonathan **Mabelin**, an infant, **eleven (11) months old**, thus, inflicting multiple mortal wounds upon the person of said victim which caused his death not long thereafter.

The following aggravating circumstances attended the commission of the crime, namely:

1. The crime was committed in the **dwelling** of the victim;
2. The crime was committed with **insult or in disregard of the respect due the victim on account of his age**.[4] (Underscoring in the original; emphasis supplied)

x x x x x x x x x

The three cases were tried jointly:

From the records of the cases, the following version of the prosecution is culled:[5]

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[3] Records (Criminal Case No. 98-628), p. 2.

[4] Records (Criminal Case No. 98-629), p. 2.

[5] TSN, February 21, 2000, pp. 4-32; TSN, February 22, 2000, pp. 33-58; TSN, April 25, 2000, pp. 2-43; TSN, August 1, 2000, pp. 2-37; TSN,

In the afternoon of June 23, 1998, while Bernadette Mabelin (Bernadette) was in the kitchen of her house, her eight-year-old daughter Juvy Mabelin (Juvy) and her playmate Teroy, appellant Elmer's son, startled her, drawing her to whip the kids.

The whipping spawned a heated argument between appellant Elmer's wife Myrna on one hand, and Bernadette and her husband Jerusalem Mabelin (Jerusalem) on the other.

Getting wind of the incident, appellant Elmer accosted Jerusalem at the latter's yard and threatened him, telling him, "Brad, this bolo which is yours, I will use this in killing you,"[6] and almost simultaneously hacking Jerusalem's left forearm and fingers. Jerusalem retaliated by hacking Elmer on the left cheek with a bolo. In the meantime, Elmer's brother-co-appellant Edgardo repaired to the scene and boxed Jerusalem, drawing the latter to hack Edgardo on the forehead.

Jerusalem thereafter went up his house and got a scythe.[7] On his way back, Delia Malolot (Delia), the aunt of appellants who had heard the commotion, intercepted Jerusalem and brought him to the office of the *barangay* captain.

Edgardo later got a bolo from his house and on his return, seeing seven-year-old Jovelyn Mabelin (Jovelyn), another daughter of Jerusalem and Bernadette who was, together with her sister Juvy, fleeing the scene of the incident, boxed, kicked, and hacked Jovelyn on the shoulder. As Edgardo's bolo fell, Jovelyn and Juvy hastily entered the nearby house of Concepcion Abragan (Concepcion) who brought them inside a room, covered them with a towel, and advised them to keep still.

Edgardo pursued Juvy and Jovelyn and tried to enter the house of Concepcion but the door was locked. Concepcion

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August 3, 2000, pp. 38-67; September 27, 2000, pp. 2-9; TSN, September 28, 2000, pp. 10-33; TSN, November 23, 2000, pp. 34-48; TSN, June 5, 2001, pp. 68-75; TSN, August 22, 2001, pp. 59-84.

[6] TSN, August 3, 2000, p. 46.

[7] *Id*. at 65.

then told Edgardo to pray, telling him that he was being "possessed by a devil,"[8] to which Edgardo replied, "Since I was already wounded I might as well kill a person."[9] As Edgardo was trying to force his way inside Concepcion's house, Elmer's wife arrived and told him to spare the little girls.

Elmer, his wife, and Edgardo thereafter proceeded to Bernadette's and Jerusalem's house where Edgardo hacked the couple's four-year-old son Junbert outside the doorway, hitting Junbert's right eye. Still incensed, Elmer and Edgardo hacked Bernadette's 11-month-old son Jonathan who was by the rail of the doorway.

Elmer and Edgardo were later arrested as Jerusalem, Jovelyn, Junbert, and Jonathan were brought to a hospital.

Seven-year-old Jovelyn sustained a wound on her right shoulder blade.[10]

Eleven-month-old Jonathan died on arrival at the hospital. His death certificate showed that his body bore an "incised wound 11 cm. from nasal-facial area to zygomatic end with zygomatic bone fracture left [an] incised wound 11 cm. near circumferential area left shoulder with completely cut humeral head,''[11] and that the immediate cause of his death was "insanguination''[12] or loss of blood.

The right eye of four-year-old Junbert was permanently damaged,[13] and the doctor who treated him opined that he could have died were it not for the timely medical assistance.[14]

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[8] TSN, September 28, 2000, p. 15.

[9] *Ibid*.

[10] Records (Criminal Case No. 98-629), p. 21; *vide* TSN, April 25, 2000, p. 11.

[11] *Id*. at 18; *vide* TSN, April 25, 2000, pp. 6-10.

[12] *Vide* Records (Criminal Case No. 98-629), p. 18; TSN, April 25, 2000, p. 9.

[13] *Vide* TSN, September 27, 2000, pp. 4-9.

[14] Records (Criminal Case No. 98-629), p. 20.

Elmer, denying the accusations, gave the following version:

As his wife and Bernadette were arguing, he intervened. Both women kept quiet. Jerusalem remarked, however, that he would break their heads[15] and soon hit him on his left face with a bolo. He retaliated by hitting the forearm of Jerusalem with a bolo. Edgardo tried to pacify him and Jerusalem, but the latter also hacked Edgardo on the forehead.

Jerusalem thereupon ran towards his house, and Edgardo pursued him (Jerusalem). He (Elmer) soon heard Bernadette shout that a child was hit and saw her descending the stairs of her house carrying a wounded child.

Policemen brought Elmer and Edgardo to a center for medical treatment after which they were brought to the municipal hall for preliminary investigation.[16]

On Edgardo's part,[17] he gave the following version:

In the evening of June 23, 1998, while he was inside his house, he heard a man and a woman shouting at each other. He thus proceeded to the site of the commotion and tried to pacify the quarrelling parties. He boxed Jerusalem in the chest, and in turn, Jerusalem hacked him with a bolo. Jerusalem thereafter left. In the meantime, he heard Bernadette shout that somebody was wounded. He then left for home and on his way, he met his father who gave him a *bolo*. He thereafter "went to the lawn of Concepcion Abragan and went wild''[18] because he was only pacifying the quarreling parties but ended up being hacked by Jerusalem.[19] Thus, in his rage, he cut Concepcion's *talisay* tree and destroyed the fence of her house, without "noticing" that he had wounded Jerusalem's children in the process.

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[15] TSN, February 21, 2001, p. 6.

[16] *Vide* TSN, February 21, 2001, p. 9, TSN, February 22, 2001, p. 24.

[17] TSN, February 27, 2001, pp. 3-12.

[18] TSN, February 27, 2001, p. 8.

[19] *Ibid*.

Branch 18 of the Misamis Oriental RTC convicted appellants by Decision[20] of October 16, 2001, disposing as follows:

WHEREFORE, based on the foregoing, the Court finds accused **EDGARDO MALOLOT and ELMER MALOLOT GUILTY beyond reasonable doubt** of the crime of **ATTEMPTED MURDER in Criminal Case No. 98-627**, and there being no mitigating circumstance but with one aggravating circumstance *(disrespect of age)*, and after applying the Indeterminate Sentence Law, the two accused are hereby sentenced to serve an imprisonment of **FOUR (4) YEARS TWO (2) MONTHS AND ONE DAY of *PRISION CORRECCIONAL* MEDIUM, as the MINIMUM, to TEN (10) YEARS and ONE (1) DAY of *PRISION MAYOR* MAXIMUM, as the MAXIMUM.** They are further directed to jointly and solidarily pay ₱20,000.00 as moral damages.

The Court likewise finds accused **EDGARDO MALOLOT and ELMER MALOLOT GUILTY beyond reasonable doubt of the crime of FRUSTRATED MURDER, in Criminal Case No. 98-628,** and there being no mitigating circumstance but with two aggravating circumstances, namely: dwelling and disrespect of age, and after applying the indeterminate sentence law, the two accused are hereby sentenced to serve an imprisonment of **TEN (10) YEARS and ONE (1) DAY OF *PRISION MAYOR MAXIMUM*, as the MINIMUM, to TWENTY (20) YEARS OF *RECLUSION TEMPORAL MAXIMUM***, as the MAXIMUM. They are jointly and solidarily directed to pay ₱40,000.00 as exemplary damages, plus another ₱40,000.00 as moral damages.

Furthermore, the Court finds the accused **EDGARDO MALOLOT and ELMER MALOLOT GUILTY beyond reasonable doubt** of the crime of **MURDER, in Criminal Case No. 98-629**, and there being no mitigating circumstance but with two aggravating circumstances, namely: dwelling and disrespect of age, accordingly the two accused are **hereby sentenced to suffer the supreme penalty of death by lethal injection.** They are jointly and solidarily directed to pay the actual and burial expenses in the amount of EIGHTY THOUSAND PESOS (₱80,000.00) which was incurred by the parents of the three victims. Further directed to pay ₱75,000.00, as indemnity for the death of Jonathan; another ₱50,000.00 as moral damage; and ₱50,000.00 as exemplary damages.

Pursuant to Section 22 of R.A. 7659 and Section 10 of Rule 122 of the Rules of Court, let the entire record be forwarded to the Supreme Court for automatic review.

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[20] Records (Criminal Case No. 98-629), pp. 68-87.

SO ORDERED.[21] (Emphasis in the original; underscoring supplied).

The records of the cases were forwarded for automatic review[22] to this Court which in turn forwarded them to the Court of Appeals for intermediate review[23] pursuant to *People v. Mateo*.[24]

In his brief,[25] Elmer raised the following as errors of the trial court:

I

... FINDING THAT THERE WAS A CONSPIRACY ON THE PART OF ACCUSED-APPELLANT ELMER MALOLOT AND HIS BROTHER EDGARDO MALOLOT IN THE COMMISSION OF THE CRIMES CHARGED.

II

... GIVING FULL FAITH AND CREDENCE TO THE INCONSISTENT TESTIMONY OF PROSECUTION WITNESS BERNADETTE MABELIN AND IN DISREGARDING THE DEFENSE INTERPOSED BY ACCUSED-APPELLANT ELMER MALOLOT.

III

... CONVICTING ACCUSED-APPELLANT ELMER MALOLOT OF THE CRIMES CHARGED DESPITE THE FACT THAT HIS GUILT WAS NOT PROVEN BEYOND REASONABLE DOUBT.[26] (Emphasis in the original)

Edgardo raised the following errors of the trial court:

I

... GIVING FULL FAITH AND CREDENCE TO THE INCONSISTENT TESTIMONY OF PROSECUTION WITNESS BERNADETTE MABELIN.

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[21] *Id*. at 86-87.

[22] CA *rollo*, pp. 2, 55.

[23] *Rollo*, p. 3.

[24] G.R. Nos. 147768-87, July 7, 2004, 433 SCRA 640.

[25] CA *rollo*, pp. 67-90.

[26] *Id*. at 81-82.

II

. . .CONVICTING ACCUSED-APPELLANT EDGARDO MALOLOT OF THE CRIMES CHARGED DESPITE THE FACT THAT HIS GUILT WAS NOT PROVEN BEYOND REASONABLE DOUBT.

III

. . .CONSIDERING THE QUALIFYING CIRCUMSTANCE OF TREACHERY.[27] (Emphasis in the original)

By Decision[28] of May 23, 2006, the Court of Appeals affirmed the conviction of Elmer and Edgardo, but added an award of exemplary damages for the Attempted Murder of Jovelyn, and reduced the civil indemnity for the death of Jonathan from ₱75,000 to ₱50,000. Thus the appellate court disposed:

> WHEREFORE, the October 16, 2001 Decision of the Regional Trial Court of Misamis Oriental, 10th Judicial Region, Branch 18, Cagayan de Oro City is hereby **AFFIRMED with MODIFICATION**, as follows:
>
> 1. In Crim. Case No. 98-627, the Accused-Appellants are to suffer the penalty of four (4) years, two (2) months and one (1) day of *prision correccional* maximum, as the minimum, to ten (10) years and one (1) day of *prision mayor* maximum, as the maximum. Additionally, they are jointly and solidarily held liable to pay the victim Ph₱10,000.00 as exemplary damages; and
>
> 2. In Crim. Case No. 98-629 the amount of indemnity for the death of Jonathan is reduced to₱50,000.00.
>
> SO ORDERED.[29] (Emphasis in the original)

The cases were thereupon returned to this Court.[30] The Solicitor General manifested[31] its intention not to file a

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[27] *Id*. at 174-175.

[28] Penned by Court of Appeals Associate Justice Normandie B. Pizarro, with the concurrences of Associate Justices Edgardo A. Camello and Ramon R. Garcia. *Id*. at 271-294.

[29] *Id*. at 293.

[30] *Rollo*, p. 1.

[31] *Id*. at 32-35.

Supplemental Brief and to adopt its Brief for the Appellee[32] filed before the Court of Appeals.

In their Supplemental Brief,[33] Elmer and Edgardo contended that:

THE GUILT OF THE ACCUSED-APPELLANT HAS NOT BEEN PROVEN BEYOND REASONABLE DOUBT.[34]

x x x x x x x x x

ASSUMING THAT THE ACCUSED-APPELLANTS ARE GUILTY, THEY SHOULD BE CONVICTED FOR ATTEMPTED HOMICIDE, FRUSTRATED HOMICIDE, AND HOMICIDE ONLY.[35]

x x x x x x x x x

ASSUMING FURTHER THAT TREACHERY WAS EMPLOYED IN THE COMMISSION OF THE CRIMES CHARGED, THE APPELLATE COURT ERRED IN APPLYING THE SAME TO BOTH OF THE ACCUSED-APPELLANTS.[36] (Underscoring supplied)

Appellants assail Bernadette's credibility due to alleged inconsistencies in her testimony in that:

x x x [d]uring direct examination, [Bernadette] testified that after the two (2) accused hacked her two (2) sons, she immediately went to her elder sister. However on cross-examination, she testified that after seeing her two (2) sons being hacked by the two (2) accused, she immediately lost consciousness and regained the same only after the police arrived at the scene.[37]

Appellants also claim that Bernadette's testimony that Concepcion was present during the hacking of Jonathan and Junbert was contradicted by Concepcion who denied the same.[38]

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[32] CA *rollo*, pp. 116-149.

[33] *Rollo*, pp. 36-43.

[34] *Id*. at 36.

[35] *Id*. at 39.

[36] *Id*. at 40.

[37] CA *rollo*, pp. 84-85, 189. *Vide* TSN, February 21, 2000, pp. 17-18; TSN, February 22, 2000, pp. 35-38.

[38] CA *rollo*, pp. 84-86, 189-191. *Vide* TSN, April 25, 2000, pp. 30-31; TSN, September 28, 2000, 28-29.

Findings and conclusions of trial courts on the credibility of witnesses enjoy, as a rule, a badge of respect, for trial courts have the advantage of observing the demeanor of witnesses as they testify.[39] Appellants have not, however, cited material facts that might have been overlooked by the trial court to affect the outcome of the cases.

The inconsistencies in the testimony of Bernadette on what transpired after the hacking of her sons, and her testimony that Concepcion was present during the said hacking which was denied by Concepcion, do not diminish Bernadette's credibility, as they pertain to peripheral matters which do not dent the proven elements of the crimes.[40]

As for appellants' denial of the existence of conspiracy, while the finding of conspiracy with respect to the frustrated murder of Junbert is sustained, that with respect to the attempted murder of Jovelyn is not.

Elmer did not participate in hacking Jovelyn. From Concepcion's testimony, Elmer was in the same place where he happened to be when Edgardo boxed Jerusalem.[41] While Elmer did not restrain Edgardo, there is no sufficient evidence that Elmer, by his presence, provided moral assistance to Edgardo as the latter hacked Jovelyn.

Conspiracy requires the same degree of proof required to establish the crime — proof beyond reasonable doubt.[42] Mere presence at the scene of the crime at the time of its commission without proof of cooperation or agreement to cooperate is not enough to constitute one a party to a conspiracy.[43]

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[39] *Vide People v. Gamiao*, 310 Phil. 252, 261 (1995).

[40] *Vide People v. Del Valle*, 423 Phil. 541, 551 (2001).

[41] TSN, September 28, 2000, pp. 19-21.

[42] *Vide People v. Lacao*, Sr., G.R. No. 95320, September 4, 1991, 201 SCRA 317, 329.

[43] *Vide People v. Gonzales*, G.R. No. 128282, April 30, 2001, 357 SCRA 460, 474.

To the Court, however, Edgardo's hacking of Junbert and the fatal hacking of Jonathan were motivated by his and Elmer's common unlawful purpose. The following circumstances indicate so:

1. Elmer entered Bernadette and Jerusalem's house, together with Edgardo, shortly after the latter was frustrated from entering Concepcion's house where she hid Jovelyn and Juvy;[44]
2. Elmer's hacking of Jonathan was simultaneous to or immediately after Edgardo's hacking of Junbert;[45] and
3. Following the hacking of both Jonathan and Junbert, one of appellants remarked that *they* had already taken *their* revenge.[46]

On appellant's taking issue on the presence of treachery, the Court does not find well-taken the following contention of Elmer and Edgardo:

> [T]he prosecution failed to present evidence that the accused-appellants have resolved to commit the crime prior to the moment of the commission of the crimes charged. There was no proof that the consummation of the alleged crimes was the result of meditation, calculation or reflection.
>
> To sustain a finding of treachery, the means, method or form of attack must be shown to have been deliberately adopted by the appellant.[47] (Underscoring in original)

There is treachery when the offender commits any of the crimes against the person, employing means, methods, or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make.[48]

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[44] TSN, February 21, 2000, pp. 13; TSN, September 28, 2000, pp. 28-33;

[45] TSN, April 25, 2000, pp. 39-40.

[46] TSN, February 21, 2000, pp. 17-18.

[47] *Rollo*, p. 40.

[48] 2nd paragraph of Article 14 (16) of the REVISED PENAL CODE.

When an adult illegally attacks a child, treachery exists even if the mode of attack is not proved by the prosecution because a child of tender years could not be expected to put up a defense, hence, is at the mercy of the assailant.[49] That the victims of the Attempted Murder, Frustrated Murder and Murder — Jovelyn, Junbert and Jonathan, respectively — were minors at the time of the incident has been proven.[50]

The allegation in each of the three informations of disregard of the age of the victim cannot, however, be appreciated as an additional aggravating circumstance in the commission of the crimes as the same is absorbed in the qualifying circumstance of treachery.[51] That leaves dwelling in the frustrated murder of Junbert and the murder of Jonathan as the aggravating circumstance in the commission thereof.

In view of the enactment on June 24, 2006 of Republic Act 9346 prohibiting the imposition of the death penalty, however, the imposable penalty for the murder of Jonathan is reduced to *reclusion perpetua*.[52]

WHEREFORE, the May 23, 2006 decision of the Court of Appeals is *AFFIRMED* with *MODIFICATION* as follows:

1. In CRIMINAL CASE NO. 98-627, accused-appellant Elmer Malolot is *ACQUITTED* on the ground of reasonable doubt. The conviction of accused-appellant Edgardo Malolot for attempted murder is *AFFIRMED*. There being no aggravating nor mitigating circumstances, and applying the Indeterminate Sentence Law, Edgardo

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[49] *Vide People v. Fallorina*, 468 Phil. 816, 840 (2004); *People v. Ostia*, 446 Phil. 181, 196 (2003); *People v. Ganohon,* G.R. Nos. 74670-74, April 30, 2001, 196 SCRA 431, 446; *People v. Sancholes*, 338 Phil. 242, 258-259 (1997); *People v. Retubado*, G.R. No. 58585, June 20, 1988, 162 SCRA 276, 286.

[50] *Vide* records (Crim. Case No. 98-627), pp. 236-238.

[51] *Vide People v. Retubado*, G.R. No. 58585, June 20, 1988, 162 SCRA 276, 286; *People v. Limaco*, 88 Phil. 35, 41-42.

[52] *Vide* Republic Act No. 9346, Section 2.

Malolot is sentenced to serve imprisonment of FOUR (4) YEARS, TWO (2) MONTHS and ONE (1) DAY of *PRISION CORRECCIONAL MAXIMUM* as MINIMUM, to NINE (9) YEARS of *PRISION MAYOR MEDIUM* as MAXIMUM. There being no aggravating circumstance, the award of ₱10,000.00 exemplary damages is *DELETED*.

2. In CRIMINAL CASE NO. 98-628, the conviction beyond reasonable doubt of both accused-appellants Elmer Malolot and Edgardo Malolot for frustrated murder, as well as the penalty imposed by the trial court, is *AFFIRMED*. There being only one aggravating circumstance, that of dwelling, the award of ₱40,000.00 exemplary damages is *REDUCED* to ₱20,000.00.

3. In CRIMINAL CASE NO. 98-629, the conviction beyond reasonable doubt of both accused-appellants Elmer Malolot and Edgardo Malolot for murder is *AFFIRMED*. In view of the enactment of Republic Act No. 9346 prohibiting the imposition of the death penalty, and applying the Indeterminate Sentence Law, both accused-appellants are sentenced to serve imprisonment of TWENTY YEARS (20) of *RECLUSION TEMPORAL* MAXIMUM as MINIMUM, to FORTY (40) years of *RECLUSION PERPETUA* as MAXIMUM.

   Following Section 3 of Republic Act No. 9346, both accused-appellants are not eligible for parole under the Indeterminate Sentence Law. There being only one aggravating circumstance, that of dwelling, the award of ₱50,000.00 exemplary damages is *REDUCED* to ₱25,000.00.

No pronouncement as to costs.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Austria-Martinez, Corona, Azcuna, Tinga, Chico-Nazario, Velasco, Jr., Reyes, and *Leonardo-de Castro, JJ.,* concur.

Nachura, J., no part. Signed pleadings as Solicitor General.

THIRD DIVISION

[G.R. No. 174414. March 14, 2008]

ELMER F. GOMEZ, *petitioner, vs.* **MA. LITA A. MONTALBAN,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; QUESTION OF LAW AND QUESTION OF FACT, DISTINGUISHED. — The distinction between questions of law and questions of fact has long been settled. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of witnesses, the existence and relevance of specific surrounding circumstances, as well as their relation to each other and to the whole, and the probability of the situation. Simple as it may seem, determining the true nature and extent of the distinction is sometimes complicated. In a case involving a "question of law," the resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact. If the query requires a re-evaluation of the credibility of witnesses, or the existence or relevance of surrounding circumstances and their relation to each other, the issue in that query is factual.

2. ID.; ID.; QUESTION OF LAW; ISSUES ON THE JURISDICTION OF THE COURT OVER THE SUBJECT MATTER AND ON THE APTNESS OF THE GRANT OF THE PETITION FOR RELIEF FROM JUDGMENT ARE QUESTIONS OF LAW. — The first issue raised in the present petition is one of jurisdiction of the court over the subject matter — meaning, the nature of the cause of action and of the relief sought. Jurisdiction is the right to act or the power and authority to hear and determine a cause. It is a question of law. The second issue refers to

the aptness of the grant of a Petition for Relief from Judgment. These questions are undoubtedly one of law, as they concern the correct interpretation or application of relevant laws and rules, without the need for review of the evidences presented before the court *a quo*.

3. ID.; COURTS; JURISDICTION; WHEN THE INTEREST ON THE LOAN IS A PRIMARY AND INSEPARABLE COMPONENT OF THE CAUSE OF ACTION, IT MUST BE INCLUDED IN THE DETERMINATION OF WHICH COURT HAS JURISDICTION; APPLICATION. — The Court gleans from the foregoing that petitioner's cause of action is the respondent's violation of their loan agreement. In that loan agreement, respondent expressly agreed to pay the principal amount of the loan, plus 15% monthly interest. Consequently, petitioner is claiming and praying for in his Complaint the total amount of ₱238,000.00, already inclusive of the interest on the loan which had accrued from 1998. Since the interest on the loan is a primary and inseparable component of the cause of action, not merely incidental thereto, and already determinable at the time of filing of the Complaint, it must be included in the determination of which court has the jurisdiction over petitioner's case. Using as basis the ₱238,000.00 amount being claimed by petitioner from respondent for payment of the principal loan and interest, this Court finds that it is well within the jurisdictional amount fixed by law for RTCs.

4. ID.; ID.; ID.; JURISDICTION CANNOT BE MADE TO DEPEND ON THE AMOUNT ULTIMATELY SUBSTANTIATED IN THE COURSE OF THE TRIAL OR BE AFFECTED BY PROOF SHOWING THAT THE CLAIMANT IS ENTITLED TO RECOVER A SUM IN EXCESS OF THE JURISDICTIONAL AMOUNT FIXED BY LAW. — To this Court, it is irrelevant that during the course of the trial, it was proven that respondent is only liable to petitioner for the amount of ₱40,000.00 representing the principal amount of the loan; ₱57,000.00 as interest thereon at the rate of 24% per annum reckoned from 26 August 1998 until the present; and ₱15,000.00 as attorney's fees. Contrary to respondent's contention, jurisdiction can neither be made to depend on the amount ultimately substantiated in the course of the trial or proceedings nor be affected by proof showing that the claimant is entitled to recover a sum in excess of the jurisdictional amount fixed by law.

Jurisdiction is determined by the cause of action as alleged in the complaint and not by the amount ultimately substantiated and awarded.

5. ID.; CIVIL PROCEDURE; RELIEF FROM JUDGMENT; NOT THE PROPER REMEDY. — A petition for relief under Rule 38 of the Rules of Court is only available against a final and executory judgment. Since respondent allegedly received a copy of the Decision dated 4 May 2004 on 14 May 2004, and she filed the Petition for Relief from Judgment on 28 May 2004, judgment had not attained finality. The 15-day period to file a motion for reconsideration or appeal had not yet lapsed. Hence, resort by respondent to a petition for relief from judgment under Rule 38 of the Rules of Court was premature and inappropriate. Second, based on respondent's allegations in her Petition for Relief before the RTC, she had no cause of action for relief from judgment. Even assuming *arguendo* that the RTC had no jurisdiction over respondent on account of the non-service upon her of the summons and complaint, the remedy of the respondent was to file a motion for the reconsideration of the 4 May 2004 Decision by default or a motion for new trial within 15 days from receipt of notice thereof. This is also without prejudice to respondent's right to file a petition for *certiorari* under Rule 65 of the Rules of Court for the nullification of the order of default of the court *a quo* and the proceedings thereafter held including the decision, the writ of execution, and the writ of garnishment issued by the RTC, on the ground that it acted without jurisdiction. Unfortunately, however, respondent opted to file a Petition for Relief from the Judgment of the RTC, which, as the Court earlier determined, was the wrong remedy. There being no fraud, accident, mistake, or excusable negligence that would have prevented petitioner from filing either a motion for reconsideration or a petition for review on *certiorari* of the 4 May 2004 Decision of the RTC, her resort to a Petition for Relief from Judgment was unwarranted.

APPEARANCES OF COUNSEL

The Mindanao Law Firm of Avisado & Maypa, Co. for petitioner.

Amado L. Cantos for respondent.

D E C I S I O N

CHICO-NAZARIO, *J.*:

This Petition for Review on *Certiorari* seeks to reverse (1) the Order[1] dated 20 June 2006 of the Regional Trial Court (RTC) of Davao City, Branch 13, which granted herein respondent Ma. Lita A. Montalban's Petition for Relief from Judgment and dismissed Civil Case No. 29,717-03 for lack of jurisdiction; and (2) the Order[2] dated 2 August 2006 denying herein petitioner Elmer F. Gomez's Motion for Reconsideration thereof.

On 30 May 2003, petitioner filed a Complaint[3] with the RTC for a sum of money, damages and payment of attorney's fees against respondent, docketed as Civil Case No. 29,717-03. The Complaint alleged, among other things, that: on or about 26 August 1998, respondent obtained a loan from petitioner in the sum of ₱40,000.00 with a voluntary proposal on her part to pay 15% interest per month; upon receipt of the proceeds of the loan, respondent issued in favor of petitioner, as security, Capitol Bank Check No. 0215632, postdated 26 October 1998, in the sum of ₱46,000.00, covering the ₱40,000.00 principal loan amount and ₱6,000.00 interest charges for one month; when the check became due, respondent failed to pay the loan despite several demands; thus, petitioner filed the Complaint praying for the payment of ₱238,000.00, representing the principal loan and interest charges, plus 25% of the amount to be awarded as attorney's fees, as well as the cost of suit.

Summons was served, but despite her receipt thereof, respondent failed to file her Answer. Consequently, she was declared[4] in default and upon motion, petitioner was allowed to present evidence *ex parte*.

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[1] *Rollo*, pp. 7-9.

[2] *Id*. at 10-11.

[3] *Id*. at 37-39.

[4] *Id*. at 47.

After considering the evidence presented by petitioner, the RTC rendered a Decision[5] on 4 May 2004 in his favor, the *fallo* of which reads:

> WHEREFORE, IN VIEW OF THE FOREGOING, the Court hereby decides this case in favor of [herein petitioner] and against [herein respondent], ordering [respondent] to pay [petitioner] the following amounts:
>
> 1. ₱40,000.00 representing the principal amount of the loan;
> 2. ₱57,600.00 representing interest at the rate of 24% per annum reckoned from August 26, 1998 until the present; and
> 3. ₱15,000.00 representing attorney's fees.

On 28 May 2004, respondent filed a Petition for Relief from Judgment[6] alleging that there was no effective service of summons upon her since there was no personal service of the same. The summons was received by one Mrs. Alicia dela Torre, who was not authorized to receive summons or other legal pleadings or documents on respondent's behalf. Respondent attributes her failure to file an Answer to fraud, accident, mistake or excusable negligence. She claimed that she had good and valid defenses against petitioner and that the RTC had no jurisdiction as the principal amount being claimed by petitioner was only ₱40,000.00, an amount falling within the jurisdiction of the Municipal Trial Court (MTC).

After petitioner filed his Answer[7] to the Petition for Relief from Judgment and respondent her Reply,[8] the said Petition was set for hearing.

After several dates were set and called for hearing, respondent, thru counsel, failed to appear despite being duly notified; hence, her Petition for Relief was dismissed[9] for her apparent lack of interest to pursue the petition.

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[5] *Id*. at 49-51.
[6] *Id*. at 52-54.
[7] *Id*. at 58-65.
[8] *Id*. at 72-74.
[9] *Id*. at 77.

Respondent filed a Motion for Reconsideration[10] of the dismissal of her Petition for Relief, stating that her counsel's failure to appear was not intentional, but due to human shortcomings or frailties, constituting honest mistake or excusable negligence.

On 18 November 2005, the RTC granted[11] respondent's motion for reconsideration, to wit:

> In regard to the motion for reconsideration file by [herein respondent] of the order of the court dismissing her petition for relief from judgment, the court, in the interest of justice, shall give [respondent] one more chance to present the merits of her position in a hearing. The dismissal of the petition is therefore reconsidered and set aside.

On 20 June 2006, the RTC granted respondent's Petition for Relief from Judgment and set aside its Decision dated 4 May 2004 on the ground of lack of jurisdiction. The *fallo* of the assailed RTC Order reads:

> WHEREFORE, the petition for relief is hereby GRANTED. The decision of this court dated May 4, 2004 is RECONSIDERED and set aside for lack of jurisdiction on the part of the court, without prejudice to the case being refiled in the proper Municipal Trial Courts.[12]

Petitioner filed a motion for reconsideration of the afore-quoted Order, but the same was denied by the RTC in another Order[13] dated 2 August 2006.

Hence, the present Petition filed directly before this Court.

In his Memorandum,[14] petitioner raises the following issues for the Court's consideration:

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[10] *Id*. at 78.

[11] *Id*. at 81.

[12] *Id*. at 9.

[13] *Id*. at 10-11.

[14] *Id*. at 129.

1. Whether or not the Regional Trial Court has jurisdiction over this case for sum of money, damages and attorney's fees where the principal amount of the obligation is ₱40,000.00 but the amount of the demand per allegation of the complaint is ₱238,000.00;

2. Whether or not respondent's relief from judgment is proper during the period for filing a motion for reconsideration and appeal.

Before the Court dwells on the principal issues, a few procedural matters must first be resolved.

Section 2(c), Rule 41 of the Rules of Court categorically provides that in all cases where only questions of law are raised, the appeal from a decision or order of the RTC shall be to the Supreme Court by petition for review on *certiorari* in accordance with Rule 45.[15]

The distinction between questions of law and questions of fact has long been settled. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set of facts; or when the issue does not call for an examination of probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of witnesses, the existence and relevancy of specific surrounding circumstances, as well as their relation to each other and to the whole, and the probability of the situation.[16]

Simple as it may seem, determining the true nature and extent of the distinction is sometimes complicated. In a case involving a "question of law," the resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence

[15] *Bukidnon Doctors' Hospital, Inc. v. Metropolitan Bank and Trust Co.*, G.R. No. 161882, 8 July 2005, 463 SCRA 222, 232.

[16] *Chiang Kai Shek College v. Court of Appeals*, G.R. No. 152988, 24 August 2004, 437 SCRA 171, 183.

presented, the question posed is one of fact. If the query requires a re-evaluation of the credibility of witnesses, or the existence or relevance of surrounding circumstances and their relation to each other, the issue in that query is factual.[17]

The first issue raised in the present petition is one of jurisdiction of the court over the subject matter — meaning, the nature of the cause of action and of the relief sought. Jurisdiction is the right to act or the power and authority to hear and determine a cause. It is a question of law.[18] The second issue refers to the aptness of the grant of a Petition for Relief from Judgment. These questions are undoubtedly one of law, as they concern the correct interpretation or application of relevant laws and rules, without the need for review of the evidences presented before the court *a quo*.

Thus, with only questions of law raised in this Petition, direct resort to this Court is proper.[19]

The Court shall now discuss whether the RTC has jurisdiction over Civil Case No. 29,717-03.

Petitioner's Complaint before the RTC reads:

> 3. On or about August 26, 1998, [herein respondent] obtained from the [herein petitioner] a **loan for the principal sum of FORTY THOUSAND PESOS (₱40,000.00)** with a voluntary proposal on her part to pay as much as **15% interest per month**. Machine copy of Cash Voucher dated August 26, 1998 is herewith attached as Annex "A".
>
> 4. Upon receipt of the proceeds of the said loan, [respondent] issued in favor of the Plaintiff Capitol Bank Check with check nos. 0215632 postdated on October 26, 1998 for the sum of Forty Six Thousand Pesos (₱46,000.00) as security on the loan with ₱6,000.00 as the first month of interest charges.

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[17] *Microsoft Corporation v. Maxicorp, Inc.*, G.R. No. 140946, 13 September 2004, 438 SCRA 224, 231.

[18] *Municipality of Kananga v. Judge Madrona*, 450 Phil. 392, 396 (2003).

[19] *Bukidnon Doctors' Hospital, Inc. v. Metropolitan Bank and Trust Co., supra* note 15 at 234.

When the check became due, [respondent] defaulted to pay her loan despite several allowances of time and repeated verbal demands from the [petitioner]. The said check was later on dishonored for the reason: "Account Closed." Machine copy of Capitol Bank Check wit nos. 0215632 is herewith attached as Annex "B".

5. On July 4, 2002, [petitioner] engaged the services of the undersigned counsel to collect the account of the [respondent]; thus, on the same day, a demand letter was sent to and received by her on July 9, 2002. And despite receipt thereof, she failed and continues to evade the payment of her obligations to the damage and prejudice of the [petitioner]. **Thus, as of July 4, 2002, [respondent]'s loan obligation stood at TWO HUNDRED THIRTY EIGHT THOUSAND PESOS (₱ 239,000.00), inclusive of interest charges for 32 months.** Machine copy of Demand Letter and its registry receipt and return card is herewith attached as Annexes "C"; "C-1" and "C-2", respectively.

6. In view of [respondent]'s refusal to pay her loan, [petitioner] is constrained to engage the services of counsel to initiate the instant action for a fee of 25% for whatever amounts is collected as flat attorney's fee. [Petitioner] will likewise incur damages in the form of docket fees.

PRAYER

WHERFORE (sic), it is respectfully prayed of the Honorable Court that Decision be rendered ordering the [respondent] to pay [petitioner] as follows:

1. The amount of **₱238,000.00 with interest charges** at the sound discretion of the Honorable Court starting on July 4, 2002 until paid in full;

2. The sum equivalent to 25 % of the amount awarded as attorney's fee;

3. Cost of suit;

4. Other relief that the Honorable Court may find just and equitable under the premises are likewise prayed for.[20] [Emphasis ours.]

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[20] *Rollo*, pp. 37-38.

The Court gleans from the foregoing that petitioner's cause of action is the respondent's violation of their loan agreement.[21] In that loan agreement, respondent expressly agreed to pay the principal amount of the loan, plus 15% monthly interest. Consequently, petitioner is claiming and praying for in his Complaint the total amount of ₱238,000.00, already inclusive of the interest on the loan which had accrued from 1998. Since the interest on the loan is a primary and inseparable component of the cause of action, not merely incidental thereto, and already determinable at the time of filing of the Complaint, it must be included in the determination of which court has the jurisdiction over petitioner's case. Using as basis the ₱238,000.00 amount being claimed by petitioner from respondent for payment of the principal loan and interest, this Court finds that it is well within the jurisdictional amount fixed by law for RTCs.[22]

There can be no doubt that the RTC in this case has jurisdiction to entertain, try, and decide the petitioner's Complaint.

To this Court, it is irrelevant that during the course of the trial, it was proven that respondent is only liable to petitioner for the amount of ₱40,000.00 representing the principal amount of the loan; ₱57,000.00 as interest thereon at the rate of 24%

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[21] Cause of action is the act or omission by which a party violates a right of another (Section 2, Rule 2 of the Rules of Court).

[22] Section 1(8) of Republic Act No. 7691 otherwise known as "An Act Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts, Amending for the Purpose Batas Pambansa Blg. 129, Otherwise Known as the "Judiciary Reorganization Act of 1980,"provides:

SECTION 1. Section 19 of Batas Pambansa Blg. 129, otherwise known as the "Judiciary Reorganization Act of 1980," is hereby amended as follows:

x x x x x x x x x

8) In all other cases in which the demand, exclusive of interest, damages of whatever kind, attorney's fees, litigation expenses, and costs or the value of the property in controversy exceeds One hundred thousand pesos (₱100,000.00) or such other cases in Metro Manila, where the demand, exclusive of the abovementioned items **exceeds Two Hundred Thousand Pesos (₱200,000.00).**

per annum reckoned from 26 August 1998 until the present; and ₱15,000.00 as attorney's fees. Contrary to respondent's contention, jurisdiction can neither be made to depend on the amount ultimately substantiated in the course of the trial or proceedings nor be affected by proof showing that the claimant is entitled to recover a sum in excess of the jurisdictional amount fixed by law. Jurisdiction is determined by the cause of action as alleged in the complaint and not by the amount ultimately substantiated and awarded.[23]

Basic as a hornbook principle is that jurisdiction over the subject matter of a case is conferred by law and determined by the allegations in the complaint which comprise a concise statement of the ultimate facts constituting the plaintiff's cause of action.[24] The nature of an action, as well as which court or body has jurisdiction over it, is determined based on the allegations contained in the complaint of the plaintiff, irrespective of whether or not the plaintiff is entitled to recover upon all or some of the claims asserted therein.[25] The averments in the complaint and the character of the relief sought are the ones to be consulted.[26] Once vested by the allegations in the complaint, jurisdiction also remains vested irrespective of whether or not the plaintiff is entitled to recover upon all or some of the claims asserted therein.[27]

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[23] *Dionisio v. Puerto,* 158 Phil. 671, 677 (1974).

[24] *Dimo Realty & Development, Inc. v. Dimaculangan*, 469 Phil. 373, 381-382 (2004).

[25] *Barangay Piapi v. Talip*, G.R. No. 138248, 7 September 2005, 469 SCRA 409, 413; *Deltaventures Resources, Inc. v. Hon. Cabato,* 384 Phil. 252, 260 (2000).

[26] *Serdoncillo v. Benolirao*, G.R. No. 118328, 8 October 1998, 297 SCRA 448, 459; *Umpoc v. Mercado*, G.R. No. 158166, 21 January 2005, 449 SCRA 220, 232; *Lacierda v. Platon*, G.R. No. 157141, 31 August 2005, 468 SCRA 650, 660-662.

[27] *Barrazona v. Regional Trial Court, Branch 61, Baguio City,* G.R. No. 154282, 7 April 2006, 486 SCRA 555, 560.

On the propriety of the granting by the RTC of respondent's Petition for Relief from Judgment, the Court finds and so declares that the RTC did indeed commit an error in doing so.

First of all, a petition for relief under Rule 38 of the Rules of Court is only available against a final and executory judgment.[28] Since respondent allegedly[29] received a copy of the Decision dated 4 May 2004 on 14 May 2004, and she filed the Petition for Relief from Judgment on 28 May 2004, judgment had not attained finality. The 15-day period to file a motion for reconsideration or appeal had not yet lapsed. Hence, resort by respondent to a petition for relief from judgment under Rule 38 of the Rules of Court was premature and inappropriate.

Second, based on respondent's allegations in her Petition for Relief before the RTC, she had no cause of action for relief from judgment.

Section 1 of Rule 38 provides:

> SECTION 1. Petition for relief from judgment*, order, or other proceedings.* – When a judgment or final order is entered, or any other proceeding is thereafter taken against a party in any court through fraud, accident, mistake, or excusable negligence, he may file a petition in such court and in the same case praying that the judgment, order or proceeding be set aside.

Under Section 1, Rule 38 of the Rules of Court, the court may grant relief from judgment only "[w]hen a judgment or final order is entered, or any other proceeding is taken against a party in any court through **fraud, accident, mistake, or excusable negligence** x x x."

In her Petition for Relief from Judgment before the RTC, respondent contended that judgment was entered against her through "mistake or fraud," because she was not duly served with summons as it was received by a Mrs. Alicia dela Torre who was not authorized to receive summons or other legal processes on her behalf.

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[28] *Aboitiz International Forwardes, Inc. v. Court of Appeals*, G.R. No. 142272, 2 May 2006, 488 SCRA 492, 506.

[29] *Rollo,* pp. 52-57.

As used in Section 1, Rule 38 of the Rules of Court, "mistake" refers to mistake of fact, not of law, which relates to the case.[30] The word "mistake," which grants relief from judgment, does not apply and was never intended to apply to a judicial error which the court might have committed in the trial. Such errors may be corrected by means of an appeal.[31] This does not exist in the case at bar, because respondent has in no wise been prevented from interposing an appeal.

"Fraud," on the other hand, must be extrinsic or collateral, that is, the kind which prevented the aggrieved party from having a trial or presenting his case to the court,[32] or was used to procure the judgment without fair submission of the controversy.[33] This is not present in the case at hand as respondent was not prevented from securing a fair trial and was given the opportunity to present her case.

Negligence to be excusable must be one which ordinary diligence and prudence could not have guarded against.[34] Under Section 1, the "negligence" must be excusable and generally imputable to the party because if it is imputable to the counsel, it is binding on the client.[35] To follow a contrary rule and allow a party to disown his counsel's conduct would render proceedings indefinite, tentative, and subject to reopening by the mere subterfuge of replacing counsel. What the aggrieved litigant should do is seek administrative sanctions against the erring counsel and not ask for the reversal of the court's ruling.[36]

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[30] *Agan v. Heirs of Sps. Nueva*, 463 Phil. 834, 840-841 (2003).

[31] *Guevara v. Tuason and Co.*, 1 Phil. 27, 28 (1901).

[32] *Garcia v. Court of Appeals*, G.R. No. 96141, 2 October 1991, 202 SCRA 228, 233-234.

[33] *Magno v. Court of Appeals*, 194 Phil. 271, 278 (1981).

[34] *Regalado v. Regalado*, G.R. No. 134154, 28 February 2006, 483 SCRA 473, 484.

[35] *Insular Life Savings and Trust Company v. Runes, Jr.*, G.R. No. 152530, 12 August 2004, 436 SCRA 317, 324-325.

[36] *Que v. Court of Appeals*, G.R. No. 150739, 18 August 2005, 467 SCRA 358, 368.

Third, the certificate of service of the process server of the court *a quo* is *prima facie* evidence of the facts as set out therein.[37] According to the Sheriff's Return of Service,[38] summons was issued and served on respondent thru one Mrs. Alicia dela Torre, thus:

"THIS IS TO CERTIFY that on June 25, 2003 at around 1:45 p.m. the undersigned sheriff caused the service of summons issued in the above-entitled case together with attached complaints and annexes for and in behalf of defendant [respondent] thru a certain Mrs. Alicia Dela Torre inside their compound at the given address who acknowledged receipt by signature and notation of said dela Torre appearing thereof.

Wherefore, this summons is respectfully returned to the Honorable Regional Trial Court, Branch 13, Davao City, duly SERVED for its records and information."

Finally, even assuming *arguendo* that the RTC had no jurisdiction over respondent on account of the non-service upon her of the summons and complaint, the remedy of the respondent was to file a motion for the reconsideration of the 4 May 2004 Decision by default or a motion for new trial within 15 days from receipt of notice thereof. This is also without prejudice to respondent's right to file a petition for *certiorari* under Rule 65 of the Rules of Court for the nullification of the order of default of the court *a quo* and the proceedings thereafter held including the decision, the writ of execution, and the writ of garnishment issued by the RTC, on the ground that it acted without jurisdiction.[39] Unfortunately, however, respondent opted to file a Petition for Relief from the Judgment of the RTC, which, as the Court earlier determined, was the wrong remedy.

In *Tuason v. Court of Appeals,*[40] the Court explained the nature of a petition for relief from judgment:

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[37] *Aboitiz International Forwarders, Inc. v. Court of Appeals*, *supra* note 28 at 506-507.

[38] *Rollo*, p. 44.

[40] G.R. No. 116607, 10 April 1996, 256 SCRA 158, 167; *Mercury Drug Corporation v. Court of Appeals*, 390 Phil. 902, 912-913 (2000).

A petition for relief from judgment is an equitable remedy that is allowed only in exceptional cases where there is no other available or adequate remedy. **When a party has another remedy available to him, which may be either a motion for new trial or appeal from an adverse decision of the trial court, and he was not prevented by fraud, accident, mistake or excusable negligence from filing such motion or taking such appeal, he cannot avail himself of this petition.** Indeed, relief will not be granted to a party who seeks avoidance from the effects of the judgment when the loss of the remedy at law was due to his own negligence; **otherwise the petition for relief can be used to revive the right to appeal which had been lost thru inexcusable negligence**. (Emphasis and underscoring supplied; citations omitted)

In the case at bar, there being no fraud, accident, mistake, or excusable negligence that would have prevented petitioner from filing either a motion for reconsideration or a petition for review on *certiorari* of the 4 May 2004 Decision of the RTC, her resort to a Petition for Relief from Judgment was unwarranted.

This Court also notes that when respondent was declared in default for her failure to file an Answer to the Complaint, she did not immediately avail herself of any of the remedies provided by law. *Lina v. Court of Appeals*[41] enumerates the remedies available to a party declared in default:

a) The defendant in default may, at any time after discovery thereof and before judgment, file a **motion, under oath, to set aside the order of default** on the ground that his failure to answer was due to fraud, accident, mistake or excusable negligence, and that he has a meritorious defense (Sec. 3, Rule 18 [now Sec. 3(b), Rule 9]);

b) If the judgment has already been rendered when the defendant discovered the default, but before the same has become final and executory, he may file a **motion for new trial** under Section 1 (a) of Rule 37;

c) If the defendant discovered the default after the judgment has become final and executory, he may file a petition **for relief** under Section 2 [now Section 1] of Rule 38; and

[41] G.R. No. 63397, 9 April 1985, 135 SCRA 637, 642.

d) He may also **appeal** from the judgment rendered against him as contrary to the evidence or to the law, even if no petition to set aside the order of default has been presented by him (Sec. 2, Rule 41). (Emphasis added)

In addition, and as this Court earlier mentioned, a petition for *certiorari* to declare the nullity of a judgment by default is also available if the trial court improperly declared a party in default, or even if the trial court properly declared a party in default, if grave abuse of discretion attended such declaration.[42]

If respondent is really vigilant in protecting her rights, she should have exhausted all the legal remedies above-mentioned to nullify and set aside the order of default against her, and should no longer have waited for the judgment to be rendered. Respondent does not deny that she did receive the summons, although she alleges that it was not properly served upon her, yet she chose to sit on her rights and did not act immediately. For respondent's failure to act with prudence and diligence in protecting her rights, she cannot now elicit this Court's sympathy.

Respondent's petition for relief from judgment is clearly without merit and should not have been granted by the RTC.

WHEREFORE, the instant petition is herby *GRANTED*. Consequently, the Decision dated 4 May 2006 of the Regional Trial Court of Davao, Branch 13, in Civil Case No. 29,717-03 is hereby *REINSTATED* and the Order dated 20 June 2006 granting the petition for relief from judgment is hereby *SET ASIDE*.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Nachura, and *Reyes, JJ.,* concur.

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[42] *Cerezo v. Tuazon*, 469 Phil. 1020, 1036-1037 (2004).

THIRD DIVISION

[G.R. No. 177948. March 14, 2008]

FLOURISH MARITIME SHIPPING and LOLITA UY, *petitioners, vs.* **DONATO A. ALMANZOR,** *respondent.*

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; NATIONAL LABOR RELATIONS COMMISSION; FACTUAL QUESTIONS ARE FOR LABOR TRIBUNALS TO RESOLVE; APPLICATION. — We reiterate the dictum that this Court is not a trier of facts, and this doctrine applies with greater force in labor cases. Factual questions are for the labor tribunals to resolve. In this case, the factual issues were resolved by the Labor Arbiter and the NLRC. Their findings were affirmed by the Court of Appeals. Judicial review by this Court does not extend to a reevaluation of the sufficiency of the evidence upon which the proper labor tribunal has based its determination.

2. ID.; THE MIGRANT WORKERS AND OVERSEAS FILIPINOS ACT OF 1995 (R.A. NO. 8042); PROVISION ON CHOICE OF WHICH AMOUNT TO AWARD AN ILLEGALLY DISMISSED OVERSEAS CONTRACT WORKER, DISCUSSED AND APPLIED. — The correct interpretation of this provision was settled in *Marsaman Manning Agency Inc. v. National Labor Relations Commission* where this Court held that "the choice of which amount to award an illegally dismissed overseas contract worker, *i.e.,* whether his salaries for the unexpired portion of his employment contract, or three (3) months' salary for every year of the unexpired term, whichever is less," comes into play only when the employment contract concerned has a term of at least one (1) year or more. The employment contract involved in the instant case covers a two year period but the overseas contract worker actually worked for only 26 days prior to his illegal dismissal. Thus, the three months' salary rule applies. There is a similar factual milieu between the case at bench and *Olarte v. Nayona*. The only difference lies in the length of the subject employment contract: *Olarte* involved a one-year contract; while the employment in this case covers a two-year period. However, they both fall under the three

> months' salary rule since the term of the contract is "at least one year or more." In *Olarte,* as well as in *JSS Indochina Corporation v. Ferrer*, we ordered the employer of an illegally dismissed overseas contract worker to pay an amount equivalent to three (3) months' salary. We are not in accord with the ruling of the Court of Appeals that respondent should be paid his salaries for 14 months and 4 days. Records show that his actual employment lasted only for 26 days. Applying the above provision, and considering that the employment contract covers a two-year period, we agree with the Labor Arbiter's disposition, as affirmed by the NLRC, that respondent is entitled to six (6) months' salary. This is obviously what the law provides.

APPEARANCES OF COUNSEL

Ching Mendoza Quilas & Associates Law Firm for petitioners.

Dela Cruz Entero & Associates for respondent.

D E C I S I O N

NACHURA, *J.*:

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the Decision[1] of the Court of Appeals dated February 27, 2007 and its Resolution[2] dated May 18, 2007 in CA-G.R. SP No. 95056. The assailed Decision affirmed with modification the Decision[3] of the National Labor Relations Commission (NLRC) dated April 28, 2006 in NLRC NCR CA NO. 046596-05 which, in turn, affirmed the Decision[4]

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[1] Penned by Associate Justice Vicente S.E. Veloso, with Associate Justices Juan Q. Enriquez, Jr. and Marlene Gonzales-Sison, concurring; *rollo*, pp. 57-67.

[2] *Rollo*, p. 72.

[3] Penned by Presiding Commissioner Lourdes C. Javier, with Commissioners Tito F. Genilo and Gregorio O. Bilog, III, concurring; *rollo*, pp. 42-48.

[4] *Rollo*, pp. 32-35.

of Labor Arbiter Lutricia F. Quitevis-Alconcel, dated October 7, 2005 in OFW NLRC CASE NO. (M) 05-01-0243-00.

The facts of the case are as follows:

Respondent Donato A. Almanzor entered into a two-year employment contract with Flourish Maritime Shipping as fisherman, with a monthly salary of NT15,840.00 with free meals every day. It was, likewise, agreed that respondent would be provided with suitable accommodations.[5]

On October 1, 2004, respondent was deployed to Taipei, Taiwan as part of the crew of a fishing vessel known as FV Tsang Cheng 66. Respondent was surprised to learn that there were only five (5) crew members on board and he had to buy his own food, contrary to the agreed stipulation of free food and accommodation.[6]

While on board, the master of the vessel gave respondent orders which he could not understand; thus, he failed to obey him. Consequently, enraged at not being obeyed, the master struck him, hitting the right dorsal part of his body. He then requested medical assistance, but the master refused.[7] Hence, he sought the help of petitioner Lolita Uy (the manning agency owner), who then talked to the master of the vessel.

While the vessel was docked at the Taipei port, respondent was informed that he would be repatriated. Upon his arrival in the Philippines, he reported to petitioners and sought medical assistance after which he was declared "fit to work." Petitioners promised that he would be redeployed, but it turned out that it was no longer possible because of his age, for then he was already 49 years old.

Thus, respondent filed a complaint for illegal dismissal, payment for the unexpired portion of his employment contract, earned wages, moral and exemplary damages plus attorney's fees.

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[5] *Id. at* 43.

[6] *Id*.

[7] *Id*. at 32-33.

Petitioners countered that respondent voluntarily resigned[8] from his employment and returned to the Philippines on the same day. They, likewise, sought the dismissal of the complaint for failure of respondent to comply with the grievance machinery and arbitration clause embodied in the contract of employment. Lastly, they insisted that respondent failed to discharge the burden to prove that he was illegally dismissed.[9]

On October 7, 2005, the Labor Arbiter rendered a Decision in favor of respondent, the dispositive portion of which reads:

> WHEREFORE, viewed from the foregoing, judgment is hereby rendered declaring respondents guilty of illegal dismissal.
>
> Respondents Flourish Maritime Shipping and Wang Yung Chin are hereby ordered to jointly and solidarily pay complainant Donato A. Almanzor the amount of NT15,840.00 times six (6) months or a total of NT Ninety-Five Thousand Forty (NT95,040.00). Respondents shall pay the total amount in its peso equivalent at the time of actual payment plus legal interest.
>
> All other claims herein sought and prayed for are hereby denied for lack of legal and factual bases.
>
> SO ORDERED.[10]

On appeal to the NLRC, the Commission affirmed *in toto* the Labor Arbiter's findings.

Unsatisfied, petitioners elevated the matter to the Court of Appeals on petition for *certiorari*.[11] The appellate court agreed with the Labor Arbiter's conclusion (as affirmed by the NLRC) that respondent was illegally dismissed from employment. It, however, modified the NLRC decision by increasing the monetary

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[8] The petitioners presented three "resignation" letters denominated as Breach of Contract Agreement Letter and Breach of Contract and Transfer to New Employer Agreement Letter; *rollo*, pp. 16-18.

[9] *Rollo*, p. 44.

[10] *Id*. at 35.

[11] *Id*. at 51-56.

award due respondent in accordance with its interpretation of Section 10 of Republic Act (R.A.) 8042.[12]

Both the Labor Arbiter and the NLRC Board of Commissioners awarded such amount equivalent to respondent's salary for six (6) months (3 months for every year of the unexpired term) considering that respondent's employment contract covered a two-year period and he was dismissed from employment after only 26 days of actual work. The CA, however, disagreed with such interpretation. According to the CA, since respondent actually worked for 26 days and was thereafter dismissed from employment, the unexpired portion of the contract is one (1) year, eleven (11) months and four (4) days. For the unexpired one (second) whole year, the court awarded three months' salary. As to the 11 months and 4 days of the first year, the appellate court refused to apply the three-month rule. Instead, in addition to three months (for the unexpired second year), it awarded full compensation corresponding to the whole unexpired term of 11 months and 4 days. Thus, the CA deemed it proper to award a total amount equivalent to the respondent's salary for 14 months and 4 days.[13]

Petitioners now raise the following issues for resolution:

1. WHETHER OR NOT THE THREE LETTERS ARE RESIGNATION LETTERS OR QUITCLAIMS.

2. WHETHER OR NOT THE MODIFICATION OF THE NLRC DECISION BY THE COURT OF APPEALS IS CONTRARY TO LAW.[14]

Simply stated, petitioners want this Court to resolve the issue of whether respondent was illegally dismissed from employment and if so, to determine the correct award of compensation due respondent.

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[12] Otherwise known as "*The Migrant Workers and Overseas Filipinos Act of 1995*."

[13] *Rollo*, p. 65.

[14] *Id*. at 10.

The Labor Arbiter concluded that petitioners, who had the burden of proof, failed to adduce any convincing evidence to establish and substantiate its claim that respondent voluntarily resigned from employment.[15] Likewise, the NLRC held that petitioners failed to show that respondent was not physically fit to perform work due to his old age. Moreover, the labor tribunal said that petitioners failed to prove that the employment contract indeed provided a grievance machinery.[16] Clearly, both labor tribunals correctly concluded, as affirmed by the Court of Appeals, that respondent was not redeployed for work, in violation of their employment contract. Perforce, the termination of respondent's services is without just or valid cause.

We reiterate the dictum that this Court is not a trier of facts, and this doctrine applies with greater force in labor cases. Factual questions are for the labor tribunals to resolve. In this case, the factual issues were resolved by the Labor Arbiter and the NLRC. Their findings were affirmed by the Court of Appeals. Judicial review by this Court does not extend to a reevaluation of the sufficiency of the evidence upon which the proper labor tribunal has based its determination.[17]

On the amount of the award due respondent, Section 10 of R.A. 8042 provides:

> SECTION 10. *Money Claims*. – x x x
>
> x x x x x x x x x
>
> In case of termination of overseas employment without just, valid or authorized cause as defined by law or contract, the worker shall be entitled to the full reimbursement of his placement fee with interest at twelve percent (12%) *per annum*, plus his salaries for the unexpired portion of his employment contract or for three (3) months for every year of the unexpired term, whichever is less.

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[15] *Id*. at 34.

[16] *Id*. at 46.

[17] *Becton Dickinson Phils., Inc. v. National Labor Relations Commission*, G.R. Nos. 159969 & 160116, November 15, 2005, 475 SCRA 123, 142; *Alfaro v. Court of Appeals*, 416 Phil. 310, 318 (2001).

x x x x x x x x x.

The correct interpretation of this provision was settled in *Marsaman Manning Agency Inc. v. National Labor Relations Commission*[18] where this Court held that "the choice of which amount to award an illegally dismissed overseas contract worker, *i.e.*, whether his salaries for the unexpired portion of his employment contract, or three (3) months' salary for every year of the unexpired term, whichever is less," comes into play only when the employment contract concerned has a term of at least one (1) year or more.[19]

The employment contract involved in the instant case covers a two-year period but the overseas contract worker actually worked for only 26 days prior to his illegal dismissal. Thus, the three months' salary rule applies. There is a similar factual milieu between the case at bench and *Olarte v. Nayona*.[20] The only difference lies in the length of the subject employment contract: *Olarte* involved a one-year contract; while the employment in this case covers a two-year period. However, they both fall under the three months' salary rule since the term of the contract is "at least one year or more." In *Olarte*, as well as in *JSS Indochina Corporation v. Ferrer,*[21] we ordered the employer of an illegally dismissed overseas contract worker to pay an amount equivalent to three (3) months' salary.

We are not in accord with the ruling of the Court of Appeals that respondent should be paid his salaries for 14 months and 4 days. Records show that his actual employment lasted only for 26 days. Applying the above provision, and considering that the employment contract covers a two-year period, we agree with the Labor Arbiter's disposition, as affirmed by the NLRC, that respondent is entitled to six (6) months' salary. This is obviously what the law provides.

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[18] 371 Phil. 827 (1999).

[19] *Id*. at 840.

[20] 461 Phil. 429 (2003).

[21] G.R. No. 156381, October 14, 2005, 473 SCRA 120.

WHEREFORE, the petition is *PARTIALLY GRANTED.* The Decision of the Court of Appeals, dated February 27, 2007, and its Resolution dated May 18, 2007 in CA-G.R. SP No. 95056, are *AFFIRMED with the MODIFICATION* that the monetary award to be paid the respondent shall be the amount set forth in the decision of the Labor Arbiter as affirmed by the NLRC.

SO ORDERED.

Ynares-Santiago (Chairperson), Austria-Martinez, Chico-Nazario, and *Reyes, JJ.,* concur.

FIRST DIVISION

[A.M. No. P-06-2250. March 24, 2008]
(Formerly OCA IPI No. 06-2413-P)

MARY ANN ESTOQUE, *complainant, vs.* **REYNALDO O. GIRADO, Sheriff IV, Regional Trial Court, Branch 33, Davao City,** *respondent.*

SYLLABUS

1. **POLITICAL LAW; ADMINISTRATIVE LAW; COURT PERSONNEL; SHERIFF'S; SHERIFF'S DUTY IN THE EXECUTION OF A WRIT, DISCUSSED. —** Time and again, it has been held that the sheriff's duty in the execution of a writ is purely ministerial; he is to execute the court order strictly to the letter and has no discretion whether to execute the judgment or not. Once the writ is placed in his hands, it is his duty, unless restrained by the court, to proceed with reasonable celerity and promptness to properly execute it according to its mandate, ensuring at all times that the enforcement of a judgment is not unduly delayed. Thus, a sheriff should know by heart his order to make a return of the writ of execution to the clerk/judge issuing it or if the judgment cannot be satisfied in full within

30 days after his receipt of the writ, to report to the court and state the reason/s therefor. In the latter case, he is further tasked to make a report to the court every 30 days on the proceedings followed until the judgment is satisfied in full or its effectivity expires. The submission of the return and periodic reports by the sheriffs is not a duty that must be taken lightly. It serves to update the court as to the status of the execution and to give it an idea as to why the judgment was not satisfied. It also provides insights for the court as to how efficient court processes are after judgment has been promulgated. The overall purpose of the requirement is to ensure speedy execution of decisions.

2. ID.; ID.; ID.; ID.; ID.; GOOD FAITH OR LACK OF IT IN PROCEEDING TO ENFORCE A WRIT IS IMMATERIAL; APPLICATION. — Good faith or lack of it in proceeding to execute the writ is inconsequential, for a sheriff is chargeable with the knowledge that being an officer of the court it behooves him to make compliance in due time. Hence, granting for argument's sake that respondent indeed entertained an honest belief that enforcing the writ would only be a futile attempt, the rules still do not give him the prerogative not to implement the *alias* writ. Moreover, respondent simply brushed aside and trivialized the orders issued by the trial court. From what appears on record, even the court was seemingly helpless to enjoin immediate compliance by respondent for he repeatedly refused, without any justification, to comply with its five directives. Nothing was practically heard from respondent until this case was filed. His constant indifference on the matter belies his representation that he had not the slightest intention to disobey the court orders.

3. ID.; ID.; ID.; ID.; ID.; REFUSAL OF A SHERIFF TO EXECUTE A WRIT CONSTITUTES SIMPLE NEGLECT OF DUTY.— Under the Revised Uniform Rules on Administrative Cases in the Civil Service, respondent is guilty of simple neglect of duty which is defined as the failure of an employee to give attention to a task expected of him and signifies a disregard of a duty resulting from carelessness or indifference. It is classified as a less grave offense which carries the penalty of suspension for one (1) month and one (1) day to six (6) months for the first offense and dismissal for the second offense. As it appears that respondent has not been previously administratively faulted

and so as not to hamper the performance of the duties of his office, instead of suspending him, he should be fined in an amount equivalent to his salary for one month.

D E C I S I O N

AZCUNA, *J.*:

This administrative case stemmed from the verified Letter-Complaint[1] of Mary Ann Estoque against Reynaldo O. Girado, Sheriff IV of Regional Trial Court, Branch 33, Davao City, for dereliction of duty in connection with the latter's alleged unreasonable failure and refusal to implement the writ of execution in Civil Case No. 23-242-94 entitled *"Marcela A. Estoque, et al. v. Apo View Hotel, et al."*

In the letter-complaint received by the Office of the Court Administrator (OCA) on April 3, 2006, complainant Estoque averred:

I am one of the plaintiffs in Civil Case No. 23,248-94, entitled *"MARCELA A. ESTOQUE, MARY ANN ESTOQUE, and NEIL MARK ESTOQUE, Plaintiffs, - versus - APO VIEW HOTEL, duly represented by MARIANO PAMINTUAN, JR., E.B. VILLAROSA & PARTNER CO., LTD., duly represented by ENGR. FELICIANO A. SUBANG and FREYSSINET DAVAO, INC., duly represented by ENGR. REYNALDO T. FUENTES, Defendants"* for injunction with prayer for temporary restraining order, damages and attorney's fees, pending before the Regional Trial Court, 11th Judicial Region, Branch 33, Davao City (hereafter "RTC 33")[.] The case was filed on October 27, 1994.

On November 9, 1994, RTC 33 rendered its Decision based on the Amicable Settlement entered into by the parties on November 8, 1994. For failure of the defendants to completely comply with the terms and conditions of the Amicable Settlement, a writ of execution, upon proper motion, was issued on April 7, 1999.

Despite the writ of execution issued on April 7, 1999, the defendants still failed to completely comply with the terms and conditions of the Amicable Settlement.

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[1] *Rollo*, pp. 1-6.

On March 10, 2000, my lawyer filed a motion for issuance of *alias* writ of execution. RTC 33 granted the said motion in its order dated April 14, 2000, and an alias writ of execution was issued on July 7, 2000.

My complaint is about the unreasonable failure and refusal of the sheriff assigned at RTC 33 in the person of **SHERIFF REYNALDO O. GIRADO** to implement, despite the length of time and follow-ups, the *alias* writ of execution issued pursuant to the court order dated April 14, 2000. For the said sheriff's failure to implement the *alias* writ of execution and his failure to make a return of the writ, I was forced to bring to the attention of RTC 33 the matter by filing appropriate motions and manifestations.

The following are the records of events[:]

1. On February 1, 2001, my lawyer filed an "*EX-PARTE MOTION* TO DIRECT THE SHERIFF TO MAKE A RETURN OF THE WRIT OF EXECUTION" xxx;

2. On February 1, 2001, RTC 33 issued an order directing Sheriff Reynaldo Girado to submit his Sheriff's Return of the Writ of Execution issued pursuant to the order dated April 14, 2000 xxx. Sheriff Reynaldo Girado failed to submit the Sheriff's Return despite the court order;

3. On April 25, 2001, my lawyer filed an *EX-PARTE* MOTION TO DIRECT THE SHERIFF OF THIS BRANCH (referring to RTC 33) TO SHOW WHY HE SHOULD NOT BE CITED FOR CONTEMPT OF COURT FOR HIS CONTINUED FAILURE TO MAKE A SHERIFF'S RETURN OF THE WRIT OF EXECUTION" x x x[;]

4. On April 27, 2001, RTC 33 issued an order directing Sheriff Reynaldo Girado to show cause why he should not be cited for contempt for failure to submit his sheriff's return on the steps he had taken with respect to the writ of execution, within ten (10) days from receipt of the order xxx. Despite the said order, Sheriff Reynaldo Girado failed to submit his comment or explanation why he should not be cited for contempt for failure to submit his sheriff's return[;]

5. On October 24, 2001, for failure of Sheriff Reynaldo Girado to comply with the order of RTC 33 dated April 27, 2001 xxx, my lawyer filed a MOTION TO CITE SHERIFF REYNALDO O. GIRADO FOR CONTEMPT OF COURT AND TO ASSIGN A SUBSTITUTE SHERIFF FOR THIS PARTICULAR CASE xxx [;]

6. On October 26, 2001, RTC 33 issued an order directing Sheriff Reynaldo Girado to file his comment to the appropriate motion [above-stated] within fifteen (15) days from October 26, 2001 xxx;

7. On January 11, 2002, RTC 33 issued another order directing the Branch Clerk of Court and *[Ex-Officio*] Provincial Sheriff to assign and designate from among the several sheriffs under him a sheriff to implement the *Alias* Writ of Execution issued in this case xxx [;]

8. [On] January 14, 2002, RTC 33 issued a separate order directing Reynaldo O. Girado to show cause why he should not be cited for CONTEMPT OF COURT for his:

"1. Failure to implement and execute the *Alias* Writ of Execution issued on July 7, 2000; if implemented and executed, for his failure to submit his [Sheriff's] Return on Execution within the period provided by law;

2. Failure to comply with the Order of this Court dated 1 February 2001;

3. Failure to comply with the Order of this Court dated 27 April 2001;

4. Failure to comply with the Order of this Court dated 26 October 2001";

x x x x x x x x x

(Order dated January [14], 2002)

x x x x x x x x x

9. On June 8, 2004, my lawyer filed a MANIFESTATION WITH MOTION bringing to the attention of RTC 33 that Sheriff Reynaldo Girado has failed to comply with its previous orders and that the Clerk of Court and [*Ex-Officio*] Provincial Sheriff has not also implemented the directive of RTC 33 contained in the order dated January 11, 2002 xxx ;

10. On June 14, 2004, acting on the Manifestation with Motion xxx, RTC 33 directed me to initiate contempt proceedings against Sheriff Reynaldo O. Girado xxx. I did not anymore initiate contempt proceedings because I expected the same result – Reynaldo O. Girado will not again comply[;]

11. On June 15, 2004, RTC 33 issued an order again directing Sheriff Reynaldo Girado to submit his explanation why he should not be held in contempt of court for failure to comply with the [Order] of this Court (RTC 33), within ten (10) days from receipt of the order xxx [;]

12. On June 24, 2002, my lawyer wrote the Clerk of Court and [*Ex-Officio*] Provincial Sheriff, Regional Trial Court, Davao City, requesting for the implementation of the Order dated January 11, 2002 for the assignment of a substitute sheriff xxx [;] [and]

13. On September 24, 2004, my lawyer wrote a REQUEST FOR IMPLEMENTATION OF THE ORDER DATED JANUARY 11, 2002 ISSUED BY BRANCH 33 OF THE REGIONAL TRIAL COURT, 11TH JUDICIAL REGION, DAVAO CITY, addressed to the Clerk of Court and [*Ex-Officio*] Provincial Sheriff, Regional Trial Court, 11th Judicial Region, Davao City xxx. Up to the present, I have not yet received any information from the Clerk of Court and [*Ex-Officio*] Provincial Sheriff regarding my said request.

Despite the several orders of RTC 33, Sheriff Reynaldo Girado has unjustifiably failed and refused and up to the present still fails and refuses to comply with those orders, leaving me with no other recourse or option but to send this present **LETTER-COMPLAINT** to your Honorable Office for proper action against Sheriff Reynaldo O. Girado.

It is feared that if no immediate implementation of the writ of execution in this case, the life of the occupants of the house, the complainant herein and the members of her family, the other plaintiffs in the aforementioned case, will be in danger and at risk considering that the kitchen of the occupants is now about to collapse and the posts are now almost suspended[.][2]

In his Comment[3] to the complaint, respondent pleaded:

a) At the outset, I would like to make it clear that I have no slightest intention not to implement the *alias* writ of execution issued by the Court of [*sic*] on July 7, 2000 much less, disobey and totally disregard the lawful orders of the court;

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[2] *Id.* at 1-3.

[3] *Id.* at 45-47.

b) The records would bare that pursuant to the Writ of Execution dated 7 April 1999, I exerted efforts to implement the same on July 30, 1999 where I conducted an inspection on the residential building of plaintiffs together with plaintiff Mary Ann Estoque and the representatives of defendant Freyssinet Davao, Inc.;

c) During said inspection, we found out that the repair made by defendant E.B. Villarosa & Partner Co. Ltd. on the residential building of plaintiffs was a failure and no certificate of completion was handed by the defendants to the plaintiffs and neither did the defendants execute a performance bond in favor of the plaintiffs as agreed upon by them;

d) As indicated in my sheriff's progress report dated 18 August 1999[,] copy furnished plaintiff's counsel, defendant E.B. Villarosa & Partner Co. Ltd. was not notified of the inspection because of the closure of its office at 102 Juan Luna Street, Davao City[,] following [the] cessation of [its] operation;

e) I tried to locate the whereabouts of the officers of E.B. Villarosa & Partner Co. Ltd., in order to fully implement the decision of the court but all my efforts proved futile;

f) On July 7, 2000, the court issued an *alias* writ of execution;

g) I was again confronted with the dilemma on how to implement it considering that defendant E.B. Villarosa & Partner Co. Ltd. is nowhere to be found;

h) In one instance where I chanced upon in court plaintiff's previous counsel, Atty. Clemencia Cataluña, I told her about it and she casually commented that "it's really a problem because how could you implement it when the one which will do the repair and make good the undertaking could not be located";

i) Locked on this predicament, I chose not to make any return nor submit any progress report to the court because plaintiff's already knew about it when I furnished them with my sheriff's progress report dated August 18, 1999;

j) In my humble understanding, I could not fully implement the subject *alias* writ of execution without defendant E.B. Villarosa & Partner Co. Ltd. having been duly informed about it in view of the fact that it has already ceased operation

and closed down its offices and the whereabouts of its officers [were] totally unknown to me;

k) To reiterate, I have no slightest intention to disregard the various motions filed by the plaintiff for me to file my return and/or progress report [or] flagrantly disobey the lawful orders of the court;

l) I sincerely apologize to the plaintiffs for not according them the respect and courtesy they deserve, and to the Honorable Court, for not religiously following its orders and directives to the letter; and

m) I am very sorry for what I have done and I strongly resolve not to commit again the same mistakes in the future.[4]

After consideration of the parties' respective submissions, the OCA, on June 27, 2006, recommended that respondent be held guilty for neglect of duty and be fined ₱1,000, with warning that a repetition of the same or similar act in the future shall be dealt with more severely.[5]

Respondent manifested his willingness to submit this matter for decision on the basis of the pleadings filed, conformably with this Court's September 25, 2006 Resolution.

The Court agrees with the evaluation of the OCA but not as to its recommended penalty.

Time and again, it has been held that the sheriff's duty in the execution of a writ is purely ministerial; he is to execute the court order strictly to the letter and has no discretion whether to execute the judgment or not. Once the writ is placed in his hands, it is his duty, unless restrained by the court, to proceed with reasonable celerity and promptness to properly execute it according to its mandate, ensuring at all times that the enforcement of a judgment is not unduly delayed.[6]

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[4] *Id*.

[5] *Id.* at 49-52.

[6] *Vargas v. Primo*, A.M. No. P-07-2336, January 24, 2008, pp. 4-5; *Cebu International Finance Corporation v. Cabigon*, A.M. No. P-06-2107, February 14, 2007, 515 SCRA 616, 622; and *Patawaran v. Nepomuceno*, A.M. No. P-02-1655, February 6, 2007, 514 SCRA 265, 277.

Thus, a sheriff should know by heart his order to make a return of the writ of execution to the clerk/judge issuing it or if the judgment cannot be satisfied in full within 30 days after his receipt of the writ, to report to the court and state the reason/s therefor. In the latter case, he is further tasked to make a report to the court every 30 days on the proceedings followed until the judgment is satisfied in full or its effectivity expires.[7] The submission of the return and periodic reports by the sheriffs is not a duty that must be taken lightly. It serves to update the court as to the status of the execution and to give it an idea as to why the judgment was not satisfied. It also provides insights for the court as to how efficient court processes are after judgment has been promulgated. The overall purpose of the requirement is to ensure speedy execution of decisions.[8]

In this case, respondent admittedly failed to implement the alias writ of execution issued on July 7, 2000, to submit a sheriff's return on execution, and to make a monthly report as to the proceedings taken to satisfy in full what had been amicably settled by the parties. He would excuse himself by arguing that complainant Estoque already knew that defendant E.B. Villarosa & Partner Co. Ltd. already ceased its operation when she was furnished a copy of the sheriff's progress report on August 18, 1999 and that, in his "humble understanding," he

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[7] *Bunagan v. Ferraren*, A.M. No. P-06-2173, January 28, 2008, p. 8; *Cebu International Finance Corporation v. Cabigon*, *id.*; and *Patawaran v. Nepomuceno*, *id.* This is in compliance with Section 14, Rule 39 of the Revised Rules on Civil Procedure, which mandates:

SEC. 14. *Return of writ of execution*. – The writ of execution shall be returnable to the court issuing it immediately after the judgment has been satisfied in part or in full. If the judgment cannot be satisfied in full within thirty (30) days after his receipt of the writ, the officer shall report to the court and state the reason therefor. Such writ shall continue in effect during the period within which the judgment may be enforced by motion. The officer shall make a report to the court every thirty (30) days on the proceedings taken thereon until the judgment is satisfied in full, or its effectivity expires. The returns or periodic reports shall set forth the whole of the proceedings taken, and shall be filed with the court and copies thereof promptly furnished the parties.

[8] *Patawaran v. Nepomuceno*, *supra* note 6.

could not fully implement the *alias* writ due to such fact and since the whereabouts of its officers were totally unknown to him.

The Court is not persuaded. Good faith or lack of it in proceeding to execute the writ is inconsequential, for a sheriff is chargeable with the knowledge that being an officer of the court it behooves him to make compliance in due time.[9] Hence, granting for argument's sake that respondent indeed entertained an honest belief that enforcing the writ would only be a futile attempt, the rules still do not give him the prerogative not to implement the *alias* writ.

Moreover, respondent simply brushed aside and trivialized the orders issued by the trial court. From what appears on record, even the court was seemingly helpless to enjoin immediate compliance by respondent for he repeatedly refused, without any justification, to comply with its five directives, to wit: on February 1, 2001 (to submit his sheriff's return of the *alias* writ of execution); on April 27, 2001 (to show cause why he should not be cited for contempt of court for continued failure to submit his sheriff's return); on October 26, 2001 (to file his comment to the motion to cite him for contempt of court and to assign a substitute sheriff); on January 14, 2002 (to show cause why he should not be cited for contempt of court for failure to implement the *alias* writ of execution and to comply with the three previous court orders); and on June 15, 2004 (to submit his explanation why he should not be held in contempt of court for failure to comply with the January 14, 2002 Order). Nothing was practically heard from respondent until this case was filed. His constant indifference on the matter belies his representation that he had not the slightest intention to disobey the court orders.

Under the Revised Uniform Rules on Administrative Cases in the Civil Service,[10] respondent is guilty of simple

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[9] *Bunagan v. Ferraren*, *id.*

[10] Promulgated by the Civil Service Commission through Resolution No. 99-1936 dated August 1999 and implemented by CSC Memorandum Circular No. 19, Series of 1999 (see *Aranda, Jr. v. Alvarez*, A.M. No. P-04-1889, November 23, 2007).

neglect of duty which is defined as the failure of an employee to give attention to a task expected of him and signifies a disregard of a duty resulting from carelessness or indifference. It is classified as a less grave offense which carries the penalty of suspension for one (1) month and one (1) day to six (6) months for the first offense and dismissal for the second offense.[11] As it appears that respondent has not been previously administratively faulted and so as not to hamper the performance of the duties of his office,[12] instead of suspending him, he should be fined in an amount equivalent to his salary for one month.

WHEREFORE, respondent Sheriff Reynaldo O. Girado is found *GUILTY* of simple neglect of duty and is *FINED* in an amount equivalent to his salary for one month, with a *STERN WARNING* that a repetition of the same or similar act in the future shall be dealt with more severely.

Let a copy of this Decision be attached to the personnel records of respondent Girado in the Office of the Administrative Services, Office of the Court Administrator.

SO ORDERED.

Puno, C.J. (Chairperson), Carpio, Corona, and *Leonardo-de Castro, JJ.,* concur.

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[11] *Vargas v. Primo*, *supra* note 6; *Sy v. Binasing*, A.M. No. P-06-2213, November 23, 2007, p. 4; *De Leon-Dela Cruz v. Recacho*, A.M. No. P-06-2122, July 17, 2007, 527 SCRA 622, 631; *Jacinto v. Castro*, A.M. No. P-04-1907, July 3, 2007, 526 SCRA 272, 278; *Tiu v. Dela Cruz*, A.M. No. P-06-2288, June 15, 2007, 524 SCRA 630, 640; *Malsi v. Malana, Jr.*, A.M. No. P-07-2290, May 25, 2007, 523 SCRA 167, 174; and *Patawaran v. Nepomuceno*, *supra* note 6.

[12] *Sy v. Binasing*, *id.*; *Jacinto v. Castro*, *id.*; and *Tiu v. Dela Cruz*, *id.*

SECOND DIVISION

[G.R. No. 154885. March 24, 2008]

DIESEL CONSTRUCTION CO., INC., *petitioner, vs.* **UPSI PROPERTY HOLDINGS, INC.,** *respondent.*

[G.R. No. 154937. March 24, 2008]

UPSI PROPERTY HOLDINGS, INC., *petitioner, vs.* **DIESEL CONSTRUCTION CO., INC. and FGU INSURANCE CORP.,** *respondents.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; CONSTRUCTION INDUSTRY AND ARBITRATION COMMISSION (CIAC); MEMBERS OF THE ARBITRAL TRIBUNAL OF THE CIAC HAVE IN THEIR FAVOR THE PRESUMPTION OF POSSESSING THE NECESSARY QUALIFICATIONS AND COMPETENCE EXACTED BY LAW.— Correlatively, Diesel, obviously having in mind the disputable presumption of regularity, correctly argues that highly specialized agencies are presumed to have the necessary technical expertise in their line of authority. In other words, the members of the Arbitral Tribunal of the CIAC have in their favor the presumption of possessing the necessary qualifications and competence exacted by law. A party in whose favor the legal presumption exists may rely on and invoke such legal presumption to establish a fact in issue. One need not introduce evidence to prove that the fact for a presumption is *prima facie* proof of the fact presumed.

2. CIVIL LAW; OBLIGATIONS; SUBSTANTIAL COMPLIANCE IN GOOD FAITH ENTITLES THE OBLIGOR TO THE FULL PAYMENT OF THE CONTRACT AMOUNT LESS ACTUAL DAMAGES SUFFERED BY THE OBLIGEE; APPLICATION.— As evidenced by UPSI's Progress Report No. 19 for the period ending March 22, 2000, Diesel's scope of work, as of that date, was already 97.56% complete. Such level of work accomplishment would, by any rational norm, be considered as substantial to

warrant full payment of the contract amount, less actual damages suffered by UPSI. Article 1234 of the Civil Code says as much, "If the obligation had been substantially performed in good faith, the obligor may recover as though there had been a strict and complete fulfillment, less damages suffered by the obligee."

3. ID.; DAMAGES; AWARD OF ATTORNEY'S FEES UPHELD IN VIEW OF EVIDENT BAD FAITH IN REFUSING TO SATISFY A VALID CLAIM. — The Court resolves to reinstate the CIAC's award of attorney's fees, there being sufficient justification for this kind of disposition. As earlier discussed, Diesel was not strictly in delay in the completion of the Project. No valid reason, therefore, obtains for UPSI to withhold the retention money or to refuse to pay the unpaid balance of the contract price. Indeed, the retention and nonpayment were, to us, as was to the CIAC, resorted to by UPSI out of whim, thus forcing the hand of Diesel to sue to recover what is rightfully due. Thus, the grant of attorney's fees would be justifiable under Art. 2208 of the Civil Code.

4. REMEDIAL LAW; COURTS; SUPREME COURT; NOT A TRIER OF FACTS; FACTUAL FINDINGS OF THE CONSTRUCTION INDUSTRY ARBITRATION COMMISSION (CIAC), AS AFFIRMED BY THE CA, ACCORDED RESPECT. — It is settled rule that the Court, not being a trier of facts, is under no obligation to examine, winnow, and weigh anew evidence adduced below. This general rule is, of course, not absolute. In *Superlines Transportation Company, Inc. v. Philippine National Construction Company*, the Court enumerated the recognized exceptions to be. In the instant case, the factual findings of the CIAC and CA, with regard to the completion of the Project and UPSI's entitlement to recover expenses allegedly incurred to finish the Project, do not fall under any one of these exceptions. As things stand, the factual findings of the CIAC and CA are supported by evidence presented during the hearing before the Arbitral Tribunal. xxx Given the 97.56% work accomplishment tendered by Diesel, UPSI's theory of abandonment and of its having spent a sum to complete the work must fall on its face. We can concede hypothetically that UPSI undertook what it characterized as "additional or rectification" works on the Project. But as both the CIAC and CA held, UPSI failed to show that such "additional or

rectification" works, if there be any, were the necessary result of the faulty workmanship of Diesel. The Court perceives of no reason to doubt, much less disturb, the coinciding findings of the CIAC and CA on the matter.

APPEARANCES OF COUNSEL

Perlas De Guzman Antonio Venturanza Quizon-Venturanza & Herbosa Law Firm and *R.A. V. Saguisag* for Diesel Construction Co., Inc.

Kalaw Sy Vida Selva & Campos for UPSI Holdings, Inc.

Jacinto Jimenez for FGU Insurance Corp.

D E C I S I O N

VELASCO, JR., *J.*:

The Case

Before the Court are these petitions for review under Rule 45 separately interposed by Diesel Construction Co., Inc. (Diesel) and UPSI Property Holdings, Inc. (UPSI) to set aside the Decision[1] dated April 16, 2002 as partly modified in a Resolution[2] of August 21, 2002, both rendered by the Court of Appeals (CA) in CA-G.R. SP No. 68340, entitled *UPSI Property Holdings, Inc. v. Diesel Construction Co., Inc., and FGU Insurance Corporation*. The CA Decision modified the Decision dated December 14, 2001 of the Arbitral Tribunal of the Construction Industry Arbitration Commission (CIAC) in CIAC Case No. 18-2001, while the CA Resolution granted in part the motion of Diesel for reconsideration and denied a similar motion of UPSI.

The Facts

The facts, as found in the CA Decision under review, are as follows:

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[1] *Rollo* (G.R. No. 154885), pp. 62-75. Penned by Associate Justice Romeo A. Brawner (Chairperson) and concurred in by Associate Justices Jose L. Sabio, Jr. and Sergio L. Pestaño.

[2] *Id*. at 51-60.

On August 26, 1995, Diesel, as Contractor, and UPSI, as Owner, entered into a Construction Agreement[3] (Agreement) for the interior architectural construction works for the 14th to 16th floors of the UPSI Building 3 Meditel/Condotel Project (Project) located on Gen. Luna St., Ermita, Manila. Under the Agreement, as amended, Diesel, for Php 12,739,099, agreed to undertake the Project, payable by progress billing.[4] As stipulated, Diesel posted, through FGU Insurance Corp. (FGU), a performance bond in favor of UPSI.[5]

Inter alia, the Agreement contained provisions on contract works and Project completion, extensions of contract period, change/extra works orders, delays, and damages for negative slippage.

Tasked to oversee Diesel's work progress were: Grace S. Reyes Designs, Inc. for interior design and architecture, D.L. Varias and Associates as Construction Manager, and Ryder Hunt Loacor, Inc. as Quantity Surveyor.[6]

Under the Agreement, the Project prosecution proper was to start on August 2, 1999, to run for a period of 90 days or until November 8, 1999. The parties later agreed to move the commencement date to August 21, 1999, a development necessitating the corresponding movement of the completion date to November 20, 1999.

Of particular relevance to this case is the section obliging the contractor, in case of unjustifiable delay, to pay the owner liquidated damages in the amount equivalent to one-fifth (1/5) of one (1) percent of the total Project cost for each calendar day of delay.[7]

In the course of the Project implementation, change orders were effected and extensions sought. At one time or another,

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[3] *Id*. at 98-125.

[4] *Id*. at 100.

[5] *Id*. at 77.

[6] *Id*. at 64.

[7] *Id*. at 99-100.

Diesel requested for extension owing to the following causes or delaying factors: (1) manual hauling of materials from the 14th to 16th floors; (2) delayed supply of marble; (3) various change orders; and (4) delay in the installation of shower assembly.[8]

UPSI, it would appear, disapproved the desired extensions on the basis of the foregoing causes, thus putting Diesel in a state of default for a given contract work. And for every default situation, UPSI assessed Diesel for liquidated damages in the form of deductions from Diesel's progress payments, as stipulated in the Agreement.[9]

Apparently irked by and excepting from the actions taken by UPSI, Diesel, thru its Project manager, sent, on March 16, 2000, a letter notice to UPSI stating that the Project has been completed as of that date. UPSI, however, disregarded the notice, and refused to accept delivery of the contracted premises, claiming that Diesel had abandoned the Project unfinished. Apart therefrom, UPSI withheld Diesel's 10% "retention money" and refused to pay the unpaid balance of the contract price.[10]

It is upon the foregoing factual backdrop that Diesel filed a complaint before the CIAC, praying that UPSI be compelled to pay the unpaid balance of the contract price, plus damages and attorney's fees. In an answer with counterclaim, UPSI denied liability, accused Diesel of abandoning a project yet to be finished, and prayed for repayment of expenses it allegedly incurred for completing the Project and for a declaration that the deductions it made for liquidated damages were proper. UPSI also sought payment of attorney's fees.[11]

After due hearing following a protracted legal sparring, the Arbitral Tribunal of the CIAC, on December 14, 2001, in CIAC Case No. 18-2001, rendered judgment for Diesel, albeit for an

[8] *Id*. at 85-89.

[9] *Id*. at 64-65.

[10] *Id*. at 65.

[11] *Id*. at 77.

amount lesser than its original demand. To be precise, the CIAC ordered UPSI to pay Diesel the total amount of Ph₱ 4,027,861.60, broken down as follows: Ph₱ 3,661,692.60, representing the unpaid balance of the contract price; and Ph₱ 366,169 as attorney's fees. In the same decision, the CIAC dismissed UPSI's counterclaim[12] and assessed it for arbitration costs in the amount of Ph₱ 298,406.03.[13]

In time, UPSI went to the CA on a petition for review, docketed as CA-G.R. SP No. 68340. Eventually, the appellate court rendered its assailed Decision dated April 16, 2002, modifying that of the CIAC, thus:

> WHEREFORE, premises considered, the petition is GRANTED and the questioned Decision is MODIFIED in this wise:
>
> a. The claim of [UPSI] for liquidated damages is GRANTED to the extent of PESOS: ONE MILLION THREE HUNDRED NINE THOUSAND AND FIVE HUNDRED (₱1,309,500.00) representing forty-five (45) days of delay at ₱29,100 *per diem*;
>
> b. We hold that [Diesel] substantially complied with the Construction Contract and is therefore entitled to one hundred percent (100%) payment of the contract price. Therefore, the claim of [Diesel] for an unpaid balance of PESOS: TWO MILLION FOUR HUNDRED FORTY-ONE THOUSAND FOUR HUNDRED EIGHTY TWO and SIXTY FOUR centavos (₱2,441,482.64), which amount already includes the retention on the additional works or Change Orders, is GRANTED, minus liquidated damages. In sum, [UPSI] is held liable to [Diesel] in the amount of PESOS: ONE MILLION ONE HUNDRED THIRTY ONE THOUSAND NINE HUNDRED EIGHTY TWO and sixty four centavos (₱1,131,982.64), with legal interest until the same is fully paid;
>
> c. The parties are liable equally for the payment of arbitration costs;
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> d. All claims for attorney's fees are DISMISSED; and
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> e. Since there is still due and owing from UPSI an amount of money in favor of Diesel, respondent FGU is DISCHARGED as surety for Diesel.

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[12] *Id*. at 96.

[13] *Id*. at 97.

Costs *de oficio*.

SO ORDERED.[14]

Therefrom, Diesel and UPSI each sought reconsideration. On August 21, 2002, the CA issued its equally assailed Resolution denying reconsideration to UPSI, but partially granting Diesel's motion, disposing as follows:

WHEREFORE, the Motion for Reconsideration of [Diesel] is partially GRANTED. The liquidated damages are hereby reduced to ₱1,146,519.00 (45 days multiplied by ₱25,478.20 *per diem*). However, in accordance with the main opinion, We hold that [UPSI] is liable to [Diesel] for the total amount of ₱3,661,692.64, representing the unpaid balance of the contract price plus the ten-percent retention, from which the liquidated damages, must, of course, be deducted. Thus, in sum, as amended, We hold that petitioner is still liable to respondent Diesel in the amount of ₱2,515,173.64, with legal interest until the same is fully paid.

The main opinion, in all other respects, STANDS.

SO ORDERED.[15]

Hence, these separate petitions are before us.

Per its Resolution of March 17, 2003, the Court ordered the consolidation of the petitions.

The Issues

In its petition in G.R. No. 154885, Diesel raises the following issues:

1. Whether or not the [CA] has the discretion, indeed the jurisdiction, to pass upon the qualifications of the individual members of the CIAC Arbitral Tribunal and declare them to be non-technocrats and not exceptionally well-versed in the construction industry warranting reversal and nullification of the tribunal's findings.

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[14] *Supra* note 1, at 73-74.

[15] *Supra* note 2, at 59.

2. Whether or not the [CA] may intervene to annul the findings of a highly specialized agency, like the CIAC, on the ground that essentially the question to be resolved goes to the very heart of the substantiality of evidence, when in so doing, [CA] merely substituted its own conjectural opinion to that of the CIAC Arbitral Tribunal's well-supported findings and award.

3. Whether or not the [CA] erred in its findings, which are contrary to the findings of the CIAC Arbitral Tribunal.[16]

On the other hand, in G.R. No. 154937, UPSI presents the following issues:

I

Whether or not portion of the Decision dated April 16, 2002 of the Honorable [CA] denying additional expenses to complete the unfinished and abandoned work of [Diesel], is null and void for being contrary to clean and convincing evidence on record.

II

Whether or not portion of the Decision x x x of the [CA] finding delay of only forty five (45) days is null and void for being not in accord with contractual stipulations upon which the controversy arise.

III

Whether or not the resolution of the Honorable Court of Appeals denying the herein petitioner's motion for reconsideration and partially granting the respondent's motion for reconsideration is likewise null and void as it does not serve its purpose for being more on expounding than rectifying errors.[17]

The issues shall be discussed *in seriatim*.

The Court's Ruling

We resolve to modify the assailed CA Decision.

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[16] *Rollo* (G.R. No. 154885), p. 24.

[17] *Rollo* (G.R. No. 154937), pp. 63-64.

First Issue

Diesel maintains that the CA erred in its declaration that it may review the CIAC's decision considering the doctrine on the binding effect of conclusions of fact of highly specialized agencies, such as the CIAC, when supported by substantial evidence.

The above contention is erroneous and, as couched, misleading.

As is noted, the CA, in its assailed resolution, dismissed as untenable Diesel's position that the factual findings of the CIAC are binding on and concludes the appellate court. The CA went to clarify, however, that the general rule is that factual conclusions of highly specialized bodies are given great weight and even finality when supported by substantial evidence. Given this perspective, the CA was correct in holding that it may validly review and even overturn such conclusion of facts when the matter of its being adequately supported by substantial evidence duly adduced on record comes to the fore and is raised as an issue.

Well-established jurisprudence has it that "[t]he consequent policy and practice underlying our Administrative Law is that courts of justice should respect the findings of fact of said administrative agencies, unless there is absolutely no evidence in support thereof or such evidence is clearly, manifestly and patently insubstantial."[18]

There can be no serious dispute about the correctness of the CA's above posture. However, what the appellate court stated later to belabor its point strikes the Court as specious and uncalled for. Wrote the CA:

This dictum finds greater application in the case of the CIAC because x x x as pointed out by petitioner in its Comment, the doctrine of primary jurisdiction relied upon by [Diesel] is diluted by the indubitable fact that the CIAC panel x x x is not at all

[18] *Blue Bar Coconut Philippines v. Tantuico*, No. L-47051, July 29, 1988, 163 SCRA 716, 729; citations omitted.

composed of technocrats, or persons exceptionally well-versed in the construction industry. For instance, its chair x x x is a statistician; another member, x x x a former magistrate, is a member of the Bar. Doubtless, these two are preeminent in their fields, and their competence and proficiency in their chosen professions are unimpeachable. However, when it comes to determining findings of fact with respect to the matter before Us, the said panel which they partly comprise cannot claim to have any special advantage over the members of this Court.[19]

The question of whether or not the findings of fact of the CIAC are supported by substantial evidence has no causal connection to the personal qualifications of the members of the arbitration panel. Surely, a person's undergraduate or postgraduate degrees, as the case may be, can hardly be invoked as the sole, fool proof basis to determine that person's qualification to hold a certain position. One's work experiences and attendance in relevant seminars and trainings would perhaps be the more important factors in gauging a person's fitness to a certain undertaking.

Correlatively, Diesel, obviously having in mind the disputable presumption of regularity, correctly argues that highly specialized agencies are presumed to have the necessary technical expertise in their line of authority. In other words, the members of the Arbitral Tribunal of the CIAC have in their favor the presumption of possessing the necessary qualifications and competence exacted by law. A party in whose favor the legal presumption exists may rely on and invoke such legal presumption to establish a fact in issue. One need not introduce evidence to prove that the fact for a presumption is *prima facie* proof of the fact presumed.[20]

To set the records straight, however, the CA did not cast aspersion on the competence let alone the *bona fides* of the members of the Arbitral Tribunal to arbitrate. In context, what the appellate court said––in reaction to Diesel's negative commentary about the CA's expertise on construction matters–

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[19] *Supra* note 2, at 56.

[20] *Tison v. Court of Appeals*, G.R. No. 121027, July 31, 1997, 276 SCRA 582, 593.

–is that the said members do not really enjoy a special advantage over the members of the CA in terms of fleshing out the facts from the evidence on record.

In any event, the fact remains that the CA stands justified in reviewing the CIAC decision.

Second and Third Issues

The next two issues, being interrelated, shall be discussed jointly.

Diesel submits that the CA, in reaching its decision, substituted its own conjectural opinion to that of the CIAC's well-grounded findings and award.

Even as Diesel's submission has little to commend itself, we deem it prudent to address its concern by reviewing the incongruent determinations of the CIAC and CA and the factual premises holding such determinations together.

As it were, the CA reduced the award for unpaid balance of the contract cost from Php 3,661,692.60, as earlier fixed by the CIAC, to Php 2,441,482.64, although it would consider the reduction and revert to the original CIAC figure. Unlike the CIAC which found the award of liquidated damages to be without basis, the CA was of a different disposition and awarded UPSI Php 1,309,500, only to reduce the same to Php 1,146,519 in its assailed resolution. Also, the CA struck out the CIAC award of Php 366,169 to Diesel for attorney's fees. Additionally, the CIAC's ruling making UPSI alone liable for the costs of arbitration was modified by the CA, which directed UPSI and Diesel to equally share the burden.

The CIAC found Diesel not to have incurred delay, thus negating UPSI's entitlement to liquidated damages. The CA, on the other hand, found Diesel to have been in delay for 45 days.

In determining whether or not Diesel was in delay, the CIAC and CA first turned on the question of Diesel's claimed entitlement to have the Project period extended, an excusable delay being

chargeable against the threshold 90-day completion period. Both were one in saying that occurrence of certain events gave Diesel the right to an extension, but differed on the matter of length of the extension, and on the nature of the delay, that is, whether the delay is excusable or not. The CA deemed the delay, and the resulting extension of 14 days, arising from the manual hauling of materials, as undeserved. But the CIAC saw it otherwise for the reason that Frederick W. Crespillo, the witness UPSI presented to refute the allegation of Diesel's entitlement to time extension for the manual hauling of materials, was incompetent to testify on the issue. As CIAC observed, Crespillo lacked personal knowledge of the real situation at the worksite.

The CIAC's reasoning, however, is flawed, assuming that the onus rested on UPSI, instead of on Diesel, to prove that the delay in the execution of the Project was excusable. Diesel explained that there was no place for its own hoisting machine at the Project site as the assigned location was being used by the General Contractor, while the alternative location was not feasible due to power constraint. Moreover, Diesel could not use the site elevator of the General Contractor as its personnel were only permitted to use the same for one hour every day at Php 600 per hour.

The provisions in the Agreement on excusable delays read:

2.3 Excusable delays: The Contractor shall inform the owner in a timely manner, of any delay caused by the following:

2.3.a Acts of God, such as storm, floods or earthquakes.

2.3.b Civil disturbance, such as riots, revolutions, insurrection.

2.3.c Any government acts, decrees, general orders or reulations limiting the performance of the work.

2.3.d Wars (declared or not).

2.3.e Any delays initiated by the Owner or his personnel which are clearly outside the control of the Contractor.

2.3.1 Delays caused by the foregoing shall be excusable. A new schedule or adjustments in contract time shall be negotiated with

the Owner. As time is of the essence of this agreement, all other delays shall not be excusable.[21]

As may be noted, a common thread runs among the events listed above, that is, the delaying event is unforeseeable and/or its occurrence is beyond the control of Diesel as contractor. Here, the lack of a location to establish Diesel's own hoisting machine can hardly be tagged as a foreseeable event. As the CA aptly observed:

> [U]nder the terms of the contract, it is Diesel that would formulate the schedule to be followed in the completion of the works; therefore, it was encumbent upon Diesel to take into account all factors that would come into play in the course of the project. From the records it appears that the General Contractor x x x had been in the premises ahead of Diesel; hence it would have been a simple matter for Diesel to have conferred with the former's officer if the use of its equipment would be viable. Likewise, it would not have been too much trouble for Diesel to have made a prior request from UPSI for the use of its freight elevator – in the face of the denial thereof, it could have made the necessary remedial measures x x x. In other words, those delays were foreseeable on the part of Diesel, with the application of even ordinary diligence. But Diesel did all of those when construction was about to commence. Therefore, We hold that the delays occasioned by Diesel's inability to install its hoisting machine x x x [were] attributable solely to Diesel, and thus the resultant delay cannot be charged against the ninety-day period for the termination of the construction.[22]

There can be no quibbling that the delay caused by the manual hauling of materials is not excusable and, hence, cannot validly be set up as ground for an extension. Thus, the CA excluded the delay caused thereby and only allowed Diesel a total extension period of 85 days. Such extension, according to that court, effectively translated to a delay of 45 days in the completion of the project. The CA, in its assailed decision, explained why:

> 7. All told, We find, and so hold, that [Diesel] has incurred in delay. x x x However, under the circumstances wherein UPSI was

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[21] *Supra* note 3, at 99.

[22] *Supra* note 1, at 66.

responsible for some of the delay, it would be most unfair to charge Diesel with two hundred and forty (240) days of delay, so much so that it would still owe UPSI, even after liquidated damages have eaten up the retention and unpaid balance, the amount of [₱4,340,000.00]. Thus, based on Our own calculations, We deem it more in accord with the spirit of the contract, as amended, x x x to assess Diesel with an unjustifiable delay of forty-five (45) days only; hence, at the rate of 1/5 of one percent as stated in the contract, [or at ₱1,309,500.00], which should be deducted from the total unpaid balance of [₱2,441,482.64], which amount already includes the retention on the additional works or Change Orders.[23]

The CA, in its questioned resolution, expounded on how it arrived at the figure of 45-day delay in this wise:

7. x x x We likewise cannot give Our assent to the asseveration of [Diesel] that Our calculations as to the number of days of delay have no basis. For indeed, the same was arrived at after taking a holistic view of the entire circumstances attendant to the instant case.
x x x

But prescinding from the above, the basis for Our ruling should not be hard to discern. To disabuse the mind of [Diesel] that the forty-five day delay was plucked from out of the blue, allow Us to let the records speak. The records will show that while the original target date for the completion x x x was 19 November 1999 x x x, there is a total of eighty-five (85) days of extension which are justifiable and sanctioned by [UPSI], to wit: thirty (30) days as authorized on 27 January 2000 by UPSI's Construction Manager x x x; thirty (30) days as again consented to by the same Construction Manager on 24 February 2000 x x x; and twenty-five (25) days on 16 March 2000 by Rider Hunt and Liacom x x x. The rest of the days claimed by Diesel were, of course, found by Us to be unjustified in the main opinion. Hence, the project should have been finished by February 12, 2000. However, by 22 March 2000, as certified to by Grace S. Reyes Designs, Inc. the project was only 97.56% finished, meaning while it was substantially finished, it was not wholly finished. By 25 March 2000, the same consultant conditionally accepted some floors but were still punch listed, so that from 12 February 2000 to 25 March 2000 was a period of forty-one (41) days. Allowing four (4) more days for the punch listed items to be accomplished, and for the

[23] *Supra* note 1, at 71-72.

"general cleaning" mentioned by Grace S. Reyes Designs, Inc., to be done, which to Us is a reasonable length of time, equals forty-five (45) days.

This is why We find the [conclusion] made by the CIAC, x x x that there was no delay whatsoever in the work done by [Diesel], too patently absurd for Us to offer Our unconditional assent.[24]

Aside from the fact that the CA seemingly assumed contradictory positions in the span of two paragraphs, its holding immediately adverted to above is patently erroneous. The CA completely failed to factor in the change orders of UPSI to Diesel—the directives effectively extending the Project completion time at the behest of UPSI.

Section V of the Agreement on the subject *Change Orders* reads:

V. CHANGES IN SCOPE OF WORK AND EXTRA WORK

Any changes or extra work in the SCOPE OF WORK recommended by the INTERIOR DESIGNER/ARCHITECT or directed and approved by the OWNER shall be presented to the CONTRACTOR. Within the shortest time possible, the CONTRACTOR x x x shall also inform the OWNER if such changes shall require a new schedule and/or revised completion date.

The Parties shall then negotiate mutually agreeable terms x x x. The CONTRACTOR shall not perform any change order or extra work until the covering terms are agreed upon [in writing and signed by the parties].[25]

Pursuant thereto, UPSI issued Change Order (CO) Nos. 1 to 4 on February 3, 2, 8, and 9, 2000 respectively. Thereafter, Diesel submitted a Schedule of Completion of Additional Works[26] under which Diesel committed to undertake CO No. 1 for 30 days from February 10, 2000; CO No. 2 for 21 days from January 6, 2000; CO No. 3 for 15 days, subject to UPSI's acceptance

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[24] *Supra* note 2, at 57-59.

[25] *Supra* note 3, at 104.

[26] *Rollo* (G.R. No. 154885), p. 165.

of Diesel's proposal; and CO No. 4 for 10 days after the receipt of the items from UPSI.

The CIAC found that the COs were actually implemented on the following dates:

CO No. 1 – February 9 to March 3, 2000
CO No. 3 – February 24 to March 10, 2000
CO No. 4 – March 16 to April 7, 2000[27]

Hence, as correctly held by the CIAC, UPSI, no less, effectively moved the completion date, through the various COs, to April 7, 2000.

Moreover, as evidenced by UPSI's Progress Report No. 19 for the period ending March 22, 2000, Diesel's scope of work, as of that date, was already 97.56% complete.[28] Such level of work accomplishment would, by any rational norm, be considered as substantial to warrant full payment of the contract amount, less actual damages suffered by UPSI. Article 1234 of the Civil Code says as much, "If the obligation had been substantially performed in good faith, the obligor may recover as though there had been a strict and complete fulfillment, less damages suffered by the obligee."

The fact that the laborers of Diesel were still at the work site as of March 22, 2000 is a reflection of its honest intention to keep its part of the bargain and complete the Project. Thus, when Diesel attempted to turn over the premises to UPSI, claiming it had completed the Project on March 15, 2000, Diesel could no longer be considered to be in delay. Likewise, the CIAC cited the Uniform General Conditions of Contract for Private Construction (CIAP Document 102), wherein it is stated that no liquidated damages for delay beyond the completion time shall accrue after the date of substantial completion of the work.[29]

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[27] *Id*. at 94.

[28] *Id*. at 71.

[29] *Id*. at 94.

In all, Diesel cannot be considered as in delay and, hence, is not amenable under the Agreement for liquidated damages.

As to the issue of attorney's fees, Diesel insists that bad faith tainted UPSI's act of imposing liquidated damages on account of its (Diesel's) alleged delay. And, this prompted Diesel to file its petition for arbitration. Thus, the CIAC granted Diesel an award of PhP 366,169 as attorney's fees. However, the CA reversed the CIAC on the award, it being its finding that Diesel was in delay.

The Court resolves to reinstate the CIAC's award of attorney's fees, there being sufficient justification for this kind of disposition. As earlier discussed, Diesel was not strictly in delay in the completion of the Project. No valid reason, therefore, obtains for UPSI to withhold the retention money or to refuse to pay the unpaid balance of the contract price. Indeed, the retention and nonpayment were, to us, as was to the CIAC, resorted to by UPSI out of whim, thus forcing the hand of Diesel to sue to recover what is rightfully due. Thus, the grant of attorney's fees would be justifiable under Art. 2208 of the Civil Code, thus:

> Article 2208. In the absence of stipulation, attorney's fees and expenses of litigation x x x cannot be recovered, except:
>
> x x x x x x x x x
>
> (5) Where the defendant acted in gross and evident bad faith in refusing to satisfy the plaintiff's plainly valid, just and demandable claim.

And for the same reason justifying the award of attorney's fees, arbitration costs ought to be charged against UPSI, too.

Fourth Issue

UPSI urges a review of the factual basis for the parallel denial by the CIAC and CA of its claim for additional expenses to complete the Project. UPSI states that the reality of Diesel having abandoned the Project before its agreed completion is supported by clear and convincing evidence.

The Court cannot accord the desired review. It is settled rule that the Court, not being a trier of facts, is under no obligation to examine, winnow, and weigh anew evidence adduced below. This general rule is, of course, not absolute. In *Superlines Transportation Company, Inc. v. Philippine National Construction Company*, the Court enumerated the recognized exceptions to be:

> x x x (1) when the findings are grounded entirely on speculation, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when there is grave abuse of discretion; (4) *when the judgment is based on a misapprehension of facts;* (5) when the findings of facts are conflicting; (6) when in making its findings the [CA] went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; *(10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; and (11)* ***when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion***.[30] (Emphasis supplied.)

In the instant case, the factual findings of the CIAC and CA, with regard to the completion of the Project and UPSI's entitlement to recover expenses allegedly incurred to finish the Project, do not fall under any one of these exceptions. As things stand, the factual findings of the CIAC and CA are supported by evidence presented during the hearing before the Arbitral Tribunal. Consider what the CIAC wrote:

> This Tribunal finds overwhelming evidence to prove that accomplishment as of the alleged "period of takeover" was 95.87% as of March 3, 2000 and increased to 97.56% on March 15, 2000 based on Progress Report # 18. x x x This is supported by the statement of [UPSI's]

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[30] G.R. No. 169596, March 28, 2007, 519 SCRA 432, 441; citations omitted.

witness, Mr. Crespillo x x x where he conceded that such admissions and statements bound [UPSI, the Owner]. By that time, [Diesel] had substantially completed the project and only needed to correct the items included in the punchlist.[31]

The CA seconded what the CIAC said, thus:

6. Neither are We prepared to sustain UPSI's argument that Diesel left the work unfinished and pulled-out all of its workmen from the project. This claim is belied by the assessment of its own Construction Manager in Progress Report No. 19 for the period "ending 22 March 2000," wherein it was plaintly stated that as of that period, with respect to Diesel, there were still twenty-three laborers on site with the project "97.56%" complete x x x. This indicates that the contracted works of Diesel were substantially completed with only minor corrections x x x, thus contradicting the avowal of UPSI that the work was abandoned in such a state that necessitated the engagement of another contractor for the project to be finished. It was therefore not right for UPSI to have declined the turn-over and refused the full payment of the contract price, x x x.[32]

Given the 97.56% work accomplishment tendered by Diesel, UPSI's theory of abandonment and of its having spent a sum to complete the work must fall on its face. We can concede hypothetically that UPSI undertook what it characterized as "additional or rectification" works on the Project. But as both the CIAC and CA held, UPSI failed to show that such "additional or rectification" works, if there be any, were the necessary result of the faulty workmanship of Diesel.

The Court perceives of no reason to doubt, much less disturb, the coinciding findings of the CIAC and CA on the matter.

The foregoing notwithstanding and considering that Diesel may only be credited for 97.56% work accomplishment, UPSI ought to be compensated, by way of damages, in the amount corresponding to the value of the 2.44% unfinished portion (100% – 97.56% = 2.44%). In absolute terms, 2.44% of the total Project cost translates to Php 310,834.01. This disposition is no more than adhering to the command of Art. 1234 of the Civil Code.

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[31] *Rollo* (G.R. No. 154885), p. 91.

[32] *Supra* note 1, at 71.

The fifth and sixth issues have already been discussed earlier and need not detain us any longer.

WHEREFORE, Diesel's petition is *PARTIALLY* GRANTED and UPSI's Petition is *DENIED* with qualification. The assailed Decision dated April 16, 2002 and Resolution dated August 21, 2002 of the CA are *MODIFIED*, as follows:

(1) The award for liquidated damages is *DELETED*;

(2) The award to Diesel for the unpaid balance of the contract price of Php 3,661,692.64 is *AFFIRMED*;

(3) UPSI shall pay the costs of arbitration before the CIAC in the amount of Php 298,406.03;

(4) Diesel is awarded attorney's fees in the amount of Php 366,169; and

(5) UPSI is awarded damages in the amount of Php 310,834.01, the same to be deducted from the retention money, if there still be any, and, if necessary, from the amount referred to in item (2) immediately above.

In summary, the aggregate award to Diesel shall be Php 3,717,027.64. From this amount shall be deducted the award of actual damages of Php 310,834.01 to UPSI which shall pay the costs of arbitration in the amount of Php 298,406.03.

FGU is released from liability for the performance bond that it issued in favor of Diesel.

No costs.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Tinga, and *Chico-Nazario,* JJ.,* concur.

* Additional member as per Special Order No. 494 dated March 3, 2008.

FIRST DIVISION

[G.R. No. 168892. March 24, 2008]

DEPUTY OMBUDSMAN FOR THE VISAYAS PRIMO C. MIRO, GRAFT INVESTIGATOR II VIRGINIA PALANCA SANTIAGO, and GRAFT INVESTIGATOR I CHARINA NAVARRO-QUIJANO, *petitioners, vs.* **CLETO ABUGAN, in his capacity as former Land Transportation Office Registrar,** *respondent.*

SYLLABUS

POLITCAL LAW; CONSTITUTIONAL LAW; THE OMBUDSMAN ACT OF 1989 (R.A. NO. 6770); POWER OF THE OFFICE OF THE OMBUDSMAN TO DIRECTLY IMPOSE ADMINISTRATIVE SANCTIONS ON ERRING GOVERNMENT OFFICIALS, UPHELD; RELEVANT RULINGS, CITED. — In the same case, we held that, under RA 6770, the Office of the Ombudsman was mandated not only to act promptly on complaints but also to enforce the administrative, civil and criminal liabilities of erring government officers and employees to promote efficient government service. RA 6770 endowed the Office of the Ombudsman with the power to penalize public officers and employees to ensure accountability in public office. In *Office of the Ombudsman v. CA,* we affirmed the aforecited statutory provisions by declaring that the Office of the Ombudsman "was intended to possess *full* administrative disciplinary authority," that is, it could directly impose administrative sanctions on erring government officials. In the same case, we said that the exercise of such power was "well founded in the Constitution and RA 6770." The power of the Office of the Ombudsman to directly impose administrative sanctions was again affirmed in the recent cases of *Barillo v. Gervasio*, *Office of the Ombudsman v. CA* and *Balbastro v. Junio.*

APPEARANCES OF COUNSEL

Office of the Legal Affairs (Ombudsman) for petitioners.
Manuel T. Degollacion, Jr. for respondent.

D E C I S I O N

CORONA, *J.*:

The focal issue in this petition for review under Rule 45 of the Rules of Court is whether the Office of the Ombudsman is imbued with the power to directly impose administrative sanctions on erring government officials.

The assailed decision of the Court of Appeals (CA) in CA-G.R. SP. No. 77922[1] held that, under the Constitution, the Office of the Ombudsman's authority was merely recommendatory.

The antecedent facts as summarized by the CA:

> On October 18, 1998, around 7:00 [pm], Jerry Tan parked his Mitsubishi L-300 Van, with Motor No. 4D56A-B1207, Chassis No. LO69WQZJL and Plate No. THE 541, registered in his name under Certificate of Registration [(CR)] No. 29367360, at Don Jose Avila St., Cebu City, just at the back of Cebu City Doctor's Hospital ... [W]hen he went back, he could no longer find his vehicle.
>
> On 19 October 1998, Jerry Tan reported the matter to the Philippine National Police, Traffic Management Office [(PNP-TMO)] headed by [Senior Inspector] Venacio Camarillo Labiano, Jr. [(Labiano, Jr.)]. He then posted a claim with the Philippine First Insurance Co., Inc. [PICI], being the vehicle's insurer. He submitted to the company a [c]ertificate of [n]on-[r]ecovery issued by the PNP-TMO duly signed by Labiano, which [stated] that…the PNP-[Traffic Management Group] had not yet recovered his vehicle. [PICI] paid the claim of Jerry Tan and was subrogated to all the rights of the latter.
>
> Further investigation conducted by the NBI shows that on 20 October 1998, just [two days] after the vehicle was lost, [the Land Transportation Office [(LTO)], Lapu-Lapu City, issued … a new [CR] covering the same vehicle still in the name of [Jerry Tan]. However, the vehicle's I.C. Motor number was changed from 4D56A-B1207 to

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[1] Dated December 9, 2004. Penned by Justice Merceditas Gozo-Dadole (retired), with the concurrence of Justices Pampio A. Abarintos and Vicente L. Yap (retired) of the Eighteenth Division of the Court of Appeals. *Rollo*, pp. 68-79.

4D56A-B-B1270; the plate number from THE 541 to GJN 311; the name of the previous owner from Ma. Luisa Lidot to Luis V. Yu…

On 7 January 1999, the registration of the vehicle was renewed with the LTO Lapu-Lapu City under Official Receipt [(OR)] No. 0456, still in the name of Jerry Tan... [O]n 13 January 1999, [another CR] ... in the name of Cristina Labiano, daughter of Labiano, was [also] issued ... It was made to appear therein that Jerry Tan sold the subject vehicle to Cristina Labiano.

When the NBI requested [respondent Cleto Abugan, as the then LTO Registrar] to produce the documents supporting the registration of the said vehicle in the name of Cristina Labiano, he could not produce the same...

[Respondent] also denied any knowledge in the issuance of the CR and OR covering the subject vehicle. He alleged that the LTO file copy of the OR and CR do not bear his signature. He contends that the transaction involving the registration of the vehicle did not reach his office and further alleged that it could be the LTO cashier, Mrs. Adelaida Lopez, who had a hand in the anomalous registration.

In her [s]worn [s]tatement given before the NBI, Mrs. Adelaida Lopez averred that it was [respondent] who allowed the registration of the vehicle even without the supporting documents.[2]

The Philippine First Insurance Co., Inc. later filed a complaint in the National Bureau of Investigation (NBI) against respondent Abugan, Venacio Camarillo Labiano, Jr. (Labiano, Jr.) and Cristina Labiano for carnapping, falsification of public/official document, and violation of RA 301[3] and RA 6713.[4] After the NBI conducted its investigation, it recommended the prosecution, to petitioner Deputy Ombudsman for Visayas Primo C. Miro (Miro), of respondent Abugan and Labiano, Jr., for falsification of public/official document and violation of RA 6713.[5]

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[2] *Id*., pp. 70-71.

[3] The Anti-Graft and Corrupt Practices Act.

[4] Code of Conduct for Government Officials and Employees.

[5] The NBI also recommended that Labiano, Jr. be prosecuted for carnapping and for violation of RA 3019.

On March 12, 2002, petitioners Miro and his co-petitioners, Virginia Palanca Santiago and Charina Navarro-Quijano,[6] made the following finding:

...[I]t appears that several transactions involving the vehicle of Mr. Jerry Tan are recorded in the LTO, Lapu-Lapu, as can be gathered from the documents recovered from said office. Pertinently, there [was] the issuance of the new certificate of registration in the name of Jerry Tan just two days after the carnapping incident. Another [was] the issuance of the certificate of registration covering said carnapped vehicle in the name of Cristina Labiano, without the supporting documents. Respondent Abugan anchors his defense on the [fact that his signature does not appear on the documents involving Jerry Tan's] vehicle. Thus[,] he ratiocinates that the absence of his signature only goes to show his non-involvement in any of those transactions...[7]

xxx xxx xxx

Apparently, the procedure being adopted by the LTO, Lapu-Lapu, significantly, that of its Head of Office, respondent Abugan, leaves much to be desired... [A]llowing the issuance of the [c]ertificates of [r]egistration without the needed documents...[8]

xxx xxx xxx

WHEREFORE, premises considered, it is hereby deemed that respondent Cleto Abugan of the [LTO], Lapu-Lapu City, is guilty of Grave Misconduct....[and is] hereby meted the penalty of [d]ismissal from the [s]ervice with [f]orfeiture of [a]ll [b]enefits and[p]erpetual [d]isqualification to [h]old [p]ublic [o]ffice.[9]

Respondent filed a motion for reconsideration (MR) but it was denied by petitioners.[10]

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[6] Graft Investigation Officers.

[7] *Rollo*, p. 161.

[8] *Id*., p. 162.

[9] *Id*., p. 163. In the same decision, petitioners likewise found Senior Inspector Labiano, Jr. guilty of dishonesty and imposed the penalty of dismissal from the service with forfeiture of all his benefits. Petitioners also disqualified him perpetually from holding any public office.

[10] Order dated 4 April 2003. *Id*., pp. 167-168.

Respondent went up to the CA via Rule 43[11] assailing petitioners' decision. In its assailed decision of December 9, 2004, the CA affirmed the findings of petitioners but held that, instead of directly imposing the penalty on respondent, they should have recommended it instead to his superior official. According to the CA:

> ...[R]elative to the authority of [petitioners] to impose the penalty of dismissal from service with forfeiture of all benefits and perpetual disqualification to hold public office on [respondent] the same...must be modified in the sense that **[petitioners] cannot directly impose the penalty as in this case considering that [the authority of the Office of the Ombudsman] is limited "to directing the officer concerned to take appropriate action against a public official or employee at fault and recommending his removal, suspension, demotion, fine, [censure] or prosecution, and ensure compliance therewith.**
>
> Thus, in the case of ***Tapiador vs. Office of the Ombudsman***, *et al*. [129124, March 15, 2002] the Supreme Court ruled:
>
> > "xxx Besides, assuming *arguendo*, that petitioner was administratively liable, the Ombudsman has no authority to directly dismiss the petitioner from the government service, particularly that his position in the BID, under Section 13, subparagraph (3) of Article [XI] of the 1987 Constitution,[12] the Ombudsman can only 'recommend' the removal of the public official or employee found to be at fault, to the public official concerned."
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> WHEREFORE, foregoing premises considered, the assailed decision dated March 12, 2002 and the Order dated April 4, 2003[13] of the

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[11] Appeals from Quasi-Judicial Agencies to the CA.

[12] *Section 13*. The Office of the Ombudsman shall have the following powers, functions, and duties:

x x x x x x x x x

(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. (emphasis supplied)

[13] *Supra* at note 10.

Ombudsman for the Visayas... is affirmed with modification insofar as the latter is concerned by recommending to the official concerned the removal or dismissal [from the service] of herein [respondent] Cleto Abugan of the [LTO], Lapu-Lapu City, having been found guilty of grave misconduct[,] with forfeiture of all benefits and perpetual disqualification to hold public office…[14] (emphasis supplied)

Petitioners sought a reconsideration of the decision. The Office of the Solicitor General (OSG) also filed an MR for and on their behalf. In the MRs, it was argued that the statement quoted by the CA in *Tapiador* was merely an *obiter dictum* as the Office of the Ombudsman's disciplinary power was not the main issue in that case. According to petitioners and the OSG, the Constitution and RA 6770[15] did not make the Office of the Ombudsman a mere recommendatory institution with no disciplinary powers to enforce its decisions.

The CA denied petitioners' and the OSG's MRs. Hence, this petition.

Petitioners now seek to reverse in part the CA's decision. They essentially argue that the CA should not have relied heavily on the *obiter dictum* in *Tapiador* that the Office of the Ombudsman was supposedly powerless to impose sanctions in administrative cases.

We grant the petition.

In *Ledesma v. CA*,[16] we ruled that the statement in *Tapiador* that made reference to the power of the Office of the Ombudsman to impose an administrative penalty was merely an *obiter dictum* and could not be cited as a doctrinal declaration of this Court. In that case, we said:

The point of contention is the binding power of any decision or order that emanates from the Office of the Ombudsman after it has conducted its investigation. Under Section 13 (3) of Article XI of the 1987 Constitution, it is provided:

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[14] *Supra* at note 1.

[15] The Ombudsman Act of 1989.

[16] G.R. No. 121629, 29 July 2005, 465 SCRA 437.

> *Section 13.* The Office of the Ombudsman shall have the following powers, functions, and 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.

Petitioner [Ledesma] insists that the word "recommend" [in Article XI, Section 13 (3) of the 1987 Constitution] be given its literal meaning; that is, the Ombudsman action is only advisory in nature rather than the one having any binding effect citing *Tapiador v. Office of the Ombudsman*, thus...

> …Besides, assuming *arguendo*, that [Ledesma was] administratively liable, the Ombudsman has no authority to directly dismiss [him] from the government service…[U]nder 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 official concerned.

For their part, the [public respondents] Solicitor General and the Office of the Ombudsman argue that the word "recommend" must be taken in conjunction with the phrase "and ensure compliance therewith…"

We agree with the ratiocination of the public respondents. Several reasons militate against the literal interpretation of [Article XI, Section 13 (3) of the Constitution]...[A] cursory reading of *Tapiador* reveals that the main point of the case was the failure of the complainant to present substantial evidence to prove the charges of the administrative case. **The statement that made reference to the power of the Ombudsman is, at best, merely an *obiter dictum*,** and as it is unsupported by sufficient explanation, it is susceptible to varying interpretations, as what precisely is before us in this case. Hence, i**t cannot be cited as doctrinal declaration of this Court nor is it safe from judicial examination.** (emphasis supplied)

In the same case, we held that, under RA 6770, the Office of the Ombudsman was mandated not only to act promptly on complaints but also to enforce the administrative, civil and criminal liabilities of erring government officers and employees to promote

efficient government service.[17] RA 6770 endowed the Office of the Ombudsman with the power to penalize public officers and employees to ensure accountability in public office.[18]

The pertinent provisions of RA 6770 read:

> Section 15. Powers, Functions and Duties – The Office of the Ombudsman shall have the following powers, functions and duties:
>
> xxx xxx xxx
>
> (3) Direct the officer concerned to take appropriate action against a public officer or employee at fault, or who neglects to perform an act or discharge a duty required by law and recommend his removal, suspension, demotion, fine, censure, or prosecution, and ensure disciplinary authority as provided under Section 21 of this Act....
>
> xxx xxx xxx
>
> Section 21. Officials Subject to Disciplinary Authority; Exceptions – **The Office of the Ombudsman shall have *disciplinary authority* over all elective and appointive officials of the Government and its subdivisions, instrumentalities and agencies, including Members of the Cabinet, local government, government-owned or controlled corporations and their subsidiaries,** except officials who may be removed only by impeachment or over Members of the Congress, and the Judiciary. (emphasis supplied)

In *Office of the Ombudsman v. CA,*[19] we affirmed the aforecited statutory provisions by declaring that the Office of the Ombudsman "was intended to possess *full* administrative disciplinary authority," that is, it could directly impose administrative sanctions on erring government officials. In the same case, we said that the exercise of such power was "well founded in the Constitution and RA 6770." We declared:

> The provisions in [RA] 6770 taken together reveal the manifest intent of the lawmakers to bestow on the Office of the Ombudsman

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[17] *Id*.; see also *Uy v. Sandiganbayan,* 407 Phil. 154 (2001).

[18] *Id*.

[19] G.R. No. 160675, 16 June 2006, 491 SCRA 92.

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.

x x x x x x x x x

The legislative history of [RA 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...[T]he lawmakers envisioned the Office of the Ombudsman to be an "activist watchman," not merely a passive one. (emphasis supplied)

In *Estarija v. Ranada*,[20] we also stated:

Through the enactment of RA 6670...the lawmakers gave the Ombudsman such powers to sanction erring officials and employees, except members of Congress and the Judiciary....[**T]he powers of the Ombudsman are not merely recommendatory. His office was given teeth to render this constitutional body not merely functional but also effective. Thus, we hold that under RA 6770 and the 1987 Constitution, the Ombudsman has the power to directly remove from government service an erring public official...**(emphasis supplied)

The power of the Office of the Ombudsman to directly impose administrative sanctions was again affirmed in the recent cases of *Barillo v. Gervasio*,[21] *Office of the Ombudsman v. CA*[22] and *Balbastro v. Junio.*[23]

WHEREFORE, the petition is hereby *GRANTED*. The assailed decision of the Court of Appeals in CA-G.R. SP. No.

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[20] G.R. No. 159314, 26 June 2006, 492 SCRA 652.

[21] G.R. No. 155088, 31 August 2006, 500 SCRA 561.

[22] G.R. No. 168079, 17 July 2007, 527 SCRA 798.

[23] G.R. No. 154678, 17 July 2007, 527 SCRA 680.

77922 is hereby *MODIFIED*. Accordingly, we rule that the penalty of dismissal from the service, with forfeiture of all his benefits and perpetual disqualification to hold public office, was correctly imposed on respondent Cleto Abugan by petitioners, Deputy Ombudsman for the Visayas Primo C. Miro and Graft Investigation Officers Virginia Palanca Santiago and Charina Navarro-Quijano.

No costs.

SO ORDERED.

Puno, C.J. (Chairperson), Carpio, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

EN BANC

[G.R. No. 169914. March 24, 2008]

ASIA'S EMERGING DRAGON CORPORATION, *petitioner, vs.* **DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, SECRETARY LEANDRO R. MENDOZA and MANILA INTERNATIONAL AIRPORT AUTHORITY,** *respondents.*

[G.R. No. 174166. March 24, 2008.]

REPUBLIC OF THE PHILIPPINES, Represented by the DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS and MANILA INTERNATIONAL AIRPORT AUTHORITY, *petitioner, vs.* **COURT OF APPEALS (Eighth Division) and SALACNIB BATERINA,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; INTERVENTION; DEFINED. — Intervention is a remedy by which a third party, not originally

impleaded in the proceedings, becomes a litigant therein to enable him, her or it to protect or preserve a right or interest which may be affected by such proceedings.

2. ID.; ID.; ID.; REQUISITES FOR INTERVENTION. — In outline form, the following are the requisites for intervention of a non-party: 1. Legal interest (a) in the matter in controversy; or (b) in the success of either of the parties; or (c) against both parties; or (d) person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; 2. Intervention will not unduly delay or prejudice the adjudication of rights of original parties; 3. Intervenor's rights may not be fully protected in a separate proceeding.

3. ID.; ID.; ID.; ID.; THE INTEREST CONTEMPLATED BY LAW MUST BE ACTUAL, SUBSTANTIAL, MATERIAL, DIRECT AND IMMEDIATE. — The interest contemplated by law must be actual, substantial, material, direct and immediate, and not simply contingent or expectant. It must be of such direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.

4. ID.; ID.; ID.; ID.; A PERSON WHOSE INTEREST IS MERELY INDIRECT, CONTIGENT AND INCHOATE HAS NO RIGHT TO INTERVENE. — In this case, the matter in controversy is the NAIA IPT III. MHC has no connection at all to this structure. It is merely a stockholder of PIATCO, the builder of NAIA IPT III. Its interest, if any, is **indirect, contingent** and **inchoate**. PIATCO has a legal personality separate and distinct from that of its stockholders, including MHC. It has rights and obligations which pertain solely to itself, not to any of its component members (*i.e.*, its stockholders). The members may change but the juridical person (in this case, PIATCO) remains the same without alteration. Its property is not merged with those owned by its stockholders. No stockholder can identify itself with the corporation. Nor can any stockholder claim to possess a right which properly and exclusively belongs to the corporation. Thus, it is PIATCO alone which is entitled to receive payment of just compensation. Moreover, MHC has no right to the reliefs it prays for. It wants to complete NAIA IPT III and manage it for 25 years. But on what ground? As stockholder of PIATCO, the bidder whose contracts were nullified? How can MHC derive its claim to operate NAIA IPT III from PIATCO when PIATCO itself has no legal right to operate the

facility? Clearly, MHC's claim is not only baseless but also absurd. If parties with such a conjectural, collateral, consequential, expectant and remote interest were allowed to intervene, proceedings would become unnecessarily complicated, expensive and interminable. It will only unduly delay and prolong the adjudication of the rights of the original parties.

APPEARANCES OF COUNSEL

Eduardo R. Ceniza for Asia's Emerging Dragon Corp.
Bernas Law Office for Cong. S.F. Baterina, *et al.*
Romulo Mabanta Buenaventura Sayoc & Delos Angeles for PIATCO
Manuel L. Fortes for private respondent.

R E S O L U T I O N

CORONA, *J.:*

For our resolution are the (1) "motion for leave of court to intervene and to admit the attached answer-in-intervention with prayer for alternative compliance of the December 19, 2005 decision" and (2) "answer-in-intervention" of Manila Hotel Corporation (MHC) filed on February 22, 2008. MHC seeks to intervene in the consolidated cases of G.R. Nos. 169914 and 174166 alleging that it has a legal interest in the matter in litigation. It avers that it purchased 20% of PIATCO's shares from the latter's two stockholders, namely, SB Airport Investments, Inc. and Sojitz Corporation on August 23, 2005 and August 24, 2005, respectively. On August 26, 2005, it also entered into an agreement with Fraport AG Frankfurt Airport Services Worldwide to purchase the latter's 30% direct shareholdings and 31.44% indirect shareholdings[1] in PIATCO.[2]

[1] These include its rights and interests in the Philippine Airport and Ground Services, Inc., Philippine Airport and Ground Services Terminals Holdings, Inc. and Philippine Airport and Ground Services Terminals, Inc. which are likewise stockholders of PIATCO; Answer-in-Intervention, p. 3.

[2] *Id*.

MHC claims that it has a legal interest in the issues raised in G.R. 169914 and the early and complete compliance with the December 19, 2005 decision in G.R. No. 166429 of this Court. Thus it prays that (1) AEDC's petition be dismissed; (2) its (MHC's) proposed alternative manner of implementing the December 19, 2005 decision be approved[3] and (3) it be allowed to manage and operate the NAIA IPT III for 25 years.[4]

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[3] Under MHC's proposal, it shall: (a) release/discharge the Republic of the financial burden of raising billions of pesos to reimburse PIATCO for the cost of construction of the NAIA IPT III; (b) complete, operate and manage the NAIA IPT III at the soonest possible time; (c) proceed with the legal machinery to settle/terminate the cases here and abroad against the Republic, inclusive of the arbitration case in Singapore and in Washington D.C., U.S.A. and (d) engage the services of professionals for the management and operation of the NAIA IPT III to make it a world-class international airport and a source of pride of the Philippines; *id*., p. 8.

[4] *Id*., p. 10. MHC made the following commitments:

"xxx under a separate subsidiary or accounting for this purpose, after deducting payment of just compensation, annual installment payment of loans on capital investments and the corresponding interest, and all the operating expenses, including rentals, taxes, and other obligations during the twenty five (25) years of operation and management, any annual net profit of MHC from the management and operation of [NAIA IPT III], after deducting the interest due on the 17.56% equity of the Cheng Yong group in PIATCO, the balance shall be distributed as follows:

(a) 15% to the Government Service Insurance System (GSIS) corresponding to its stockholdings in MHC;

(b) 50% to the following organizations and institutions for charitable purposes;

1. 10% to the Philippine National Red Cross to assist victims of calamities;
2. 10% to the Department of Social Welfare and Development to help street children;
3. 10% to the CARITAS of Archdiocese of Manila for its charitable projects;
4. 10% to the Armed Forces of the Philippines to help sons and daughters of disabled and deceased soldiers;
5. 10% to the Philippine National Police Karangalan ng mga Alagad ng Batas Foundation, Inc. to help improve the quality of life of policemen and their dependents;

MHC's motion for intervention is an improper remedy.

Intervention is a remedy by which a third party, not originally impleaded in the proceedings, becomes a litigant therein to enable him, her or it to protect or preserve a right or interest which may be affected by such proceedings. The pertinent rule is Rule 19, Section 1 of the Rules of Court which states:

SEC. 1. Who may intervene. — A person who has a legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both, or is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof may, with leave of court, be allowed to intervene in the action. The court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties, and whether or not the intervenor's rights may be fully protected in a separate proceeding.

In outline form, the following are the requisites for intervention of a non-party:

1. Legal interest
   - (a) in the matter in controversy; or
   - (b) in the success of either of the parties; or
   - (c) against both parties; or
   - (d) person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof;
2. Intervention will not unduly delay or prejudice the adjudication of rights of original parties;
3. Intervenor's rights may not be fully protected in a separate proceeding.[5]

(c) 17.5% to Manila International Airport Authority (MIAA) as payment of rental and other charges for the use of the [NAIA IPT III] premises, and 17.5% stockholders of [MHC] other than GSIS.

To show its good faith, MHC will request the Commission on Audit as its internal auditor of its books of account in connection with the management and operation of [NAIA IPT III];" *id*., pp. 9-10.

[5] *Ortega v. Court of Appeals*, 359 Phil. 126, 139 (1998), citing the *1997 Rules of Civil Procedure* by Feria, pp. 71-72.

MHC asserts that because of its substantial stockholdings in PIATCO, it has a legal interest in the matter in litigation. However, it conveniently fails to state its legal basis for the intervention.

The interest contemplated by law must be actual, substantial, material, direct and immediate, and not simply contingent or expectant. It must be of such direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.[6]

The scenario here is similar to the intervention sought in *Magsaysay-Labrador, v. CA*.[7] In that case, Rodriguez-Magsaysay filed an action against Subic Land Corporation (SLC) *et al.* She alleged that her husband, the late Senator Genaro Magsaysay, assigned land (which was part of their conjugal property) to SLC. She prayed that this assignment be annulled. Magsaysay-Labrador, *et al.*, the sisters of the late senator, filed a motion for intervention on the ground that their brother had already conveyed to them his shareholdings in SLC amounting to 41% of its total capital. They argued that as transferees of the shares, they had a legal interest in the matter in litigation. The Court disagreed:

> Here, the interest, if it exists at all, of petitioners-movants is indirect, contingent, remote, conjectural, consequential and collateral. At the very least, their interest is purely inchoate, or in sheer expectancy of a right in the management of the corporation and to share in the profits thereof and in the properties and assets thereof on dissolution, after payment of the corporate debts and obligations.
>
> While a share of stock represents a proportionate or aliquot interest in the property of the corporation, it does not vest the owner thereof with any legal right or title to any of the property, his interest in the corporate property being equitable or beneficial in nature. Shareholders are in no legal sense the owners of corporate property, which is owned by the corporation as a distinct legal person.[8]

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[6] *Alfelor v. Halasan*, G.R. No. 165987, 31 March 2006, 486 SCRA 451, 461, citing *Nordic Asia Ltd. v. CA*, 451 Phil. 482, 492-493 (2003).

[7] G.R. No. 58168, 19 December 1989, 180 SCRA 266.

[8] *Id.*, pp. 271-272, citations omitted.

In this case, the matter in controversy is the NAIA IPT III. MHC has no connection at all to this structure. It is merely a stockholder of PIATCO, the builder of NAIA IPT III. Its interest, if any, is **indirect**, **contingent** and **inchoate**. PIATCO has a legal personality separate and distinct from that of its stockholders, including MHC. It has rights and obligations which pertain solely to itself, not to any of its component members (*i.e.*, its stockholders).[9] The members may change but the juridical person (in this case, PIATCO) remains the same without alteration.[10] Its property is not merged with those owned by its stockholders.[11] No stockholder can identify itself with the corporation.[12] Nor can any stockholder claim to possess a right which properly and exclusively belongs to the corporation. Thus, it is PIATCO alone which is entitled to receive payment of just compensation.

Moreover, MHC has no right to the reliefs it prays for. It wants to complete NAIA IPT III and manage it for 25 years. But on what ground? As stockholder of PIATCO, the bidder whose contracts were nullified? How can MHC derive its claim to operate NAIA IPT III from PIATCO when PIATCO itself has no legal right to operate the facility? Clearly, MHC's claim is not only baseless but also absurd.

If parties with such a conjectural, collateral, consequential, expectant and remote interest were allowed to intervene, proceedings would become unnecessarily complicated, expensive and interminable.[13] It will only unduly delay and prolong the adjudication of the rights of the original parties.

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[9] Tolentino, *CIVIL CODE OF THE PHILIPPINES: COMMENTARIES AND JURISPRUDENCE,* Vol. I, 1987 edition, Central Professional Books, Inc., p. 179.

[10] *Id*.

[11] *Id*.

[12] See *United States Bank v. Planter's Bank*, 9 Wheat 907.

[13] *Supra* note 7 at 271.

Finally, granting but not conceding that MHC has a cause of action cognizable by the courts, its interest as a stockholder of PIATCO can well be protected in a separate proceeding.

It is settled that the right to intervene is not an absolute right; it may only be permitted by the courts when the movant establishes facts which satisfy the requirements of the law authorizing it.[14]

As the requisites have not been met, MHC has no right whatsoever to intervene.

WHEREFORE, the motion for leave to intervene of Manila Hotel Corporation is hereby *DENIED* for being an improper remedy.

SO ORDERED.

Puno, C.J., Quisumbing, Austria-Martinez, Carpio Morales, Tinga, Chico-Nazario, Velasco, Jr., Reyes, and *Leonardo-de Castro, JJ.,* concur.

Ynares-Santiago, J., C.J. Puno certifies that *J.* Santiago voted in favor of the resolution.

Carpio, Azcuna, and *Nachura, JJ.*, no part.

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[14] *Secretary of Agrarian Reform v. Tropical Homes, Inc.*, 414 Phil. 389, 404-405 (2001), citing *Big Country Ranch Corp. v. CA*, G.R. No. 102927, 12 October 1993, 227 SCRA 161, 165; *Firestone Ceramics, Inc. v. CA*, 372 Phil. 401, 413 (1999), citing *Gibson v. Revilla*, G.R. No. L-41432, 30 July 1979, 92 SCRA 219.

FIRST DIVISION

[G.R. No. 170432. March 24, 2008]

AMOS P. FRANCIA, JR., CECILIA P. FRANCIA, and HEIRS OF BENJAMIN P. FRANCIA, *petitioners, vs.* **MUNICIPALITY OF MEYCAUAYAN,** *respondent.*

SYLLABUS

REMEDIAL LAW; SPECIAL CIVIL ACTIONS; EXPROPRIATION; REQUISITES BEFORE A LOCAL GOVERNMENT UNIT MAY ENTER INTO THE POSSESSION OF THE PROPERTY SOUGHT TO BE EXPROPRIATED; DETERMINATION OF A PUBLIC PURPOSE, NOT A CONDITION PRECEDENT. — Before a local government unit may enter into the possession of the property sought to be expropriated, it must (1) file a complaint for expropriation sufficient in form and substance in the proper court and (2) deposit with the said court at least 15% of the property's fair market value based on its current tax declaration. The law does not make the determination of a public purpose a condition precedent to the issuance of a writ of possession.

APPEARANCES OF COUNSEL

Mendoza Navarro-Mendoza & Partners Law Offices for petitioners.

Honorato D. Martinez for respondent.

R E S O L U T I O N

CORONA, *J.*:

On February 6, 2003, respondent Municipality of Meycauayan, Bulacan filed a complaint for expropriation[1] against petitioners

[1] Docketed as Civil Case No. 296-M-2003. Annex "G", *rollo*, pp. 146-152. The complaint was filed pursuant to Municipal Ordinance No. 2002-14 authorizing the Municipality of Meycauayan to institute expropriation proceedings for the acquisition of petitioners' property. The said ordinance was approved by the Sangguniang Panlalawigan of the Province of Bulacan in Kapasiyahan Blg. 376-T on August 15, 2002.

Amos P. Francia, Jr., Cecilia P. Francia and Benjamin P. Francia[2] in the Regional Trial Court (RTC) of Malolos, Bulacan, Branch 16. Respondent needed petitioners' 16,256 sq. m. idle property at the junction of the North Expressway, Malhacan-Iba-Camalig main road artery and the MacArthur Highway.[3] It planned to use it to establish a common public terminal for all types of public utility vehicles with a weighing scale for heavy trucks.

In their answer,[4] petitioners denied that the property sought to be expropriated was raw land. It was in fact developed[5] and there were plans for further development. For this reason, respondent's offer price of ₱2,333,500 (or ₱111.99 per square meter) was too low.

After trial, the RTC ruled that the expropriation was for a public purpose. The construction of a common terminal for all public utility conveyances (serving as a two-way loading and unloading point for commuters and goods) would improve the flow of vehicular traffic during rush hours. Moreover, the property was the best site for the proposed terminal because of its accessibility. Thus, on November 8, 2004, the RTC issued the following order:[6]

> WHEREFORE, premises considered, after [respondent] has deposited with this Court the fifteen percent (15%) of the fair market value of the property based on the current tax declaration of the property to be expropriated, it may take immediate possession of the property upon issuance of writ of possession that this court will issue for that purpose.
>
> Further, the purposes of assessment and determination of the area needed that will suit the purpose of expropriation and just compensation of the lot sought to be expropriated, the court hereby

[2] Petitioner Benjamin P. Francia was substituted by his heirs upon his death pursuant to Rule 3, Section 16 of the Rules of Court.

[3] Covered by TCT No. 123604 (M).

[4] Annex "H", *rollo*, pp. 153-160.

[5] Among its improvements were a Caltex gasoline station and a hollow blocks factory.

[6] Penned by Judge Thelma R. Pinero-Cruz. Annex "B", *rollo*, pp. 124-126.

appoints commissioners to be composed of the officer-in-charge of this court, Lerida Socorro E. Joson and one each from [respondent] and [petitioners].

Notify all parties concerned.

SO ORDERED.[7]

Petitioners moved for the reconsideration of the November 8, 2004 order but the motion was denied in an order dated January 31, 2005.

Aggrieved, petitioners filed a petition for *certiorari* in the Court of Appeals (CA) contending that the RTC committed grave abuse of discretion in issuing its November 8, 2004 and January 31, 2005 orders. They claimed that the trial court issued the orders without conducting a hearing to determine the existence of a public purpose.

On July 28, 2005, the CA rendered a decision[8] partially granting the petition. Finding that petitioners were deprived of an opportunity to controvert respondent's allegations, the appellate court nullified the order of expropriation except with regard to the writ of possession. According to the CA, a hearing was not necessary because once the expropriator deposited the required amount (with the Court), the issuance of a writ of possession became ministerial.

Petitioners moved for partial reconsideration but their motion was denied. Hence, this recourse.

Petitioners essentially aver that the CA erred in upholding the RTC's orders that, in expropriation cases, prior determination of the existence of a public purpose was not necessary for the issuance of a writ of possession.

We deny the petition.

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[7] *Id.*, p. 126.

[8] Penned by Associate Justice Marina L. Buzon and concurred in by Associate Justices Mario L. Guariña III and Santiago Javier Ranada (retired) of the Tenth Division of the Court of Appeals. Dated July 28, 2005. *Id.,* pp. 106-123.

Section 19 of Republic Act 7160[9] provides:

Section 19. Eminent Domain.– A local government unit may, through its chief executive and acting pursuant to an ordinance, exercise the power of eminent domain for public use, or purpose, or welfare for the benefit of the poor and the landless, upon payment of just compensation, pursuant to the provisions of the Constitution and pertinent laws; *Provided, however,* That the power of eminent domain may not be exercised unless a valid and definite offer has been previously made to the owner, and that such offer was not accepted; *Provided, further,* **That the local government unit may immediately take possession of the property upon the filing of the expropriation proceedings and upon making a deposit with the proper court of at least fifteen percent (15%) of the fair market value of the property based on the current tax declaration of the property to be expropriated**; *Provided, finally,* That, the amount to be paid for the expropriated property shall be determined by the proper court, based on the fair market value at the time of the taking of the property. (emphasis supplied)[10]

Before a local government unit may enter into the possession of the property sought to be expropriated, it must (1) file a complaint for expropriation sufficient in form and substance in the proper court and (2) deposit with the said court at least 15% of the property's fair market value based on its current

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[9] The Local Government Code of 1991.

[10] *Cf.* Rules and Regulations Implementing RA 7160, Rule VI, Art. 36:

Article 36. *Expropriation proceedings.* (a) If the [local government unit (LGU)] fails to acquire a private property for public use, purpose or welfare through purchase, LGU may expropriate said property through a resolution of the *sanggunian* authorizing its chief executive to initiate expropriation proceedings.

(b) The local chief executive shall cause the provincial, city, or municipal attorney concerned or, in his absence, the provincial or city prosecutor, to file expropriation proceedings in the proper court in accordance with the Rules of Court and other pertinent laws.

(c) **The LGU may immediately take possession of the property upon filing of expropriation proceedings and upon making a deposit with the proper court of at least fifteen percent (15%) of the fair market value of the property based on the current tax declaration of the property to be expropriated.** (emphasis supplied)

tax declaration.[11] The law does not make the determination of a public purpose a condition precedent to the issuance of a writ of possession.[12]

WHEREFORE, the petition is hereby *DENIED***.**

Costs against petitioners.

SO ORDERED.

Puno, C.J. (Chairperson), Carpio, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

SECOND DIVISION

[G.R. No. 171571. March 24, 2008]

REPUBLIC OF THE PHILIPPINES, Represented by MACTAN-CEBU INTERNATIONAL AIRPORT AUTHORITY (MCIAA), *petitioner, vs.* **HEIRS OF FRANCISCA DIGNOS-SORONO, namely: TEODORO SORONO, LUCIO SORONO, JR., ARSENIO T. SORONO, RODULFO S. OLIVAR, ALFONSA T. SORONO, CONSTANCIO S. LUMONGSOD, EULALIA S. LIMPANGOG, and FLORENCIA S. BAGUIO; HEIRS OF JUAN L. AMISTOSO,[1] namely: MARIO L. AMISTOSO, LYN-LYN AMISTOSO, ALLAN L. AMISTOSO, RAQUEL S. AMISTOSO, EUFRONIO S. AMISTOSO, JR., and ROGELIO S. AMISTOSO; HEIRS OF BRIGILDA D. AMISTOSO, namely: VICTOR A. YAGONG, HEDELIZA A. YAGONG, and CIRIACA**

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[11] See *Robern Development Corporation v. Judge Quitain,* 373 Phil. 773, 794-801 (1999). See also *Biglang-awa v. Hon. Bacalla,* 399 Phil. 308, 317-325 (2000).

[12] *City of Iloilo v. Legaspi,* G.R. No. 154614, 25 November 2004, 444 SCRA 269, 283 citing *City of Manila v. Serrano,* 412 Phil. 754, 763 (2001).

[1] Also spelled Amistuoso in some parts of the records.

A. YAGONG; HEIRS OF PASTOR DIGNOS; HEIRS OF ISABEL DIGNOS, namely: DR. NAPOLEON A. AMORES, VICENTE A. BASMAYOR, DOMINGO A. BASMAYOR, and LYDIA A. BASMAYOR; HEIRS OF DONATA DIGNOS, namely: TRINIDAD D. FUENTES, NICASIA D. FUENTES, and IRINEO D. FUENTES; HEIRS OF SEGUNDA DIGNOS, namely: HONORATA D. CORTES and BENIGNO D. CORTES; HEIRS OF GREGORIA DIGNOS, namely: RITA D. FUENTES and JOSE D. FUENTES; HEIRS OF DOMINGO FUENTES, namely: CIRILA P. DIGNOS and BASILIO P. DIGNOS; and HEIRS OF ISABELO DIGNOS, namely: TERESITA R. DIGNOS,[2] *respondents.*

SYLLABUS

1. CIVIL LAW; PROPERTY; CO-OWNERSHIP; SALE OF A CO-OWNER OF THE WHOLE PROPERTY WILL AFFECT ONLY HIS OWN SHARE; RULING IN *BAILON-CASILAO V. CA,* REITERATED; APPLICATION. — *Apropos* is the following pertinent portion of this Court's decision in *Bailon-Casilao v. CA*: As early as 1923, this Court has ruled that even if a co-owner sells the whole property as his, the sale will **affect only his own share** but **not those of the other co-owners who did not consent** to the sale. From the foregoing, it may be deduced that since a co-owner is entitled to sell his undivided share, a sale of the entire property by one co-owner without the consent of the other co-owners is **not null and void. However, only the rights of the co-owner-seller are transferred, thereby making the buyer a co-owner of the property.** Petitioner's predecessor-in-interest CAA thus acquired only the rights pertaining to the sellers-heirs of Tito Dignos, which is only ¼ undivided share of the two lots.

2. ID.; ID.; ID.; PRESCRIPTION DOES NOT LIE. — Petitioner's insistence that it acquired the property through acquisitive prescription, if not ordinary, then extraordinary, does not lie.

[2] The Court of Appeals was originally impleaded but was omitted pursuant to Section 4, Rule 45 of the Rules of Court.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Senining Belcina Atup Entise Limalima Jumao-as and Bantilan Law Offices for respondents.

D E C I S I O N

CARPIO MORALES, *J.*:

Assailed via petition for review on *certiorari* is the April 23, 2005 decision of the Court of Appeals[3] affirming that of the Regional Trial Court (RTC) of Lapu-lapu City, Branch 54.[4]

Lot Nos. 2296 and 2316 of the Cadastral Survey of Opon, Lapu-lapu City were adjudicated on December 7, 1929 by the then Court of First Instance of Cebu in favor of the following in four equal shares:

a) **Francisca Dignos**, married to Blas Sorono – ¼ share in the two lots;

b) **Tito Dignos**, married to Candida Torrebillas – ¼ share in the two lots;

c) **Isabel Dignos**, married to Fabiano Amores;
Donata Dignos, married to Estanislao Fuentes;
Segunda Dignos, married to Demetrio Cortes;
Gregoria Dignos, married to Severo Fuentes;
Domingo Dignos, married to Venturada Potot; and
Isabelo Dignos, married to Petronilla Gamallo – ¼ share in the two lots; and

d) **Silveria Amistuoso**, married to Melecio Tumulak;
Mario Amistuoso, married to Rufina Tampus;
Juan Amistuoso, married to Narcisa Cosef;

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[3] Penned by Justice Mercedes Gozo-Dadole and concurred in by Justice Pampio A. Abarintos and Justice Sesinando E. Villon, all of the Court of Appeals; CA-G.R. CV. No. 64614, *rollo*, pp. 53-64.

[4] Civil Case No. 4373-L, For: Quieting of Title, Legal Redemption with Prayer for Preliminary Injunction, *id.* at 114-122.

Brigilda Amistuoso, married to Casimiro Yagong; and
Pastor Amistuoso, widower – ¼ share in the two lots.[5]

It appears that the two lots were not partitioned by the adjudicatees.

It appears further that the heirs of Tito Dignos, who, as reflected above, was awarded ¼ share in the two lots, sold for ₱2,565.59 the entire two lots to the then Civil Aeronautics Administration (CAA) via a public instrument entitled "Extrajudicial Settlement and Sale" executed on October 11, 1957, without the knowledge of respondents whose predecessors-in-interest were the adjudicatees of the rest of the ¾ portion of the two lots.[6]

In 1996, CAA's successor-in-interest, the Mactan Cebu International Airport Authority (MCIAA), erected a security fence traversing Lot No. 2316 and relocated a number of families, who had built their dwellings within the airport perimeter, to a portion of said lot to enhance airport security in line with the standards set by the International Civil Aviation Organization and the Federal Aviation Authority.

MCIAA later caused the issuance in its name of Tax Declaration No. 00548 covering Lot No. 2296 and Tax Declaration No. 00568 covering Lot No. 2316.

Respondents soon asked the agents of MCIAA to cease giving third persons permission to occupy the lots but the same was ignored.

Respondents thereupon filed on January 8, 1996 a Complaint for Quieting of Title, Legal Redemption with Prayer for a Writ of Preliminary Injunction against MCIAA before the RTC of Lapu-lapu City,[7] alleging that the existence of the tax declarations "would cast a cloud on their valid and existing titles" to the lots. They alleged that "corresponding original certificates of

[5] Records, p. 183.

[6] *Rollo*, pp. 95-99.

[7] Records, p. 2.

title in favor of the decreed owners were . . . issued but the same could no longer be found and located, and in all probability, were lost during the Second World War."[8] (This claim was not specifically denied by petitioner in its Answer with Counterclaim.)[9]

Respondents further alleged that neither they nor their predecessors-in-interests sold, alienated or disposed of their shares in the lots of which they have been in continuous peaceful possession.

Respondents furthermore alleged that neither petitioner nor its predecessor-in-interest had given them any written notice of its acquisition of the ¼ share of Tito Dignos.

Respondents thus prayed as follows:

1) Upon the filing of this complaint, that a restraining order be issued enjoining the defendant and any of its officers, agents, employees, and any third person acting on their behest, to desist from occupying their portions of Lots 2296 and 2316, Opon Cadastre, and upon due notice and hearing, to issue the corresponding writ of preliminary injunction for the same purpose;

2) To declare the tax declarations of the defendant or any of its predecessors-in-interests covering Lots 2296 and 2316, Opon Cadastre, to be null and void:

3) To grant unto the plaintiffs the right of preemption in the sale of the one-fourth share of Tito Dignos in the above-mentioned parcels of land under the provisions of Articles 1620 and 1623 of the Civil Code;

4) To order the defendant to reimburse plaintiffs the sum of ₱10,000.00 acceptance fee, the sums of ₱1,000.00 per appearance fee, the sum of ₱10,000.00 for costs of litigation;

5) To order the defendant to pay the plaintiffs the sum of ₱100,000.00 for moral damages.

Plaintiffs further pray for such orders as may be just and equitable under the premises.[10] (Underscoring supplied)

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[8] *Vide* Defendant[-petitioner]'s Answer with Counterclaim, *id*., pp. 55-61.

[9] *Ibid*.

[10] *Id*. at 3-4.

Republic of the Philippines, represented by the MCIAA (hereafter petitioner), in its Answer with Counterclaim,[11] maintained that from the time the lots were sold to its predecessor-in-interest CAA, it has been in open, continuous, exclusive, and notorious possession thereof; through acquisitive prescription, it had acquired valid title to the lots since it was a purchaser in good faith and for value; and assuming *arguendo* that it did not have just title, it had, by possession for over 30 years, acquired ownership thereof by extraordinary prescription.

At all events, petitioner contended that respondents' action was barred by estoppel and laches.

The trial court found for respondents. It held that respondents and their predecessors-in-interest were in peaceful and continuous possession of their shares in the lots, and were disturbed of such possession only in 1996 when petitioner put up the security fence that traversed Lot No. 2316 and relocated families that had built their houses within the airport perimeter to a portion of said lot.

On petitioner's claim that it had acquired ownership by extraordinary prescription, the trial court brushed it aside on the ground that registered lands cannot be the subject of acquisitive prescription.

Neither, held the trial court, had respondents' action prescribed, as actions for quieting of title cannot prescribe if the plaintiffs are in possession of the property in question, as in the case of herein respondents.

On petitioner's defense of laches, the trial court also brushed the same aside in light of its finding that respondents, who have long been in possession of the lots, came to know of the sale only in 1996. The trial court added that respondents could not be charged with constructive notice of the 1957 Extrajudicial Settlement and Sale of the lots to CAA as it was erroneously

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[11] *Id.* at 55-61.

registered under Act No. 3344,[12] the law governing recording of instruments or deeds relating to real estate which are *not* registered under the Torrens system. The subject lots being registered, the trial court found, the registration of the deed should have been made under Act No. 496,[13] the applicable law in 1957. In fine, the trial court held that the registration of the deed under Act No. 3344 did not operate as constructive notice to the whole world.[14]

Concluding, the trial court held that the questioned sale was valid only with respect to Tito Dignos' ¼ share of the lots, and that the sale thereof was subject to the right of legal redemption by respondents following Article 1088 of the Civil Code, reading:

> Should any of the heirs sell his hereditary rights to a stranger before partition, any or all of the co-heirs may be subrogated to the rights of the purchaser by reimbursing him for the price of the sale, provided they do so within the period of one month from the time they were notified in writing of the sale by the vendor.

In light of its finding that the heirs of Tito Dignos did not give notice of the sale to respondents, the trial court held that the period for legal redemption had not yet lapsed; and the redemption price should be ¼ of the purchase price paid by the CAA for the two lots.

The trial court thus disposed:

> WHEREFORE, all premises considered, the Court rules in favor of plaintiffs and hence renders judgment:
>
> a) Declaring Tax Declarations Nos. 00915 and 00935, as well as all other tax declarations covering Lot 2296 and Lot 2316 under the names of the Civil Aeronautics Administration, the Bureau of Air Transportation and the defendant Mactan Cebu International Airport

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[12] The trial court inadvertently referred to the law as Republic Act No. 3344.

[13] The trial court inadvertently referred to the law as Republic Act No. 496.

[14] *Rollo*, pp. 118-121.

Authority, as null and void and directing the City Assessor of Lapu-Lapu City to cancel them;

b) Declaring the Extrajudicial Settlement and Sale affecting Lot 2296 and Lot 2316 (Exhibit "H" for plaintiffs) as void and ineffective as regards the three-fourth[s] (3/4) shares of plaintiffs in both lots and declaring the herein plaintiffs as owners of such three fourth[s] shares and;

c) Ordering the defendant to resell to plaintiffs for a total price of Six Hundred forty Pesos (₱640.00) the one-fourth (1/4) shares in Lot 2296 and Lot 2316 it had purchased from the heirs of the late Tito Dignos in 1957;

No pronouncement as to costs.

SO ORDERED.[15]

As priorly stated, the Court of Appeals affirmed the trial court's decision.

Hence, the present petition for review on *certiorari* which proffers the following

GROUNDS FOR ALLOWANCE OF THE PETITION

THE COURT OF APPEALS GRAVELY ERRED IN AFFIRMING THE TRIAL COURT'S DECISION WHEN RESPONDENTS NO LONGER HAVE ANY RIGHT TO RECOVER LOTS 2296 AND 2316 DUE TO THE PRIOR SALE THEREOF TO THE REPUBLIC AND UPON THE EQUITABLE GROUNDS OF ESTOPPEL AND LACHES.[16]

The petition fails.

Article 493 of the Civil Code provides:

Each co-owner shall have the full ownership of his part and of the fruits and benefits pertaining thereto, and he may therefore alienate, assign or mortgage it, and even substitute another person in its enjoyment, except when personal rights are involved. But the effect of the alienation of the mortgage, with respect to the co-owners, shall be limited to the portion which may be allotted to him in the division upon the termination of the co-ownership.

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[15] *Id.* at 122.

[16] *Id.* at 40-41.

Apropos is the following pertinent portion of this Court's decision in *Bailon-Casilao v. CA*:

> As early as 1923, this Court has ruled that even if a co-owner sells the whole property as his, the sale will **affect only his own share** but **not those of the other co-owners who did not consent** to the sale [*Punsalan v. Boon Liat*, 44 Phil. 320 (1923)]. This is because under the aforementioned codal provision, the sale or other disposition affects only his undivided share and the transferee gets only what would correspond to his grantor in the partition of the thing owned in common. [*Ramirez v. Bautista*, 14 Phil. 528 (1909)]. Consequently, by virtue of the sales made by Rosalia and Gaudencio Bailon which are valid with respect to their proportionate shares, and the subsequent transfers which culminated in the sale to private respondent Celestino Afable, the said Afable thereby became a co-owner of the disputed parcel of land as correctly held by the lower court since the sales produced the effect of substituting the buyers in the enjoyment thereof [*Mainit v. Bandoy*, 14 Phil. 730 (1910)].
>
> From the foregoing, it may be deduced that since a co-owner is entitled to sell his undivided share, a sale of the entire property by one co-owner without the consent of the other co-owners is **not null and void. However, only the rights of the co-owner-seller are transferred, thereby making the buyer a co-owner of the property.**[17]
>
> (Emphasis and underscoring supplied)

Petitioner's predecessor-in-interest CAA thus acquired only the rights pertaining to the sellers-heirs of Tito Dignos, which is only ¼ undivided share of the two lots.

Petitioner's insistence that it acquired the property through acquisitive prescription, if not ordinary, then extraordinary, does not lie. The trial court's discrediting thereof is well taken. It bears emphasis at this juncture that in the Extrajudicial Settlement and Sale forged by CAA and Tito Dignos' heirs in 1957, the following material portions thereof validate the claim of respondents that the two lots were registered:

xxx xxx xxx

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[17] G.R. No. 78178, April 15, 1988, 160 SCRA 738, 745.

4. That since the Original Transfer Certificate of Title of the above-mentioned property/ies has/have been lost and/or destroyed, or since the said lot/s is/are covered by Cadastral Case No. 19, and a decree issued on March 19, 1930, bearing Decree No./s 474824 & 474825, and the VENDEE hereby binds itself to reconstitute said title/s at its own expense and that the HEIRS-VENDORS, their heirs, successors and assigns bind themselves to help in the reconstitution of title so that the said lot/s may be registered in the name of the VENDEE in accordance with law[.][18]

xxx x x x xxx

The trial court's discrediting of petitioner's invocation of laches and prescription of action is well-taken too.

As for petitioner's argument that the redemption price should be ¼ of the prevailing market value, not of the actual purchase price, since, so it claims, "(1) they received just compensation for the property at the time it was purchased by the Government; and, (2) the property, due to improvements introduced by petitioner in its vicinity, is now worth several hundreds of millions of pesos,"[19] the law is not on its side. Thus, Article 1088 of the Civil Code provides:

> Should any of the heirs sell his hereditary rights to a stranger before the partition, any or all of the co-heirs may be subrogated to the rights of the purchaser **by reimbursing him for the price of the sale**, provided they do so within the period of one month from the time they were notified in writing of the sale by the vendor. (Emphasis and underscoring supplied)

The Court may take judicial notice of the increase in value of the lots. As mentioned earlier, however, the heirs of Tito Dignos did not notify respondents about the sale. At any rate, since the Extrajudicial Settlement and Sale stipulates, thus:

> That the HEIRS-VENDORS, their heirs, assigns and successors, undertake and **agree to warrant and defend the possession and ownership of the property/ies herein sold against any and all just claims of all persons whomsoever** and should the VENDEE be

[18] Records, pp. 127-128.

[19] *Rollo*, p. 47.

disturbed in its possession, to prosecute and defend the same in the Courts of Justice[20] (Emphasis and underscoring supplied),

petitioner is not without any remedy. This decision is, therefore, without prejudice to petitioner's right to seek redress against the vendors-heirs of Tito Dignos and their successors-in-interest.

WHEREFORE, the petition is, in light of the foregoing disquisition, *DENIED*.

SO ORDERED.

Quisumbing (Chairperson), Tinga, Chico-Nazario, and *Velasco, Jr., JJ.,* concur.

SECOND DIVISION

[G.R. No. 174680. March 24, 2008]

VICTORIA C. TAYAG, *petitioner, vs.* **FELICIDAD A. TAYAG-GALLOR,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL PROCEEDINGS; PETITION FOR ISSUANCE OF LETTERS OF ADMINISTRATION MUST BE FILED BY AN INTERESTED PERSON. — Rule 79 of the Rules of Court provides that a petition for the issuance of letters of administration must be filed *by an interested person*. In *Saguinsin v. Lindayag,* 6 SCRA 874, the Court defined an interested party as one who would be benefited by the estate, such as an heir, or one who has a claim against the estate, such as a creditor. This interest, furthermore, must be material and direct, not merely indirect or contingent. Hence, where the right of the person filing a petition for the issuance of letters of administration is dependent on a fact which has not been established or worse, can no longer be established, such

[20] Records, p. 127.

contingent interest does not make her an interested party. Here lies the complication in the case which the appellate court had not discussed, although its disposition of the case is correct.

2. ID.; ID.; ID.; VOLUNTARY RECOGNITION *VIS-À-VIS* JUDICIAL OR COMPULSORY RECOGNITION. — Voluntary recognition must be express such as that in a record of birth appearing in the civil register, a final judgment, a public instrument or private handwritten instrument signed by the parent concerned. The voluntary recognition of an illegitimate child by his or her parent needs no further court action and is, therefore, not subject to the limitation that the action for recognition be brought during the lifetime of the putative parent. Judicial or compulsory recognition, on the other hand, may be demanded by the illegitimate child of his parents and must be brought during the lifetime of the presumed parents.

3. ID.; ID.; ID.; ID.; *UYGUANGCO V. COURT OF APPEALS*, NOT APPLICABLE IN CASE AT BAR. — In *Uyguangco v. Court of Appeals,* 178 SCRA 684, Graciano Uyguangco, claiming to be an illegitimate child of the decedent, filed a complaint for partition against the latter's wife and legitimate children. However, an admission was elicited from him in the course of his presentation of evidence at the trial that he had none of the documents mentioned in Article 278 of the 1950 Civil Code to show that he was the illegitimate son of the decedent. The wife and legitimate children of the decedent thereupon moved for the dismissal of the case on the ground that he could no longer prove his alleged filiation under the applicable provision of the Civil Code. The Court, applying the provisions of the Family Code which had then already taken effect, ruled that since Graciano was claiming illegitimate filiation under the second paragraph of Article 172 of the Family Code, *i.e.,* open and continuous possession of the status of an illegitimate child, the action was already barred by the death of the alleged father.

4. ID.; ID.; ID.; ID; CASE AT BAR. — In contrast, respondent in this case had not been given the opportunity to present evidence to show whether she had been voluntarily recognized and acknowledged by her deceased father because of petitioner's opposition to her petition and motion for hearing on affirmative defenses. There is, as yet, no way to determine if her petition is actually one to compel recognition which had already been

foreclosed by the death of her father, or whether indeed she has a material and direct interest to maintain the suit by reason of the decedent's voluntary acknowledgment or recognition of her illegitimate filiation.

5. ID.; CIVIL PROCEDURE; CAUSE OF ACTION; ALLEGATION THAT RESPONDENT IS AN ILLEGITIMATE CHILD OF THE DECEDENT SUFFICES AS A CAUSE OF ACTION. — We find, therefore, that the allegation that respondent is an illegitimate child of the decedent suffices even without further stating that she has been so recognized or acknowledged. A motion to dismiss on the ground of failure to state a cause of action in the complaint hypothetically admits the truth of the facts alleged therein. Assuming the fact alleged to be true, *i.e.,* that respondent is the decedent's illegitimate child, her interest in the estate as such would definitely be material and direct. The appellate court was, therefore, correct in allowing the proceedings to continue, ruling that, "respondent still has the duty to prove the allegation (that she is an illegitimate child of the decedent), just as the petitioner has the right to disprove it, in the course of the settlement proceedings."

APPEARANCES OF COUNSEL

Galang Law Office for petitioner.

D E C I S I O N

TINGA, *J.*:

This is a petition for review on *certiorari* seeking the reversal of the Decision[1] of the Court of Appeals dated 29 May 2006, and its Resolution[2] dated 28 August 2006 in CA-G.R. SP No. 79205.

The antecedents are as follows:

On 15 January 2001, respondent herein, Felicidad A. Tayag-Gallor, filed a petition for the issuance of letters of administration

[1] *Rollo*, pp. 16-23.

[2] *Id*. at 25.

over the estate of Ismael Tayag.[3] Respondent alleged in the petition, docketed as Special Proceeding No. 5994 (SP 5994), that she is one of the three (3) illegitimate children of the late Ismael Tayag and Ester C. Angeles. The decedent was married to petitioner herein, Victoria C. Tayag, but the two allegedly did not have any children of their own.

On 7 September 2000, Ismael Tayag died intestate, leaving behind two (2) real properties both of which are in the possession of petitioner, and a motor vehicle which the latter sold on 10 October 2000 preparatory to the settlement of the decedent's estate. Petitioner allegedly promised to give respondent and her brothers ₱100,000.00 each as their share in the proceeds of the sale. However, petitioner only gave each of them half the amount she promised.

Respondent further averred that on 20 November 2000, petitioner has caused the annotation of 5 September 1984 affidavit executed by Ismael Tayag declaring the properties to be the paraphernal properties of petitioner. The latter allegedly intends to dispose of these properties to the respondent's and her brothers' prejudice.

Petitioner opposed the petition, asserting that she purchased the properties subject of the petition using her own money. She claimed that she and Ismael Tayag got married in Las Vegas, Nevada, USA on 25 October 1973, and that they have an adopted daughter, Carmela Tayag, who is presently residing in the USA. It is allegedly not true that she is planning to sell the properties. Petitioner prayed for the dismissal of the suit because respondent failed to state a cause of action.[4]

In a Motion[5] dated 31 August 2001, petitioner reiterated her sole ownership of the properties and presented the transfer certificates of title thereof in her name. She also averred that it is necessary to allege that respondent was acknowledged

[3] Records, pp. 2-6.

[4] *Id*. at 18-22; Opposition dated March 30, 2001.

[5] *Id*. at 68.

and recognized by Ismael Tayag as his illegitimate child. There being no such allegation, the action becomes one to compel recognition which cannot be brought after the death of the putative father. To prevent further encroachment upon the court's time, petitioner moved for a hearing on her affirmative defenses.

The Motion was denied in an Order[6] dated 3 April 2003. Petitioner's motion for reconsideration was likewise denied in an Order[7] dated 16 July 2003.

The appellate court, in a Decision[8] dated 29 May 2006, upheld the denial of petitioner's motion and directed the trial court to proceed with the case with dispatch. The Court of Appeals ruled, in essence, that the allegation that respondent is an illegitimate child suffices for a cause of action, without need to state that she had been recognized and acknowledged as such. However, respondent still has to prove her allegation and, correspondingly, petitioner has the right to refute the allegation in the course of the settlement proceedings.

The Court of Appeals denied reconsideration in a Resolution[9] dated 28 August 2006.

In her Petition[10] 17 dated September 2006, petitioner asserts that respondent should not be allowed to prove her filiation in the settlement of Ismael Tayag's estate. If, following the case of *Uyguanco v. Court of Appeals*,[11] the claim of filiation may no longer be proved in an action for recognition, with more reason that it should not be allowed to be proved in an action for the settlement of the decedent's estate. Thus, petitioner claims, respondent may no longer maintain an action to prove that she is the illegitimate child of the decedent after the latter's death.

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[6] CA *rollo*, p. 12.

[7] *Id*. at 13.

[8] *Rollo*, pp. 16-22.

[9] *Id*. at 25.

[10] *Id*. at 3-14.

[11] G.R. No. 76873, 26 October 1989, 178 SCRA 684.

Unfortunately, the two-page Comment,[12] dated 17 April 2007, fails to shed any more light on the present controversy.

The Reply[13] dated 3 September 2007 reiterates the arguments in the petition.

The main issue in this case is deceptively simple. As crafted by the Court of Appeals, it is whether respondent's petition for the issuance of letters of administration sufficiently states a cause of action considering that respondent merely alleged therein that she is an illegitimate child of the decedent, without stating that she had been acknowledged or recognized as such by the latter. The appellate court held that the mere allegation that respondent is an illegitimate child suffices.

Rule 79 of the Rules of Court provides that a petition for the issuance of letters of administration must be filed *by an interested person.* In *Saguinsin v. Lindayag,*[14] the Court defined an interested party as one who would be benefited by the estate, such as an heir, or one who has a claim against the estate, such as a creditor. This interest, furthermore, must be material and direct, not merely indirect or contingent.

Hence, where the right of the person filing a petition for the issuance of letters of administration is dependent on a fact which has not been established or worse, can no longer be established, such contingent interest does not make her an interested party. Here lies the complication in the case which the appellate court had not discussed, although its disposition of the case is correct.

Essentially, the petition for the issuance of letters of administration is a suit for the settlement of the intestate estate of Ismael Tayag. The right of respondent to maintain such a suit is dependent on whether she is entitled to successional rights as an illegitimate child of the decedent which, in turn, may be established through voluntary or compulsory recognition.

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[12] *Rollo*, pp. 72-73.

[13] *Id.* at 79-81.

[14] G.R. No. L-17759, 17 December 1962, 6 SCRA 874, citing *Trillana v. Crisostom*o and *Espinosa v. Barrios*, 70 Phil. 311 (1951).

Voluntary recognition must be express such as that in a record of birth appearing in the civil register, a final judgment, a public instrument or private handwritten instrument signed by the parent concerned.[15] The voluntary recognition of an illegitimate child by his or her parent needs no further court action and is, therefore, not subject to the limitation that the action for recognition be brought during the lifetime of the putative parent.[16] Judicial or compulsory recognition, on the other hand, may be demanded

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[15] Art. 175 in relation to Art. 172 and Art. 173, New Civil Code.

Art. 175. Illegitimate children may establish their illegitimate filiation in the same way and on the same evidence as legitimate children.

The action must be brought within the same period specified in Article 173, except when the action is based on the second paragraph of Article 172, in which case the action may be brought during the lifetime of the alleged parent.

Art. 172. The filiation of legitimate children is established by any of the following:

(1) The record of birth appearing in the civil register or a final judgment; or

(2) An admission of legitimate filiation in a public document or a private handwritten instrument and signed by the parent concerned.

In the absence of the foregoing evidence, the legitimate filiation shall be proved by:

(1) The open and continuous possession of the status of a legitimate child, or

(2) Any other means allowed by the Rules of Court and special laws.

Art. 173. The action to claim legitimacy may be brought by the child during his or her lifetime and shall be transmitted to the heirs should the child die during minority or in a state of insanity. In these cases, the heirs shall have a period of five years within which to institute the action.

The action already commenced by the child shall survive notwithstanding the death of either or both of the parties.

See also *In the Matter of the Intestate Estate of the Deceased Josefa Delgado and Guillermo Rustia,* G.R. No. 155733, 27 January 2006, 480 SCRA 334.

[16] *Divinagracia v. Bellosillo*, No. L-47407, 12 August 1986, 143 SCRA 356.

by the illegitimate child of his parents and must be brought during the lifetime of the presumed parents.[17]

Petitioner's thesis is essentially based on her contention that by Ismael Tayag's death, respondent's illegitimate filiation and necessarily, her interest in the decedent's estate which the Rules require to be material and direct, may no longer be established. Petitioner, however, overlooks the fact that respondent's successional rights may be established not just by a judicial action to compel recognition but also by proof that she had been voluntarily acknowledged and recognized as an illegitimate child.

In *Uyguangco v. Court of Appeals, supra,* Graciano Uyguangco, claiming to be an illegitimate child of the decedent, filed a complaint for partition against the latter's wife and legitimate children. However, an admission was elicited from him in the course of his presentation of evidence at the trial that he had none of the documents mentioned in Article 278[18] of the 1950 Civil Code to show that he was the illegitimate son of the decedent. The wife and legitimate children of the decedent thereupon moved for the dismissal of the case on the ground that he could no longer prove his alleged filiation under the applicable provision of the Civil Code.

The Court, applying the provisions of the Family Code which had then already taken effect, ruled that since Graciano was claiming illegitimate filiation under the second paragraph of Article 172 of the Family Code, *i.e.,* open and continuous possession of the status of an illegitimate child, the action was already barred by the death of the alleged father.

In contrast, respondent in this case had not been given the opportunity to present evidence to show whether she had been voluntarily recognized and acknowledged by her deceased father because of petitioner's opposition to her petition and motion

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[17] *Id*.

[18] Art. 278. Recognition shall be made in the record of birth, a will, statement before a court of record, or in any authentic writing.

for hearing on affirmative defenses. There is, as yet, no way to determine if her petition is actually one to compel recognition which had already been foreclosed by the death of her father, or whether indeed she has a material and direct interest to maintain the suit by reason of the decedent's voluntary acknowledgment or recognition of her illegitimate filiation.

We find, therefore, that the allegation that respondent is an illegitimate child of the decedent suffices even without further stating that she has been so recognized or acknowledged. A motion to dismiss on the ground of failure to state a cause of action in the complaint hypothetically admits the truth of the facts alleged therein.[19] Assuming the fact alleged to be true, *i.e.,* that respondent is the decedent's illegitimate child, her interest in the estate as such would definitely be material and direct. The appellate court was, therefore, correct in allowing the proceedings to continue, ruling that, "respondent still has the duty to prove the allegation (that she is an illegitimate child of the decedent), just as the petitioner has the right to disprove it, in the course of the settlement proceedings."

WHEREFORE, the instant petition is *DENIED*. The Decision of the Court of Appeals dated 29 May 2006 and its Resolution dated 28 August 2006 are *AFFIRMED*. No pronouncement as to costs.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Chico-Nazario, and *Velasco, Jr., JJ.,* concur.

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[19] *Drilon v. Court of Appeals*, G.R. No. 106922, 20 April 2001, 357 SCRA 13.

EN BANC

[G.R. No. 180643. March 25, 2008]

ROMULO L. NERI, *petitioner, vs.* **SENATE COMMITTEE ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS, SENATE COMMITTEE ON TRADE AND COMMERCE, and SENATE COMMITTEE ON NATIONAL DEFENSE AND SECURITY,** *respondents.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; LEGISLATIVE POWERS; OVERSIGHT POWERS; DIFFERENTIATION. — The landmark case of *Senate v. Ermita* draws in bold strokes the distinction between the **legislative** and **oversight** powers of the Congress, as embodied under Sections 21 and 22, respectively, of Article VI of the Constitution, to wit: **SECTION 21.** The Senate or the House of Representatives or any of its respective committees may conduct inquiries **in aid of legislation** in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected. **SECTION 22.** The heads of department may upon their own initiative, with the consent of the President, or upon the request of either House, or as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall not be limited to written questions, but may cover matters related thereto. When the security of the state or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session. *Senate* cautions that while the above provisions are closely related and complementary to each other, they should not be considered as pertaining to the same power of Congress. Section 21 relates to the power to conduct inquiries *in aid of legislation.* Its aim is to elicit information that may be used for legislation. On the other hand, Section

22 pertains to the power to conduct a question hour, the objective of which is to obtain information in pursuit of Congress' oversight function. Simply stated, while both powers allow Congress or any of its committees to conduct inquiry, their **objectives** are different.

2. ID.; ID.; ID.; ID.; DISTINCTION WITH REGARD TO USE OF COMPULSORY PROCESS. — This distinction gives birth to another distinction with regard to the use of compulsory process. Unlike in Section 21, Congress **cannot** compel the appearance of executive officials under Section 22. The Court's pronouncement in *Senate v. Ermita* is clear: When Congress merely seeks to be informed on how department heads are implementing the statutes which it has issued, its right to such information is not as imperative as that of the President to whom, as Chief Executive, such department heads must give a report of their performance as a matter of duty. In such instances, Section 22, in keeping with the separation of powers, states that Congress may only *request* their appearance. Nonetheless, when the inquiry in which Congress requires their appearance is 'in aid of legislation' under Section 21, the appearance is *mandatory* for the same reasons stated in *Arnault*. **In fine, the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation**. This is consistent with the intent discerned from the deliberations of the Constitutional Commission. Ultimately, the power of Congress to compel the appearance of executive officials under Section 21 and the lack of it under Section 22 find their basis in the principle of separation of powers. While the executive branch is a co-equal branch of the legislature, it cannot frustrate the power of Congress to legislate by refusing to comply with its demands for information.

3. ID.; ID.; EXECUTIVE DEPARMENT; EXECUTIVE PRIVILEGE; TWO (2) KINDS. — In *In Re: Sealed Case,* the U.S. Court of Appeals delved deeper. It ruled that there are two (2) kinds of executive privilege; one is the **presidential communications privilege** and, the other is the **deliberative process privilege**. The former pertains to **"communications, documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential."** The latter includes **'advisory opinions,**

recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."

4. ID.; ID.; ID.; ID.; ID.; PRESIDENTIAL COMMUNICATIONS PRIVILEGE, EXPLAINED. — The *Nixon* and *post-Watergate cases* established the broad contours of the **presidential communications privilege**. In *United States v. Nixon,* the U.S. Court recognized a great public interest in preserving **"the confidentiality of conversations that take place in the President's performance of his official duties."** It thus considered presidential communications as **"presumptively privileged."** Apparently, the presumption is founded on the **"President's generalized interest in confidentiality."** The privilege is said to be necessary to guarantee the candor of presidential advisors and to provide **"the President and those who assist him… with freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately."**

5. ID.; ID.; ID.; ID.; ID.; MARKED DISTINCTIONS BETWEEN TWO KINDS OF EXECUTIVE PRIVILEGE. — Accordingly, they are characterized by marked distinctions. **Presidential communications privilege** applies to **decision-making of the President** while, the **deliberative process privilege**, to **decision-making of executive officials**. The **first** is rooted in the constitutional principle of separation of power and the President's unique constitutional role; the **second** on common law privilege. Unlike the **deliberative process privilege,** the **presidential communications privilege applies to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones.** As a consequence, congressional or judicial negation of the **presidential communications privilege** is always subject to greater scrutiny than denial of the **deliberative process privilege.**

6. ID.; ID.; ID.; ID.; ID.; ELEMENTS. — The above cases, especially, *Nixon, In Re Sealed Case* and *Judicial Watch,* somehow provide the elements of **presidential communications privilege**, to wit: **1)** The protected communication must relate to a "quintessential and non-delegable presidential power." **2)** The communication must be authored or "solicited and received" by a close advisor of the President or the President himself. The judicial test is that an advisor must be in "operational proximity" with the President. **3)** The **presidential communications privilege** remains

a qualified privilege that may be overcome by a showing of adequate need, such that the information sought "likely contains important evidence" and by the unavailability of the information elsewhere by an appropriate investigating authority.

7. ID.; ID.; ID.; ID.; ID.; PRESUMPTION THAT PRESIDENTIAL COMMUNICATIONS PRIVILEGE IS PRIVILEGED CAN BE OVERCOME ONLY BY MERE SHOWING OF PUBLIC NEED BY THE BRANCH OF THE GOVERNMENT SEEKING ACCESS TO CONVERSATIONS; CASE AT BAR. — The earlier case of *Nixon v. Sirica,* held that **presidential communications privilege** are presumptively privileged and that the presumption can be overcome only by mere showing of public need by the branch seeking access to conversations. The courts are enjoined to resolve the competing interests of the political branches of the government "in the manner that preserves the essential functions of each Branch." Here, the record is bereft of any categorical explanation from respondent Committees to show a compelling or critical need for the answers to the three (3) questions in the enactment of a law. Instead, the questions veer more towards the exercise of the legislative oversight function under Section 22 of Article VI rather than Section 21 of the same Article. *Senate v. Ermita* ruled that **"the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation."** It is conceded that it is difficult to draw the line between an inquiry *in aid of legislation* and an inquiry in the exercise of oversight function of Congress. In this regard, much will depend on the content of the questions and the manner the inquiry is conducted.

8. ID.; ID.; ID.; ID.; ID.; VALIDITY OF CLAIM OF EXECUTIVE PRIVILEGE DEPENDS, NOT ONLY ON THE GROUND INVOKED BUT ALSO ON THE PROCEDURAL SETTING OR THE CONTEXT IN WHICH THE CLAIM IS MADE. — Respondent Committees argue that a claim of executive privilege does not guard against a possible disclosure of a crime or wrongdoing. We see no dispute on this. It is settled in *United States v. Nixon* that "demonstrated, specific need for evidence in **pending criminal trial**" outweighs the President's "generalized interest in confidentiality." However, the present case's distinction with the *Nixon* case is very evident. In *Nixon*, there is a pending criminal proceeding where the information

is requested and it is the demands of due process of law and the fair administration of criminal justice that the information be disclosed. This is the reason why the U.S. Court was quick to **"limit the scope of its decision."** It stressed that it is **"not concerned here with the balance between the President's generalized interest in confidentiality x x x and congressional demands for information."** Unlike in *Nixon*, the information here is elicited, not in a criminal proceeding, but in a legislative inquiry. In this regard, *Senate v. Ermita* stressed that the validity of the claim of executive privilege depends not only on the ground invoked but, also, on the **procedural setting** or the **context** in which the claim is made.

9. ID.; ID.; BILL OF RIGHTS; RIGHT TO PUBLIC INFORMATION; SUBJECT TO LIMITATION. — The right to public information, like any other right, is subject to limitation. Section 7 of Article III provides: The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, **subject to such limitations as may be provided by law**. The provision itself expressly provides the limitation, *i.e.* **as may be provided by law**. Some of these laws are Section 7 of Republic Act (R.A.) No. 6713, Article 229 of the Revised Penal Code, Section 3 (k) of R.A. No. 3019, and Section 24(e) of Rule 130 of the Rules of Court. These are in addition to what our body of jurisprudence classifies as confidential and what our Constitution considers as belonging to the larger concept of executive privilege. Clearly, there is a recognized public interest in the confidentiality of certain information. We find the information subject of this case belonging to such kind.

10. ID.; ID.; ID.; ID.; CANNOT BE EQUATED TO THE RIGHT OF CONGRESS, AS REPRESENTATIVES ELECTED BY THE PEOPLE, TO OBTAIN INFORMATION IN AID OF LEGISLATION. — More than anything else, though, the right of Congress or any of its Committees to obtain information *in aid of legislation* cannot be equated with the people's right to public information. The former cannot claim that every legislative inquiry is an exercise of the people's right to information. The distinction between such rights is laid down in *Senate v. Ermita:* There are, it bears noting, clear distinctions

between the right of Congress to information which underlies the power of inquiry and the right of people to information on matters of public concern. For one, the demand of a citizen for the production of documents pursuant to his right to information does not have the same obligatory force as a *subpoena duces tecum* issued by Congress. Neither does the right to information grant a citizen the power to exact testimony from government officials. These powers belong only to Congress, not to an individual citizen. **Thus, while Congress is composed of representatives elected by the people, it does not follow, except in a highly qualified sense, that in every exercise of its power of inquiry, the people are exercising their right to information.** The members of respondent Committees should not invoke as justification in their exercise of power a right properly belonging to the people in general. This is because when they discharge their power, they do so as public officials and members of Congress.

11. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; TWO KINDS; PRESIDENTIAL COMMUNICATIONS PRIVILEGE; COURT IS CONVINCED COMMUNICATIONS ELICITED BY THE THREE (3) QUESTIONS ARE COVERED.— Using the above elements, we are convinced that, indeed, the communications elicited by the three (3) questions are covered by the **presidential communications privilege**. ***First***, the communications relate to a "quintessential and non-delegable power" of the President, *i.e.* the power to enter into an executive agreement with other countries. Executive Secretary Ermita premised his claim of executive privilege on the ground that the communications elicited by the three (3) questions "fall under conversation and correspondence between the President and public officials" necessary in "her executive and policy decision-making process" and, that "the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China." This authority of the President to enter into *executive agreements* without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence. ***Second,*** the communications are "received" by a close advisor of the President. Under the "operational proximity" test, petitioner can be considered a close advisor, being a member of President Arroyo's cabinet. *And* ***third***, there is no adequate showing of

a compelling need that would justify the limitation of the privilege and of the **unavailability** of the information elsewhere by an appropriate investigating authority.

12. ID.; ID.; ID.; ID.; CLAIM PROPERLY INVOKED.— Jurisprudence teaches that for the claim to be properly invoked, there must be a formal claim of privilege, lodged by the head of the department which has control over the matter." A formal and proper claim of executive privilege requires a "precise and certain reason" for preserving their confidentiality. The Letter dated November 17, 2007 of Executive Secretary Ermita satisfies the requirement. It serves as the formal claim of privilege. There, he expressly states that ***"this Office is constrained to invoke the settled doctrine of executive privilege as refined in Senate v. Ermita, and has advised Secretary Neri accordingly."*** Obviously, he is referring to the Office of the President. That is more than enough compliance. In *Senate v. Ermita*, a less categorical letter was even adjudged to be sufficient. With regard to the existence of "precise and certain reason," we find the grounds relied upon by Executive Secretary Ermita specific enough so as not "to leave respondent Committees in the dark on how the requested information could be classified as privilege." The case of *Senate v. Ermita* only requires that an allegation be made "whether the information demanded involves military or diplomatic secrets, closed-door Cabinet meetings, *etc*." The particular ground must only be specified. The enumeration is not even intended to be comprehensive." The following statement of grounds satisfies the requirement: The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect. At any rate, as held further in *Senate v. Ermita,* the Congress must not require the executive to state the reasons for the claim with such particularity as to compel disclosure of the information which the privilege is meant to protect. This is a matter of respect to a coordinate and co-equal department.

13. REMEDIAL LAW; CIVIL PROCEDURE; GRAVE ABUSE OF DISCRETION; CONSTRUED. — 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."

14. ID.; ID.; ID.; CASE AT BAR. — Respondent Committees committed grave abuse of discretion in issuing the contempt **Order** in view of five (5) reasons. ***First,*** there being a legitimate claim of executive privilege, the issuance of the contempt Order suffers from constitutional infirmity. ***Second,*** respondent Committees did not comply with the requirement laid down in *Senate v. Ermita* that the invitations should contain the "possible needed statute which prompted the need for the inquiry," along with "the usual indication of the subject of inquiry and the **questions** relative to and in furtherance thereof." Compliance with this requirement is imperative, both under Sections 21 and 22 of Article VI of the Constitution. This must be so to ensure that the rights of both persons **appearing in or affected** by such inquiry are respected as mandated by said Section 21 and by virtue of the express language of Section 22. Unfortunately, despite petitioner's repeated demands, respondent Committees did not send him an advance list of questions. ***Third,*** a reading of the transcript of respondent Committees' January 30, 2008 proceeding reveals that only a minority of the members of the Senate Blue Ribbon Committee was present during the deliberation. Section 18 of the *Rules of Procedure Governing Inquiries in Aid of Legislation* provides that: "The Committee, **by a vote of majority** of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer proper questions by the Committee or any of its members." Clearly, the needed vote is a **majority** of all the members of the Committee. Apparently, members who did not actually participate in the deliberation were made to sign the contempt Order. Thus, there is a cloud of doubt as to the validity of the contempt Order dated January 30, 2008. ***Fourth,*** we find merit in the argument of the OSG that respondent Committees likewise violated Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the **"duly**

published rules of procedure." We quote the OSG's explanation: The phrase "**duly published rules of procedure**" requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of rules as it may deem fit. **Not having published its *Rules of Procedure*, the subject hearings in aid of legislation conducted by the 14th Senate, are therefore, procedurally infirm.** ***And fifth,*** respondent Committees" issuance of the contempt Order is arbitrary and precipitate. It must be pointed out that respondent Committees did not **first** pass upon the claim of executive privilege and inform petitioner of their ruling. Instead, they curtly dismissed his explanation as "unsatisfactory" and simultaneously issued the Order citing him in contempt and ordering his immediate arrest and detention.

15. ID.; ID.; CONTEMPT; POWER TO BE USED JUDICIOUSLY WITH THE END IN VIEW OF UTILIZING SAME FOR CORRECTION AND PRESERVATION OF DIGNITY OF ISSUING COURT, TRIBUNAL BOARD OR SENATE COMMITTEE. — Even the courts are repeatedly advised to exercise the power of contempt judiciously and sparingly with utmost self-restraint with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication. Respondent Committees should have exercised the same restraint, after all petitioner is not even an ordinary witness. He holds a high position in a co-equal branch of government.

16. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIARY; BASIC PRINCIPLES OF CONSTITUTIONAL LAW CANNOT BE SUBORDINATED TO THE NEEDS OF A PARTICULAR SITUATION. — In rendering this decision, the Court emphasizes once more that the basic principles of constitutional law cannot be subordinated to the needs of a particular situation. As magistrates, our mandate is to rule objectively and dispassionately, always mindful of Mr. Justice Holmes' warning on the dangers inherent in cases of this nature, thus: "some accident of immediate and overwhelming interest…appeals to the feelings and distorts the judgment. These immediate interests

exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." In this present crusade to "search for truth," we should turn to the fundamental constitutional principles which underlie our tripartite system of government, where the Legislature enacts the law, the Judiciary interprets it and the Executive implements it. They are considered separate, co-equal, coordinate and supreme within their respective spheres but, imbued with a system of checks and balances to prevent unwarranted exercise of power. The Court's mandate is to preserve these constitutional principles at all times to keep the political branches of government within constitutional bounds in the exercise of their respective powers and prerogatives, even if it be in the search for truth. This is the only way we can preserve the stability of our democratic institutions and uphold the Rule of Law.

***YNARES-SANTIAGO, J., separate opinion*:**

1. POLITICAL LAW; CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; NOT ABSOLUTE.— The President does not have an unlimited discretionary privilege to withhold information from Congress, the Judiciary or the public, even if the claim is founded on one of the traditional privileges covered by the doctrine on executive privilege. It was clearly stated in *Senate v. Ermita* that a claim of executive privilege may be valid or not depending on the ground invoked to justify it and the context in which it is made. In this sense, therefore, executive privilege is not absolute.

2. REMEDIAL LAW; EVIDENCE; TESTIMONY OF WITNESSES; PETITIONER NERI CAN NOT REFUSE TO APPEAR BEFORE THE SENATE COMMITTEES ON THE ASSUMPTION THAT HE WILL TESTIFY ONLY ON MATTERS THAT ARE PRIVILEGED. — It was wrong for petitioner to assume that he was being summoned by the Senate Committees only to answer the three questions cited above. It may be true that he had exhaustively testified on the ZTE-NBN project during the September 26, 2007 hearing, however, it is not for him to conclude that the Senate Committees have gathered all the necessary information that they needed. He cannot refuse to appear before the Senate Committees on the assumption that he will testify only on matters that are privileged. The Senate

Committees, in the exercise of their constitutionally-mandated functions, can inquire into any matter that is pertinent and relevant to the subject of its investigation.

3. POLITICAL LAW; CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; GRAVE IMPLICATIONS ON PUBLIC ACCOUNTABILITY AND GOVERNMENT RESPONSIBILITY JUSTIFY REJECTION OF CLAIM OF EXECUTIVE PRIVILEGE. — The privilege attached to presidential communications was not regarded as absolute. For while the President's need for complete candor and objectivity from advisers calls for great deference from the courts, a generalized claim of confidentiality, without more, cannot prevail over a specific need for evidence in a pending criminal trial. Thus, presidential conversations and correspondences are not entirely confidential and the privilege attached to this type of information may yield to other considerations. In *US v. Nixon*, it was the "fundamental demands of due process of law in the fair administration of criminal justice" that was the overriding consideration which led to the disallowance of the claim of privilege. In the instant case, I submit that the grave implications on public accountability and government transparency justify the rejection of the claim of executive privilege.

4. ID.; ID.; ID.; ID.; CONSIDERING THAT THE PRIVILEGE IS AN EXEMPTION FROM THE OBLIGATION TO DISCLOSE INFORMATION, NECESSITY FOR NON-DISCLOSURE MUST BE OF SUCH HIGH DEGREE AS TO OUTWEIGH PUBLIC INTEREST; CASE AT BAR. — The doctrine of executive privilege applies only to certain types of information of a sensitive character that would be against the public interest to divulge. As held in *Senate v. Ermita*, the doctrine is premised on the fact that certain information must, **as a matter of necessity**, be kept confidential in pursuit of the public interest. Considering that the privilege is an exemption from the obligation to disclose information, the necessity for non-disclosure must be of such high degree as to outweigh public interest. Petitioner miserably failed to demonstrate that the reasons for his non-disclosure far outweigh public interest. He has not sufficiently shown that there is an imperative need to keep confidential his conversations with the President regarding the ZTE-NBN scandal. He failed to show how disclosure of the presidential

conversations would affect the country's military, diplomatic and economic affairs, as he so asserted to the Senate Committees and before this Court. In fact, his counsel admitted that no military secrets were involved in the conversations, only military "concerns." Neither did the conversations necessarily refer to diplomatic secrets, but only to "our relationship in general with a friendly foreign power." These generalized claims do not suffice to justify his refusal to disclosure.

5. ID.; ID.; ID.; ID.; THE PUBLIC'S OPINION, NEGATIVE OR OTHERWISE, SHOULD ENHANCE THE PRESIDENT'S PERFORMANCE OF HER CONSTITUTIONALLY MANDATED DUTIES. — Except for generally claiming that to require petitioner to answer the three questions would have a "chilling effect" on the President, in that she would be apprehensive to consult her advisers for fear of being scrutinized by third parties, petitioner has not established any compelling and demonstrable ground for claiming executive privilege. The following exchange between Chief Justice Reynato S. Puno and petitioner's counsel, Atty. Antonio R. Bautista, is enlightening: CHIEF JUSTICE PUNO: In the functional test, the t(h)rust is to balance what you said as the benefits *versus* the harm on the two branches of government making conflicting claims of their powers and privileges. Now, using the functional test, please tell the Court how the Office of the President will be seriously hampered in the performance of its powers and duties, if petitioner Neri would be allowed to appear in the Senate and answer the three questions that he does not want to answer? ATTY. BAUTISTA: Your Honor, the effect, the chilling effect on the President, she will be scared to talk to her advisers any longer, because for fear that anything that the conversation that she had with them will be opened to examination and scrutiny by third parties, and that includes Congress. And (interrupted) CHIEF JUSTICE PUNO: x x x How will that affect the functions of the President, will that debilitate the Office of the President? ATTY. BAUTISTA: Very much so, Your Honor. x x x Because there are lists of projects, which have to be-which require financing from abroad. And if the President is known or it's made public that she preferred this one project to the other, then she opens herself to condemnation by those who were favoring the other projects which were not prioritized. CHIEF JUSTICE PUNO: Is this not really an important project,

one that is supposed to benefit the Filipino people? So if the President says you prioritize this project, why should the heavens fall on the Office of the President? ATTY. BAUTISTA: Well, there are also other projects which have, which are supported by a lot of people. Like the Cyber Ed project, the Angat Water Dam project. If she is known that she gave low priority to these other projects, she opens herself to media and public criticism, not only media but also in rallies, Your Honor. x x x I do not see how public condemnation and criticism can have an adverse effect on the President's performance of her powers and functions as Chief Executive. In a democracy such as ours, it is only to be expected that official action may be met with negative feedback or even outrage from a disapproving public. If at all, the public's opinion, negative or otherwise, should enhance the President's performance of her constitutionally-mandated duties. It is through open discussion and dialogue that the government better responds to the needs of its citizens and the ends of government better achieved.

6. ID.; ID.; ID.; ID.; THE CONSTITUTION COULD NEVER SANCTION EXECUTIVE PRIVILEGE AS A SHIELD FOR OFFICIAL WRONGDOING. — At this point, it would not be amiss to state that it was petitioner who provided the Senate Committees with information that, prior to the signing of the ZTE-NBN contract, he had told the President of the ₱200M bribery attempt allegedly perpetrated by Chairman Abalos. As admitted by petitioner's counsel during the oral arguments of this case, the allegation, if proven, would constitute a crime under our penal laws. To allow the details of this alleged crime to be shrouded by a veil of secrecy "would permit criminal conspiracies at the seat of government." Needless to say, the Constitution could never sanction executive privilege as a shield for official wrongdoing.

CORONA, *J.*, *concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; INQUIRIES IN AID OF LEGISLATION; THREE-FOLD LIMITATION IN SECTION 21, ARTICLE VI OF THE CONSTITUTION. — Section 21, Article VI regulates the power of Congress to conduct legislative investigations by providing a three-fold limitation: (1) the power must be exercised in aid of legislation; (2) it must be in accordance with

the duly published rules of procedure and (3) the rights of persons appearing in or affected by such inquiries shall be respected.

2. ID.; ID.; ID.; ID.; ID.; FIRST LIMITATION. — The first limitation ensures that no person can be punished for contumacy as a witness unless his testimony is required in a matter which Congress or any of its committees has jurisdiction to inquire into. This is an essential element of the jurisdiction of the legislative body.

3. ID.; ID.; ID.; ID.; ID.; SECOND LIMITATION. — The second limitation means that either House of Congress or any of its committees must follow its duly published rules of procedure. **Violation of the rules of procedure by Congress or any of its committees contravenes due process.**

4. ID.; ID.; ID.; ID.; ID.; THIRD LIMITATION. — The third limitation entails that legislative investigation is circumscribed by the Constitution, particularly by the Bill of Rights. As such, this limitation does not create a new constitutional right. It simply underscores fundamental rights such as the rights against self-incrimination, unreasonable searches and seizures and to demand that Congress observe its own rules as part of due process.

5. ID.; ID.; ID.; ID.; ID.; IN THE ABSENCE OF A RULE OF PROCEDURE ON ANY MATTER WHICH IS THE SUBJECT OF A LEGISLATIVE INQUIRY, ANY ACTION WHICH IMPINGES ON SUBSTANTIAL RIGHTS OF PERSONS WOULD BE UNCONSTITUTIONAL. — In sum, Congress has the inherent power to conduct inquiries in aid of legislation. However, as a condition for the exercise of this power, the Constitution requires Congress to lay down and publish specific and clear rules of procedure. No action which affects the substantial rights of persons appearing in legislative inquiries may be taken unless it is in accordance with duly published rules of procedure. In other words, before substantial rights may be validly affected, Congress or its committees must faithfully follow the relevant rules of procedure relating to it. This will ensure the constitutional intent of respect for the rights of persons appearing in or affected by legislative inquiries. **In the absence of a rule of procedure on any matter which is the subject of a legislative inquiry, any action which impinges on substantial rights of persons would be unconstitutional**.

6. ID.; ID.; ID.; ID.; RULES OF PROCEDURE OF THE SENATE AND RULES OF THE BLUE RIBBON COMMITTEE DO NOT AUTHORIZE RESPONDENT COMMITTEES TO ISSUE AN ORDER TO ARREST PETITIONER NERI. — Under the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee, respondent Committees are authorized only **to detain** a witness found guilty of contempt. On the other hand, **nowhere does the word "arrest" appear in either rules of procedure**. As stated previously, the second constitutional limitation to the power of legislative investigation is the promulgation and publication of rules of procedure that will serve as guidelines in the exercise of that power. Respondent Committees transgressed this constitutional constraint because there is no rule of procedure governing the issuance of an order of arrest. The Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee do not state that respondent Committees have the power to issue an order of arrest. Such omission is fatal to respondent Committees' cause. It negates their claim that the order to arrest Neri is valid, lawful and constitutional.

7. ID.; ID.; ID.; ID.; THE DISTINCTION IS SUBSTANTIAL FOR IT AFFECTS THE FUNDAMENTAL RIGHT TO BE FREE FROM UNWARRANTED GOVERNMENTAL RESTRAINT. — There is a whale of a difference between the power to detain and the power to arrest. To detain means to hold or keep in custody. On the other hand, to arrest means to seize, capture or to take in custody by authority of law. Thus, the power to detain is the power to keep or maintain custody while the power to arrest is the power to take custody. The power to detain implies that the contumacious witness is in the premises (or custody) of the Senate and that he will be kept therein or in some other designated place. In contrast, the power to arrest presupposes that the subject thereof is not before the Senate or its committees but in some other place outside. The distinction is not simply a matter of semantics. It is substantial, not conceptual, for it affects the fundamental right to be free from unwarranted governmental restraint.

8. ID.; ID.; ID.; ID.; THE POWER TO ORDER THE DETENTION OF A CONTUMACIOUS WITNESS CAN NOT BE EXPANDED TO INCLUDE THE POWER TO ISSUE AN ORDER OF ARREST. — Since the Rules of Procedure of the Senate and

the Rules of the Blue Ribbon Committee speak only of a power to order the detention of a contumacious witness, it cannot be expanded to include the power to issue an order of arrest. Otherwise, the constitutional intent to limit the exercise of legislative investigations to the procedure established and published by the Senate or its committees will be for naught.

9. ID.; ID.; ID.; ID.; *SUBPOENA AD TESTIFICANDUM*; NO SANCTION FOR REFUSAL OR FAILURE TO OBEY IN RULES OF PROCEDURE OF THE SENATE AND RULES OF THE BLUE RIBBON COMMITTEE. — Neri was ordered arrested and detained allegedly for contempt because of his refusal or failure to comply with a *subpoena ad testificandum*. However, a careful reading of the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee shows that they do not provide for a sanction on the refusal or failure to obey a *subpoena ad testificandum*. Respondent Committees are authorized to detain a person only in the exercise of their contempt power.

10. ID.; ID.; ID.; ID.; ID.; ID.; DEFICIENCY BECOMES PRONOUNCED WHEN COMPARED TO CONTEMPT PROVISION OF THE RULES OF COURT. — This deficiency becomes all the more pronounced when compared to Section 9, Rule 21 of the Rules of Court: SEC. 9. Contempt. – Failure by any person without adequate cause to obey a subpoena served upon him shall be deemed a contempt of the court from which the subpoena is issued. If the subpoena was not issued by a court, the disobedience thereto shall be punished in accordance with the applicable law or Rule. The contempt provision of Rule 21 expressly penalizes the unwarranted failure to obey a subpoena (whether *ad testificandum* or *duces tecum*) as contempt of court. In contrast, the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee cover only the following acts of a witness before it: disobedience of any committee order including refusal to produce documents pursuant to a *subpoena duces tecum*, refusal to be sworn or to testify or to answer a proper question and giving of false or evasive testimony.

11. ID.; ID.; ID.; ID.; POWER OF CONTEMPT; PROPER SUBJECT OF CONTEMPT POWER IS "ANY WITNESS BEFORE" THE RESPONDENT COMMITTEES. — Pursuant to the Rules of Procedure of the Senate and the Rules of the Blue Ribbon

Committee, the proper subject of the contempt power is "any witness before" the concerned committee(s) of the Senate. This means that the witness must be in attendance or physically present at the legislative inquiry. It is in this context (and this context alone) that the respective provisions of the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee speak of the witness's disobedience of any committee order, refusal to be sworn or to testify or to answer a proper question and giving of false or evasive testimony. Likewise, it is only in accordance with such premise that a witness may be ordered detained.

12. ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — In this case, **Neri was not before the respondent Committees**. That was why respondent Committees ordered his arrest. Indeed, the *subpoena ad testificandum* issued to Neri commanded him to appear and testify before the Blue Ribbon Committee on November 20, 2007. The December 2, 2007 show cause order was issued because he "failed to appear" in the November 20, 2007 hearing while the January 30, 2008 arrest order was issued on account of his "failure to appear and testify."

13. CRIMINAL LAW; *EX POST FACTO* LAW; ORDER HOLDING PETITIONER IN CONTEMPT TANTAMOUNT TO *EX POST FACTO* ACT. — Moreover, while the contempt power of the legislature is *sui generis*, it is analogous to that exercised by courts of justice. As a rule, proceedings against a purported contemnor are commonly treated as **criminal in nature**. This being so, the order holding Neri in contempt for his alleged failure or refusal to obey a *subpoena ad testificandum* notwithstanding the absence of duly promulgated rules of procedure on that matter was tantamount to an *ex post facto* act.

TINGA, *J.*, *separate concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; HEARINGS IN AID OF LEGISLATION; PURPOSE. — The purpose of legislative inquiry is constitutionally and jurisprudentially linked to the function of legislation, *i.e.*, the task of formulating laws. The method of enacting sensible laws necessarily requires a legislature that is well-informed of the factual background behind the intended

legislation. It is for such purpose, morally or politically neutral as it may be, that the function exists as a constitutional principle.

2. ID.; ID.; ID.; ID.; ID.; DO NOT SHARE SAME GOALS AS CRIMINAL TRIAL OR IMPEACHMENT PROCESS.— Contrary as it may be to the public expectation, legislative inquiries do not share the same goals as the criminal trial or the impeachment process. The orientation of legislative inquiries may be remedial in nature, yet they cannot be punitive in the sense that they cannot result in legally binding deprivation of a person's life, liberty or property. No doubt that a legislative inquiry conducted under the glare of klieg lights can end up destroying one's life, livelihood or public reputation – as many suspected American leftists discovered when they were caught in the dragnet of persecution during the McCarthy era – yet such unfortunate results should only incidentally obtain as a result of an inquiry aimed not at specific persons, but at the framework of the laws of the land.

3. ID.; ID.; ID.; ID.; ID.; VITAL TO DRAW DISTINCTIONS BETWEEN LEGISLATIVE INQUIRIES AND CRIMINAL OR IMPEACHMENT TRIALS. — It is vital to draw the distinction between legislative inquiries and the other legal processes, such as impeachment or criminal trials, that are oriented towards imposing sanctions in the name of the State. As the latter processes embody the avenue of the State to impose punishment, the Constitution establishes elaborate procedural safeguards, also subsumed under the principles of due process and equal protection, to assure a fair proceeding before sanction is levied. In contrast, since the end result of a legislative inquiry is not constitutionally intended to be legally detrimental to persons subject of or participatory to the inquiry, the procedural safeguards attached to it are more lenient. The Constitution does require that "[t]he rights of persons appearing in or affected by such inquiries shall be respected," but such expression is less definitive than the rights assured to persons subject to criminal procedure. For example, there is no explicit constitutional assurance that persons appearing before legislative inquiries are entitled to counsel, though Congress in its wisdom may impose such a requirement.

4. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; PRESUMPTIVE PRIVILEGE FOR PRESIDENTIAL

COMMUNICATIONS. — In the United States, perhaps the leading case on executive privilege is *U.S. v. Nixon 418 U.S. 683,* x x x the U.S. Supreme Court acknowledged that there was "a presumptive privilege for Presidential communications," such being "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." That point, which the parties in *Nixon* acceded to without contest, was justified, thus: The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.

5. ID.; ID.; ID.; ID.; IT WOULD BE HIGHLY USEFUL FOR THE COURT TO ACKNOWLEDGE THAT THE PRESUMPTION EXISTS, OTHERWISE THE TRADITIONAL EXERCISE OF FUNCTIONS BY ALL THREE BRANCHES OF GOVERNMENT WILL FALTER. — The existence of a presumption is hardly a foolproof shelter for the president since it can be overturned, as was done in *Nixon*. Still, it would be highly useful for the Court to acknowledge that the presumption exists. Otherwise, the traditional exercise of functions by all three branches of government will falter. If the president is denied the presumption of confidentiality of his communications and correspondence, there is no reason to extend such presumption of confidentiality to executive sessions conducted by Congress, or to judicial deliberations of this Court and all other lower courts. After all, the three branches of government are co-equals.

6. ID.; ID.; ID.; ID.; ID.; PRESUMPTIVE PRIVILEGE CHARACTERIZED AS "GENERIC PRIVILEGE" IN *ERMITA*. — The presumptive privilege attaching to presidential conversations or correspondences falls under what the Court, in *Ermita*, had characterized as "generic privilege," which covers the internal deliberations within the government, including

"intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." In such a case, the privilege attaches not because of the content of the correspondence, but because of the process under which such correspondence has come into existence.

7. ID.; ID.; ID.; LEGISLATIVE DEPARTMENT; PRESENT CLAIM OF EXECUTIVE PRIVILEGE SHOULD BE TESTED AGAINST FUNCTION OF LEGISLATIVE INQUIRY. — Still, just because the claim of executive privilege in this case is invoked as to the contents of presidential conversations with executive officials, we must consider the presumptive privilege extant and favorable to petitioner Neri. There is now need for respondents to demonstrate that this presumptive privilege is outweighed by the constituent functions of its own subject legislative inquiries. The present claim of executive privilege should be tested against the function of the legislative inquiry, which is to acquire insight and information for the purpose of legislation. Simply put, would the divulgence of the sought-after information impede or prevent the Senate from enacting legislation?

8. ID.; ID.; ID.; ID.; ID.; THE RESPONDENTS COULD EASILY PRESUME THE WORST OF THE PRESIDENT IN ENACTING LEGISLATION LINKED TO THE PRESENT INQUIRIES. — I submit, with respect to the three questions asked of petitioner Neri, that the Senate will not be impeded from crafting and enacting any legislation it may link to the present inquiries should the privilege be upheld. **There is no demonstration on the part of respondents that legislation will be rendered necessary or unnecessary should petitioner Neri refuse to answer those questions. If respondents are operating under the premise that the president and/or her executive officials have committed wrongdoings that need to be corrected or prevented from recurring by remedial legislation, the answers to those three questions will not necessarily bolster or inhibit respondents from proceeding with such legislation. They could easily presume the worst of the president in enacting such legislation**. But at bar, respondents failed to demonstrate how the refusal of petitioner Neri to answer the three subject questions would hamper its ability to legislate. As such, the general presumptive privilege that attaches to the conversations of the president with executive officials supersedes the right

of respondents to such information for the purpose of its legislative inquiry.

CHICO-NAZARIO, *J.*, *concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIARY; FINAL ARBITER ON THE QUESTION OF WHETHER OR NOT A BRANCH OF GOVERNMENT OR ANY OF ITS OFFICIALS HAS ACTED WITH GRAVE ABUSE OF DISCRETION. — This Court shall not shirk from its duty, impressed upon it by no less than the Constitution, to exercise its judicial power "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." It was clearly intended by the framers of the Constitution that the judiciary be the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction. And when the Judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments, but only asserts the solemn and sacred obligation entrusted to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which the instrument secures and guarantees to them.

2. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; GRAVE ABUSE OF DISCRETION; DEFINITION.— By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It must be grave abuse of discretion as when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and must be so patent and so gross 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.

3. POLITICAL LAW; CONSTITUTIONAL LAW; REPUBLICAN SYSTEM OF GOVERNMENT; MAIN CHARACTERISTICS.— Our republican system of Government is composed of three independent and co-equal branches, the Executive, Legislative, and Judiciary. One of the fundamental tenets underlying our constitutional system is the principle of separation of powers,

pursuant to which the powers of government are mainly divided into three classes, each of which is assigned to a given branch of the service. The main characteristic of said principle is not, however, this allocation of powers among said branches of the service, but the fact that: 1) each department is independent of the others and supreme within its own sphere; and 2) the powers vested in one department cannot be given or delegated, either by the same or by Act of Congress, to any other department.

4. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; DEFINITION. — Simply put, executive privilege is "the power of the Government to withhold information from the public, the courts, and the **Congress**." It is also defined as "the right of the President and high-level executive branch officers to withhold information from **Congress**, the courts, and ultimately the public." It must be stressed that executive privilege is a right vested in the President which she may validly exercise within her sphere of executive power. The President can validly invoke executive privilege to keep information from the public and even from co-equal branches of the Government, *i.e.*, the Legislature and the Judiciary.

5. ID.; ID.; ID.; ID.; RATIONALE. — A more extensive explanation for the rationale behind the executive privilege can be found in *United States v. Nixon*, to wit: The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. **A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately**. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.

6. ID.; ID.; ID.; ID.; PRESUMPTIVELY PRIVILEGED. — It is clear from the foregoing that executive privilege is not meant to

personally protect the President, but is inherent in her position to serve, ultimately, the public interest. It is not an evil thing that must be thwarted at every turn. Just as acts of the Legislature enjoy the presumption of validity, so must also the acts of the President. Just all other public officers are afforded the presumption of regularity in the exercise of their official functions, then what more the President, the highest Executive official of the land. Hence, when the President claims that certain information is covered by executive privilege, then rightfully, said information must be presumptively privileged.

7. REMEDIAL LAW; EVIDENCE; PRIVILEGED PRESUMPTIONS; BURDEN IS ON RESPONDENT SENATE COMMITTEE TO OVERCOME SAME BY CONTRARY EVIDENCE. — Furthermore, since the information the respondent Senate Committees seek is presumptively privileged, the burden is upon them to overcome the same by contrary evidence.

8. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; HEARINGS IN AID OF LEGISLATION; RESPONDENT SENATE COMMITTEES FAILED TO ESTABLISH THAT THE ABSENCE OF PETITIONER NERI'S ANSWERS TO THREE QUESTIONS FRUSTRATES THE POWER OF THE SENATE TO LEGISLATE. — Respondent Senate Committees present three pending Senate bills for which the investigative hearings are being held: a. Senate Bill No. 1793, introduced by Senator Mar Roxas, entitled "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes." b. Senate Bill No. 1794, introduced by Senator Mar Roxas, entitled "An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes." c. Senate Bill No. 1317, introduced by Senator Miriam Defensor Santiago, entitled "An Act Mandating Concurrence to International Agreements and Executive Agreements." Consistent with the requirement laid down in *Ermita*, petitioner Neri attended the

26 September 2007 investigative hearing on the aforementioned Senate bills, even though he was obviously ill that day, answered all the other questions of the Senators regarding the NBN Project including the attempted bribery upon him, except the three questions for which he invoked executive privilege by order of the President. Respondent Senate Committees failed to establish that petitioner Neri's answers to these three questions are indispensable, or that they are not available from any other source, or that the absence thereof frustrates the power of the Senate to legislate.

9. ID.; ID.; ID.; ID.; RESPONDENT SENATE COMMITTEES UNEXPLAINABLY FAILED TO COMPLY WITH GUIDELINES IN *ERMITA* THAT AN OFFICIAL OF THE EXECUTIVE, SUMMONED TO APPEAR BEFORE IT MUST BE AFFORDED REASONABLE TIME TO INFORM THE PRESIDENT (BY BEING FURNISHED WITH COPIES OF OTHER QUESTIONS STILL TO BE ASKED OF HIM) OF THE POSSIBLE NEED TO INVOKE EXECUTIVE PRIVILEGE. — Respondent Senate Committees lightly brushed aside petitioner Neri's claim of executive privilege with a general statement that such is an unsatisfactory reason for not attending the 20 November 2007 hearing. It likewise precipitately issued the contempt and arrest Order against petitioner Neri for missing only one hearing, the 20 November 2007, despite the explanation given by petitioner Neri, through Executive Secretary Ermita and counsel Atty. Bautista, for his non-appearance at said hearing, and the expression by petitioner Neri of his willingness to return before respondent Senate Committees if he would be furnished with the other questions they would still ask him. Petitioner Neri's request for advance copy of the questions was not unreasonable considering that in *Ermita*, this Court required: It follows, therefore, that when an official is being summoned by Congress on a matter which, in his own judgment, might be covered by executive privilege, he must be afforded *reasonable time* to inform the President or the Executive Secretary of the possible need for invoking the privilege. This is necessary in order to provide the President or Executive Secretary with fair opportunity to consider whether the matter indeed calls for a claim of executive privilege. **If, after the lapse of that reasonable time, neither the President nor the Executive Secretary invokes the privilege, Congress is no longer bound to respect the failure**

of the official to appear before Congress and may then opt to avail of the necessary legal means to compel his appearance. Yet the respondent Senate Committees unexplainably failed to comply therewith.

10. ID.; ID.; BILL OF RIGHTS; PROCEDURAL DUE PROCESS; A WITNESS SHOULD BE INFORMED OF RULES GOVERNING HIS APPEARANCE AND TESTIMONY BEFORE RESPONDENT SENATE COMMITTEES SO THAT HE MAY BE AWARE OF ANY DEVIATION FROM ESTABLISHED PROCEDURE. — Another point militating against the issuance of the contempt and arrest Order is its issuance even without quorum and the required number of votes in the respondent Senate Committees. During oral arguments, Senator Francis N. Pangilinan asserted that whatever infirmities at the committee level were cured by the 2/3 votes of the entire Senate favoring the issuance of the contempt and arrest Order against petitioner Neri, since the committee is a mere agent of the entire chamber. In their Memorandum, respondent Senate Committees no longer addressed said issue contending that petitioner Neri never assailed the procedure by which the contempt and arrest Order was issued. While this Court may not rule on an issue not raised in the Petition, it may take note of the apparent lack of clear and established rules for the issuance by the Senate of a contempt and arrest Order against a recalcitrant witness in hearings conducted in aid of legislation. Senators may very well be familiar with the practice or tradition of voting in such cases, but not necessarily the witness against whom the contempt and arrest Order may be issued and who shall suffer the loss of his liberty. Procedural due process requires that said witness be informed of the rules governing his appearance and testimony before the Senate Committees, including the possible issuance of a contempt and arrest Order against him, because only then can he be aware of any deviation from the established procedure and of any recourse available to him.

11. ID.; ID.; LEGISLATIVE DEPARTMENT; HEARINGS IN AID OF LEGISLATION; RESPONDENT SENATE COMMITTEES ARE WITHOUT JURISDICTION TO GATHER EVIDENCE OF A CRIME. — Finally, much has been said about this Court not allowing the executive privilege to be used to conceal a criminal act. While there are numerous suspicions and allegations of crimes committed by public officers in the NBN Project, these

remain such until the determination by the appropriate authorities. Respondent Senate Committees are definitely without jurisdiction to determine that a crime was committed by the public officers involved in the NBN Project, for such authority is vested by the Constitution in the Ombudsman. Again, it must be emphasized, that the Senate's power of inquiry shall be used to obtain information in aid of legislation, and not to gather evidence of a crime, which is evidently a prosecutorial, not a legislative, function.

VELASCO, JR., *J.*, *separate concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; DEFINITION. — In the Philippine setting, the term "executive privilege" means the power of the President to withhold certain types of information from the courts, the Congress, and ultimately the public. Apart from diplomatic and military secrets and the identity of government informers, another type of information covered by executive privilege relates to information about internal deliberations comprising the process by which government decisions are reached or policies formulated.

2. ID.; ID.; ID.; ID.; BASIS FOR PRIVILEGE. — *U.S. v. Nixon* (418 U.S. 683) explains the basis for the privilege in the following wise: The expectation of a President to the confidentiality of his conversation and correspondences, like the claim of confidentiality of judicial deliberations x x x has all the values to which we accord deference for the privacy of all citizens. x x x A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express privately. These are the considerations justifying a presumptive privilege for Presidential communications.

3. ID.; ID.; LEGISLATIVE DEPARTMENT; HEARING IN AID OF LEGISLATION; COMMITTEE HAS POWER TO REQUIRE THE WITNESS TO ANSWER ANY QUESTION PERTINENT TO SUBJECT OF INQUIRY AND PUNISH AN UNWILLING WITNESS FOR CONTEMPT. — What was once an implicit authority of Congress and its committees to conduct hearings in aid of legislation—with the concomitant power necessary and proper for its effective discharge—is now explicit in the 1987 Constitution. And this power of inquiry carries with it

the authority to exact information on matters which Congress is competent to legislate, subject only to constitutional restrictions. The Court, in *Arnault v. Nazareno*, 87 Phil. 29, acknowledged that once an inquiry is established to be within the jurisdiction of a legislative body to make, the investigation committee has the power to require the witness to answer any question pertinent to the subject of the inquiry and punish a recalcitrant or unwilling witness for contempt.

4. ID.; ID.; ID.; ID.; ID.; CRUCIAL SAFEGUARDS THAT CIRCUMSCRIBE THE LEGISLATIVE POWER OF INQUIRY.— But *Bengson v. Senate Blue Ribbon Committee* (203 SCRA 767) made it abundantly clear that the power of Congress to conduct inquiries in aid of legislation is not "absolute or unlimited." Section 21, Article VI of the Constitution providing: The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected. establishes what we tagged in *Senate v. Ermita (Ermita)* as "crucial safeguards" that circumscribe the legislative power of inquiry. The provision thus requires the inquiry to: (1) properly be **in aid of legislation,** else, the investigating committee acts beyond its power; without a valid legislative purpose, a congressional committee is without authority to use the compulsory process otherwise available in the conduct of inquiry in aid of legislation; (2) be done in accordance with duly published rules of procedure, irresistibly implying the constitutional infirmity of an inquiry conducted without or in violation of such published rules; and (3) respect the rights of persons invited or subpoenaed to testify, such as their right against self-incrimination and to be treated in accordance with the norms individuals of good will observe.

5. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; STEPS TO FOLLOW IN CLAIMING EXECUTIVE PRIVILEGE.— In *Ermita*, the Court, citing US case law, outlined the steps to follow in claiming executive privilege. Foremost of these are: (1) it must be clearly asserted, which petitioner did, and by the Government to which the privilege belongs; (2) there must be a formal claim of privilege, lodged by the head of the department having control over the matter; and 3) the statement of the claim must be specific and the claim must state

the reasons for withholding the information. Save for some broad statements about the need to protect military, diplomatic, and national security secrets, all the requirements respecting the proper manner of making the claim have satisfactorily been met. As we explained in *Ermita*, the Senate cannot require the executive to state the reasons for the claim with such particularity as to veritably compel disclosure of the information which the privilege is designed to protect in the first place.

6. ID.; ID.; LEGISLATIVE DEPARTMENT; HEARINGS IN AID OF LEGISLATION; GUIDELINES FOR EXACTING FAITHFUL COMPLIANCE FROM SUMMONED OFFICIALS CLAIMING EXECUTIVE PRIVILEGE OVER THE MATTER SUBJECT OF INQUIRY. — It may be stated at this juncture that respondents committees have certain obligations to comply with before they can exact faithful compliance from a summoned official claiming executive privilege over the matter subject of inquiry. Again, *Ermita* has laid out the requirements to be met under that given scenario. They are, to me, not mere suggestions but mandatory prescriptions envisaged as they are to protect the rights of persons appearing or affected by the congressional inquiries. These requirements are: *First*, the invitation or subpoena shall indicate the possible questions to be asked; *second*, such invitation or subpoena shall state the proposed statute which prompted the need for the inquiry; and *third*, that the official concerned must be given reasonable time to apprise the President or the Executive Secretary of the possible need for invoking executive privilege. For the purpose of the first requirement, it would be sufficient if the person invited or subpoenaed is, at least, reasonably apprised and guided by the particular topics to be covered as to enable him to properly prepare. The questions need not be couched in precise details or listed down to exclude all others.

7. ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — Annex "B" of the Petition, or the subpoena *ad testificandum* dated November 13, 2007 addressed to the petitioner literally makes no reference to any intended legislation. It did not also accord him with a fair notice of the questions likely to be asked. As it were, the subpoena contained nothing more than a command for the petitioner to appear before the Blue Ribbon Committee at a stated date, then and there to "testify on what [he] know[s] relative to the subject matter under inquiry." And lest it be overlooked,

it is not clear from Annex "B" what matters relating to a proposed bill, if there be any, cannot be addressed without information as to the specifics of the conversation between the President and the petitioner. In net effect, the subpoena thus issued is legally defective, issued as it were in breach of what to me are mandatory requirements. Accordingly, the non-compliance with the subpoena is, under the premises, justifiable. Similarly, respondent committees are precluded from imposing sanctions against the person, petitioner in this instance, thus subpoenaed should the latter opt not to comply with the subpoena.

8. ID.; ID.; ID.; ID.; ORDER FOR PETITIONER NERI'S ARREST; AUTHORITY EMANATES FROM *RULES OF PROCEDURE GOVERNING INQUIRIES IN AID OF LEGISLATION,* NOT *RULES OF THE SENATE*. — The Court is very much aware that Sec. 3(c) of the *Rules of the Senate* empowers the Senate President to "sign x x x orders of arrest." It cannot be overemphasized, however, that the order for the petitioner's arrest was a joint committee action which naturally ought to be governed by the *Rules of Procedure Governing Inquiries in Aid of Legislation*, not the *Rules of the Senate*. It would be a sad commentary if Senate committees can choose to ignore or apply their very own rules when convenient, given that violation of these rules would be an offense against due process.

9. ID.; ID.; ID.; ID.; ID.; ID.; ASSAILED ORDER; NOT APPROVED BY REQUIRED MAJORITY VOTE OF RESPECTIVE MEMBERS OF EACH OF THE THREE INVESTIGATING COMMITTEES. — But conceding for the nonce the authority of the respondents to order an arrest, as an incident to its contempt power, to be effected by their own organic security complement, the assailed order would still be invalid, the same not having been approved by the required majority vote of the respective members of each of the three investigating committees. Respondents veritably admitted the deficiency in votes when they failed to document or otherwise prove—despite a commitment to do so during the oral arguments—the due approval of the order of citation and arrest. And unable to comply with a promised undertaking, they offer the lame excuse that the matter of approval of the citation and arrest order is a non-issue.

10. ID.; ID.; ID.; ID.; ID.; ID.; ID.; INFIRM AS *SENATE RULES OF PROCEDURE GOVERNING INQUIRIES IN AID OF LEGISLATION* DOES NOT AUTHORIZE THE ARREST OF AN UNWILLING WITNESS NOT *BEFORE* IT.— The perceived obstructive defiance of the subpoena (Annex "*B*", Petition) triggered the issuance of the assailed contempt and arrest order. It behooves the Court to now strike the said order down, not only because its existence is the by-product of or traceable to, a legally infirm subpoena, but also because the *Senate Rules of Procedure Governing Inquiries in Aid of Legislation* does not authorize the arrest of unwilling or reluctant witness not **before** it. Surely, respondents cannot look to Sec. 18 of the rules of procedure governing legislative inquiries as the arrest-enabling provision since it only speaks of contempt in the first place. Sec. 18 reads: **Sec. 18. Contempt.** The Committee, by a **majority vote** of all its members, may punish for **contempt** any witness **before it** who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members. xxx Such witness may be ordered by the Committee to be detained in such place at it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents or to be sworn or to testify, or otherwise purge himself of that contempt.

NACHURA, *J.*, *separate concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; CONSTITUTIONALLY-RECOGNIZED "PRESUMPTIVE PRIVILEGE, EXPLAINED." — *U.S. v. Nixon*, the leading case on executive privilege in the United States, acknowledges a constitutionally-recognized "presumptive privilege" on the confidentiality of presidential communications. The rationale for such privilege is expressed in the following disquisition: The expectation of a President to the confidentiality of his conversations and correspondences, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens, and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping polices and making

decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.

2. ID.; ID.; ID.; ID.; ID.; IT MUST BE FORMALLY CLAIMED OR ASSERTED BY THE APPROPRIATE EXECUTIVE OFFICIAL.— However, it is simply a generalized privilege of confidentiality and does not enjoy the same degree of unqualified acceptance as the governmental privilege against public disclosure of state secrets regarding military, diplomatic and other national security matters. Further, it must be formally claimed or asserted by the appropriate executive official. As held in *U.S. v. Reynolds:* The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by the officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

3. ID.; ID.; ID.; ID.; ID.; MUST YIELD TO REQUIREMENTS IN THE FAIR ADMINISTRATION OF CRIMINAL JUSTICE.— In *U.S. v. Nixon*, it is abundantly clear that when the general privilege of confidentiality of Presidential communications notably made in the performance of the President's duties and responsibilities is ranged against the requirements in the fair administration of criminal justice, executive privilege must yield. According to the U.S. Supreme Court, the right to the production of evidence at a criminal trial has constitutional dimensions. The high tribunal declared: The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of criminal prosecution. On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the

basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal case.

4. ID.; ID.; ID.; ID.; RIGHT TO PRODUCTION OF RELEVANT EVIDENCE IN CIVIL PROCEEDINGS DOES NOT HAVE THE SAME CONSTITUTIONAL DIMENSIONS AS CRIMINAL PROCEEDINGS. — In *Cheney v. U.S. District Court for the District of Columbia*, where the United States District Court for the District of Columbia entered orders permitting discovery against Vice-President Cheney, other federal officials and members of the National Energy Policy Development Group (NEPDG) on the basis of the allegation of a public interest organization and environmental group that NEPDG was subject to procedural and disclosure requirements of the Federal Advisory Committee Act (FACA), the U.S. Supreme Court stressed the disparity between criminal and civil judicial proceedings in so far as the need for invocation of executive privilege with sufficient specificity is concerned. In reversing the Court of Appeals, the U.S. Supreme Court declared: x x x The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. x x x In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be "expansively construed, for they are in derogation of the search for truth." The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to the production of relevant evidence in civil proceedings does not have the same "constitutional dimensions."

5. ID.; ID.; LEGISLATURE; INQUIRIES IN AID OF LEGISLATION; THE COMMITTEE HAS TO SHOW WHETHER SUBPOENAED MATERIALS ARE CRITICAL TO THE PERFORMANCE OF ITS LEGISLATIVE FUNCTIONS.— As to the conflict between the confidentiality interest invoked by the President and congressional demands for information in a legislative investigation, there is a close parallel between the instant case and *Senate Select Committee on Presidential Campaign Activities v. Nixon*. In that case, the Senate Committee was created by resolution of the Senate to investigate "illegal, improper or unethical activities" occurring in connection with the presidential campaign and election of 1972, and "to determine … the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." In testimony before the Committee, Alexander Butterfield, a former Deputy Assistant to the President, stated that certain presidential conversations, presumably including those which Mr. Dean and others had previously testified to, had been recorded on electronic tapes. The Committee thereupon attempted informally to obtain certain tapes and other materials from the President. When these efforts proved unsuccessful, the Committee issued the subpoena subject of the case. x x x The Court then denied the prayer of the Select Committee in this wise: We find that the Select Committee has failed to make the requisite showing. In its papers below and in its initial briefs to this Court, the Committee stated that it seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to "the extent of malfeasance in the executive branch," and, most importantly, the possible involvement of the President himself. The Committee has argued that the testimony before it makes out "a *prima facie* case that the President and his closest associates have been involved in criminal conduct," that the "materials bear on that involvement," and that these facts alone must defeat any presumption of privilege that might otherwise prevail. It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigation by the proper governmental institutions into possible criminal wrongdoing. x x x But under *Nixon v. Sirica*, the showing required to overcome

the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions. x x x The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or an institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in *Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. We see no comparable need in the legislative process, at least, not in the circumstances of this case.

6. ID.; ID.; ID.; ID.; ID.; CASE AT BENCH.— Applying the foregoing decisions to the case at bench, it is my view that the respondents' need for disclosure of the information sought from the petitioner does not at all approximate the "constitutional dimensions" involved in criminal proceedings. While it is true that the Senate Committees, when engaged in inquiries in aid of legislation, derive their power from the Constitution, this is not a situation analogous to that in *Nixon*, where the court's ability to fulfill its constitutional mandate to resolve a case or

controversy within its jurisdiction hinged on the availability of certain indispensable information. Rather, as in *Senate Select Committee*, this is a situation where Senate Committees insist on obtaining information from the petitioner, without at all any convincing showing how and why the desired information "is demonstrably critical to the responsible fulfillment of the Committees' functions." Indeed, respondents have not adequately explained how petitioner's answers to the three questions are crucial to the task of crafting the intended legislation given the inescapable fact that numerous other persons, from the ranks of government and the private sector, had been called to and had already testified at the respondent's hearings. It is not uncommon for some legislative measures to be fashioned on the strength of certain assumptions that may have no solid factual precedents. In any event, the respondents have not demonstrated that the information sought is unqualifiedly necessary for a legitimate legislative purpose, or that the intended legislation would be stillborn without petitioner's responses to the three questions. The respondents have likewise failed to show that the information needed for legislation cannot be obtained from sources other than the petitioner. In fine, the presumption was not successfully rebutted.

7. ID.; ID.; ID.; ID.; IF *U.S. V. NIXON* IS TO BE THE COURT'S ANCHOR, THE REQUIREMENTS OF NECESSITY AND SPECIFICITY ARE DEMANDED LIKEWISE OF THE ONE WHO DESIRES DISCLOSURE.— In *Nixon*, the criminal subpoenas were required to comply with the exacting standards of **relevancy, admissibility and specificity**. As declared by the U.S. Supreme Court: Upon invocation of the claim of privilege by the President to whom subpoena *duces tecum* had been directed, it was the duty of the district court to treat the subpoenaed material as presumptively privileged and to require the special prosecutor to demonstrate that the presidential material was essential to justice of the pending criminal case. Thus, the Court addressed the issue of executive privilege only after it was satisfied that the special prosecutor had adequately met these demanding requirements. In the present controversy, no such standards were set, and none was observed. In lieu of a showing of a specific necessity for disclosure, the respondent Committees continue to insist on the primacy of

its power of legislative inquiry, upon a claim that to uphold the presumptive privilege is an impermissible infringement of the legislative power, and to permit the withholding of the desired information will result in the emasculation of the Senate as a legislative body. Of course, this is accompanied by the invocation of the general constitutional principles of transparency, right to information, due process, public office is a public trust, among others, and the unbending adherence to the pronouncement in *Senate v. Ermita* that: "A claim of privilege, being a claim of exemption from an obligation to disclose information, must, therefore, be clearly asserted." But if *U.S. v. Nixon* is to be our anchor, then we must concede that the requirements of necessity and specificity are demanded not only of he who claims the presumptive privilege, but also of the one who desires disclosure. And to our mind, the respondents have fallen short of these requirements.

8. ID.; ID.; ID.; ID.; CANNOT BE USED TO SHIELD CRIMINAL ACTIVITY OR WRONGDOING; NOT FUNCTION OF RESPONDENTS-SENATE COMMITTEES TO INVESTIGATE CRIMINAL ACTIVITY. — Then, there is the undeniable imperative that executive privilege cannot be used to shield criminal activity or wrongdoing. Again, we must draw reason from extant jurisprudence. *Senate Select Committee* explicates the point which the respondents are missing: But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions. It is not the function of the respondents to investigate criminal activity; this is a responsibility of other agencies, such as the Office of the Ombudsman. This Court may even take judicial notice of the fact that the Ombudsman, upon a request of the President, has already commenced a criminal investigation into the subject

of the legislative inquiry, the NBN deal. Presumably, the Ombudsman has already summoned the petitioner to give testimony therein, and by analogy with *Nixon v. Sirica*, petitioner cannot withhold information in that investigation by invoking executive privilege.

9. ID.; ID.; LEGISLATURE; INQUIRIES IN AID OF LEGISLATION; COURT SUGGESTED GUIDELINES IN *SENATE V. ERMITA*; NOT COMPLIED WITH; SHADOW CAST ON REGULARITY OF QUESTIONED INQUIRY.— Finally, it should not escape this Court that on oral argument, the respondents were asked if they had complied with the following guidelines suggested in *Senate v. Ermita*, as a way of avoiding the pitfalls in *Bengzon v. Senate Blue Ribbon Committee*: One possible way for Congress to avoid such a result as occurred in *Bengzon* is to indicate in its invitations to the public officials concerned or to any person for that matter, the possible needed statute which prompted the need for the inquiry. Given such statements in its invitations, along with the usual indication of the subject of the inquiry and the questions relative to and in furtherance thereof, there would be less room for speculation on the part of the person invited on whether the inquiry is in aid of legislation. In reply, the respondents admitted that they did not. This admission has cast a shadow on the regularity of the inquiry such that even the main argument of respondents could fall.

BRION, *J.*, *separate concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; PROVISIONS THAT LEVEL THE INDIVIDUAL'S PLAYING FIELD AS AGAINST THE GOVERNMENT AND ITS INHERENT AND EXPRESS POWERS. — On the *processes* aspect, I conclude that the Senate processes were attended by fatal infirmities that should invalidate the contempt citation and the order of arrest. Even allowing for the attendant tension, the inter-branch lack of cooperation, and Neri's admitted absences, the Senate Committees' arrest order was a misplaced move from the strictly legal point of view and one that was out of proportion to the attendant circumstances under the standards of common human experience. This view proceeds from no less than the 1987 Constitution that expressly provides that *"The rights of persons appearing in or affected by such inquiries shall be*

respected." Interestingly, this Section as a whole seeks to strengthen the hand of the Legislature in the exercise of inquiries in aid of legislation. In so doing, however, it makes the above reservation for the individual who may be at the receiving end of legislative might. What these "rights" are the Section does not expressly say, but these rights are recognized by jurisprudence and cannot be other than those provided under the Bill of Rights – the constitutional provisions that level the individual's playing field as against the government and its inherent and express powers.

2. ID.; ID.; LEGISLATIVE DEPARTMENT; INQUIRIES IN AID OF LEGISLATION; RULES GOVERNING INQUIRIES IN AID OF LEGISLATION; SECTION 8 DOES NOT AUTHORIZE COMMITTEES TO ISSUE A WARRANT OF ARREST; POWER IS GIVEN TO SENATE PRESIDENT PURSUANT TO SECTION 3, RULE III OF THE RULES OF THE SENATE. — Asked about these numbers, Senator Pangilinan as Majority Floor Leader could only state that any defect in the committee voting had been cured because the sixteen (16) senators who voted, or two-thirds of the Senate, effectively signed for the Senate in plenary session. The Order of arrest, however, was issued in the names of the three participating committees, and was signed by the sixteen (16) senators as committee members, either regular or *ex-oficio*, and not as senators acting in plenary. Furthermore, Section 18 of the Rules Governing Inquiries in Aid of Legislation, does not authorize the committees to issue a warrant of arrest against a witnes who fails to obey a *subpoena ad testificandum.* This power is vested solely by Rule III Section 3 of the Rules of the Senate on the Senate President. While Senate President Manny Villar did sign the arrest order together with the members of the three (3) participating committees, there still appeared no valid basis for his action for lack of effective and valid supporting committee action authorizing the order of arrest; the signatures of the sixteen (16) senators were mere unintended results of their respective participation in the investigating committees, and did not reflect their intent to sign as senators in plenary session. The contempt citation and order of arrest therefore do not have any basis in effective committee and Senate actions and cannot thus stand as valid.

3. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; CRITICAL IS FACT OF CONVERSATION.— The Senate

Committees' apparent conclusion that the questions – both the expressly cited and the related follow-ups – are not covered by executive privilege appears to miss the point of the letter of Secretary Ermita when he claimed the privilege for *conversations and correspondence of the President in the exercise of her executive and policy decision making*. Although Secretary Ermita stated that the information might impair diplomatic as well as economic relations with the People's Republic of China, the thrust of the claimed privilege is not so much the "content" of the conversation or correspondence, but the fact of conversation in the course of executive and policy decision making. In other words, it is not necessary for the conversation or correspondence to contain diplomatic, trade or military secret as these matters are covered by their own reasons for confidential treatment. What is material or critical is *the fact of conversation or correspondence in the course of official policy or decision making*; privilege is recognized to afford the President and her executives the widest latitude in terms of freedom from present and future embarrassment in their discussions of policies and decisions. This narrow exception to the rule on disclosure and transparency ultimately redounds to the public interest in terms of the quality and timeliness of executive policies and decisions and, in this sense, is not anathema to other constitutional guarantees relating to the people's right to know and public accountability. Like police and other inherent powers of government, it may seemingly give the government a strong hand but in the end is best for the common good. Thus, these types of Presidential conversations are presumed privileged once it is established that they refer to official policy or decision making. The operative words for the presumption to arise are *"official policy or decision making."*

4. ID.; ID.; ID.; ID.; PRIVILEGE CAN NOT BE USED TO SHIELD CRIME, AS DISCLOSURE WILL THEN SERVE THE HIGHER PURPOSE OF BRINGING INJUSTICE TO LIGHT.— To be sure, *the presumption is not absolute* as the purpose is not to shield the President from any and all types of inquiries. Where a higher purpose requiring disclosure is present and cited in the proper proceeding, then the privilege must fall and disclosure can be compelled. As the oral arguments on the case showed, all parties are agreed that the privilege cannot be used to shield

crime as disclosure will then serve the higher purpose of bringing injustice to light.

5. ID.; ID.; ID.; ID.; ID.; MANTLE OF PRIVILEGE MUST REMAIN UNLESS IT CAN BE SHOWN IN A PROPER PROCEEDING, THAT THE PRESIDENTIAL CONVERSATION RELATED TO HER INVOLVEMENT IN, KNOWLEDGE OF OR COMPLICITY IN A CRIME. — Unless and until it can therefore be shown *in the proper proceeding* that the Presidential conversation related to her involvement in, knowledge of or complicity in a crime, or where the inquiry occurs in the setting of official law enforcement or prosecution, then the mantle of privilege must remain so that disclosure cannot be compelled. This conclusion is dictated by the requirement of order in the delineation of boundaries and allocation of governmental responsibilities. The "proper" proceeding is not necessarily in an inquiry in aid of legislation since the purpose of bringing crime to light is served in proceedings before the proper police, prosecutory or judicial body, not in the halls of congress in the course of investigating the effects of or the need for current or future legislation.

CARPIO, *J.*, *dissenting and concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; DEFINITION. — Executive privilege is the implied constitutional power of the President to withhold information requested by other branches of the government. The Constitution does not expressly grant this power to the President but courts have long recognized implied Presidential powers if "necessary and proper" in carrying out powers and functions expressly granted to the Executive under the Constitution. In the United States, executive privilege was first recognized as an implied constitutional power of the President in the 1973 case of *United States v. Nixon,* 418 U.S. 683, U.S. Presidents, however, have asserted executive privilege since the time of the first President, George Washington. In this jurisdiction, several decisions have recognized executive privilege starting with the 1995 case of *Almonte v. Vasquez*, 314 Phil. 150, and the most recent being the 2002 case of *Chavez v. Public Estates Authority,* 433 Phil. 506, and the 2006 case of *Senate v. Ermita,* 488 SCRA 1. Executive privilege is rooted in the separation of powers. Executive privilege is an implied

constitutional power because it is necessary and proper to carry out the express constitutional powers and functions of the Executive free from the encroachment of the other co-equal and co-ordinate branches of government. Executive privilege springs from the supremacy of each branch within its own assigned area of constitutional powers and functions.

2. ID.; ID.; ID.; ID.; WITH RESPECT TO MILITARY AND NATIONAL SECURITY SECRETS. — As Commander-in-Chief of the Armed Forces and as Chief Executive, the President is ultimately responsible for military and national security matters affecting the nation. In the discharge of this responsibility, the President may find it necessary to withhold sensitive military and national security secrets from the Legislature or the public.

3. ID.; ID.; ID.; ID.; WITH RESPECT TO DIPLOMATIC SECRETS.— As the official in control of the nation's foreign service by virtue of the President's control of all executive departments, bureaus and offices, the President is the chief implementer of the foreign policy relations of the State. The President's role as chief implementer of the State's foreign policy is reinforced by the President's constitutional power to negotiate and enter into treaties and international agreements. In the discharge of this responsibility, the President may find it necessary to refuse disclosure of sensitive diplomatic secrets to the Legislature or the public. Traditionally, states have conducted diplomacy with considerable secrecy. There is every expectation that a state will not imprudently reveal secrets that its allies have shared with it.

4. ID.; ID.; ID.; ID.; WITH RESPECT TO PRESIDENTIAL COMMUNICATIONS. — There is also the need to protect the confidentiality of the internal deliberations of the President with his Cabinet and advisers. To encourage candid discussions and thorough exchange of views, the President's communications with his Cabinet and advisers need to be shielded from the glare of publicity. Otherwise, the Cabinet and other presidential advisers may be reluctant to discuss freely with the President policy issues and executive matters knowing that their discussions will be publicly disclosed, thus depriving the President of candid advice.

5. ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — The three questions that Executive Secretary Ermita claims are covered by executive

privilege, if answered by petitioner, will not disclose confidential Presidential communications. Neither will answering the questions disclose diplomatic secrets. Counsel for petitioner *admitted* this during the oral arguments in the following exchange: ASSOCIATE JUSTICE CARPIO: Going to the first question x x x whether the President followed up the NBN project, is there anything wrong if the President follows up with NEDA the status of projects in government x x x, is there anything morally or legally wrong with that? ATTY. LANTEJAS: There is nothing wrong, Your Honor, because (interrupted) ASSOCIATE JUSTICE CARPIO: That's normal. ATTY. LANTEJAS: That's normal, because the President is the Chairman of the NEDA Board, Your Honor. ASSOCIATE JUSTICE CARPIO: Yes, so there is nothing wrong. So why is Mr. Neri afraid to be asked this question? ATTY. LANTEJAS: I just cannot (interrupted) ASSOCIATE JUSTICE CARPIO: You cannot fathom? ATTY. LANTEJAS: Yes, Your Honor. ASSOCIATE JUSTICE CARPIO: You cannot fathom. The second question, were you dictated to prioritize the ZTE [contract], is it the function of NEDA to prioritize specific contract[s] with private parties? No, yes? ATTY. LANTEJAS: The prioritization, Your Honor, is in the (interrupted). ASSOCIATE JUSTICE CARPIO: Project? ATTY. LANTEJAS: In the procurement of financing from abroad, Your Honor. ASSOCIATE JUSTICE CARPIO: Yes. The NEDA will prioritize a project, housing project, NBN project, the Dam project, but never a specific contract, correct? ATTY. LANTEJAS: Not a contract, Your Honor. ASSOCIATE JUSTICE CARPIO: This question that Secretary Neri is afraid to be asked by the Senate, he can easily answer this, that NEDA does not prioritize contract[s], is that correct? ATTY. LANTEJAS: It is the project, Your Honor. ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question? ATTY. LANTEJAS: I cannot, I cannot fathom. Your Honor. ASSOCIATE JUSTICE CARPIO: You cannot fathom also? ATTY. LANTEJAS: Yes, Your Honor. ASSOCIATE JUSTICE CARPIO: But is there anything wrong if the President will tell the NEDA Director General, you prioritize this project, is there anything legally or morally wrong with that? ATTY. LANTEJAS: There is nothing wrong with that, Your Honor. ASSOCIATE JUSTICE CARPIO: There is nothing [wrong]. It happens all the time? ATTY. LANTEJAS: The NEDA Board, the Chairman of the NEDA Board, yes, she can. ASSOCIATE

JUSTICE CARPIO: [S]he can always tell that? ATTY. LANTEJAS: Yes, Your Honor. ASSOCIATE JUSTICE CARPIO: Okay. Let's go to the third question, whether the President said, to go ahead and approve the project after being told about the alleged bribe. Now, x x x it is not the NEDA Director General that approves the project, correct? ATTY. LANTEJAS: No, no, Your Honor. ASSOCIATE JUSTICE CARPIO: It is the (interrupted) ATTY. LANTEJAS: It is the NEDA Board, Your Honor. ASSOCIATE JUSTICE CARPIO: The NEDA Board headed by the President. ATTY. LANTEJAS: Yes, Your Honor. ASSOCIATE JUSTICE CARPIO: So this question, is not correct also, x x x whether the President said to Secretary Neri to go ahead and approve the project? Secretary Neri does not approve the project, correct? ATTY. LANTEJAS: He's just the Vice Chairman, Your Honor. ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question? ATTY. LANTEJAS: I cannot tell you, Your Honor. ASSOCIATE JUSTICE CARPIO: You cannot fathom also? ATTY. LANTEJAS: Yes, Your Honor. ASSOCIATE JUSTICE CARPIO: You cannot fathom also. ATTY. LANTEJAS: Yes, Your Honor. Petitioner's counsel admits that he "cannot fathom" why petitioner refuses to answer the three questions. Petitioner's counsel admits that the three questions, even if answered by petitioner, will not disclose confidential Presidential discussions or diplomatic secrets. The invocation of executive privilege is thus unjustified.

6. ID.; ID.; ID.; ID.; NOT ABSOLUTE. — Executive privilege, however, is not absolute. The interest of protecting military, national security and diplomatic secrets, as well as Presidential communications, must be weighed against other constitutionally recognized interests. There is the declared state policy of full public disclosure of all transactions involving public interest, the right of the people to information on matters of public concern, the accountability of public officers, the power of legislative inquiry, and the judicial power to secure testimonial and documentary evidence in deciding cases.

7. ID.; ID.; ID.; ID.; ID.; BALANCING OF INTERESTS BASED ON FACTUAL CIRCUMSTANCES OF EACH CASE IS A FUNCTION OF THE COURTS. — The balancing of interests – between executive privilege on one hand and the other competing constitutionally recognized interests on the other hand - is a function of the courts. The courts will have to decide

the issue based on the factual circumstances of each case. This is how conflicts on executive privilege between the Executive and the Legislature, and between the Executive and the Judiciary, have been decided by the courts.

8. ID.; ID.; ID.; ID.; MUST BE EXERCISED IN PURSUANCE OF OFFICIAL POWERS AND FUNCTIONS, NOT IN HIDING A CRIME OR PRIVATE MATTERS.— Executive privilege must be exercised by the President in pursuance of **official** powers and functions. Executive privilege cannot be invoked to hide a crime because the President is neither empowered nor tasked to conceal a crime. On the contrary, the President has the constitutional duty to enforce criminal laws and cause the prosecution of crimes. Executive privilege cannot also be used to hide private matters, like private financial transactions of the President. Private matters are those not undertaken pursuant to the lawful powers and official functions of the Executive. However, like all citizens, the President has a constitutional right to privacy. In conducting inquiries, the Legislature must respect the right to privacy of citizens, including the President's.

9. ID.; ID.; ID.; ID.; ID.; CASE AT BAR.— Executive privilege can never be used to hide a crime or wrongdoing, even if committed by high government officials. Executive privilege applies only to protect **official** acts and functions of the President, never to conceal illegal acts by anyone, not even those of the President. During the oral arguments on 4 March 2008, **counsel for petitioner admitted that executive privilege cannot be invoked to hide a crime**. Counsel for petitioner also *admitted* that petitioner and the President discussed a scandal, and that the "**scandal was about bribery**." Thus: JUSTICE CARPIO: Counsel, in your petition, paragraph 7.03, x x x – you are referring to the discussions between Secretary Neri and the President and you state: - ["]This discussion dwelt on the impact of the bribery scandal involving high government officials on the countries diplomatic relations and economic and military affairs and the possible loss of confidence of foreign investors and lenders in the Philippines.["] You stated the same claim also in your letter of 29 November 2007 to the Senate, is that correct? ATTY. BAUTISTA: That is true, Your Honor. JUSTICE CARPIO: **Now, can Executive Privilege be invoked to hide a crime or a wrongdoing on the part of government officials?** ATTY. BAUTISTA: **Definitely not, Your Honor.** JUSTICE

CARPIO: x x x Now, you are saying that the discussions between the President and Secretary Neri that you claim[x] to be privilege[d] refer to bribery scandal involving government officials. So, you are admitting that there is a crime here? ATTY. BAUTISTA: Only the scandal, Your Honor, not the crime. JUSTICE CARPIO: But you are saying bribery, bribery is a crime, correct? ATTY. BAUTISTA: That is true, Your Honor. JUSTICE CARPIO: **So, they discuss[ed] about a bribery involving government officials, correct?** ATTY. BAUTISTA: **The scandal, Your Honor**. JUSTICE CARPIO: **No, [it] says bribery**. ATTY. BAUTISTA: **Well, bribery, the scandal was about bribery**. x x x. Petitioner admits in his Petition, and through his counsel in the 15 November 2007 letter to the Senate Blue Ribbon Committee and during the oral arguments, that he discussed with the President a "**bribery scandal involving high government officials**." This particular discussion of petitioner with the President is not covered by executive privilege. The invocation of executive privilege on the three questions dwelling on a bribery scandal is clearly unjustified and void. Public office is a public trust and not a shield to cover up wrongdoing. Petitioner must answer the three questions asked by the Senate Committees.

10. ID.; ID.; ID.; ID.; MUST BE INVOKED BY THE PRESIDENT WITH SPECIFICITY. — Executive privilege can be invoked only by the President who is the sole Executive in whom is vested **all** executive power under the Constitution. However, the Executive Secretary can invoke executive privilege "By Order of the President," which means the President personally instructed the Executive Secretary to invoke executive privilege in a particular circumstance. Executive privilege must be invoked with **specificity** sufficient to inform the Legislature and the Judiciary that the matter claimed as privileged refers to military, national security or diplomatic secrets, or to confidential Presidential communications. A claim of executive privilege accompanied by sufficient specificity gives rise to a presumptive executive privilege. A generalized assertion of executive privilege, without external evidence or circumstances indicating that the matter refers to any of the recognized categories of executive privilege, will not give rise to presumptive executive privilege.

11. ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — During the oral arguments, counsel for petitioner failed to correct or remedy

the lack of specificity in the invocation of executive privilege by Executive Secretary Ermita. Thus: JUSTICE CARPIO: Okay, was the DFA involved in the negotiation[s] for the NBN contract? ATTY. BAUTISTA: I do not know, Your Honor. xxx xxx xxx CHIEF JUSTICE PUNO: Do [you] also know whether there is any aspect of the contract relating to diplomatic relations which was referred to the Department of Foreign Affairs for its comment and study? ATTY. LANTEJAS: As far as I know, Your Honors, there was no referral to the Department of Foreign Affairs, Your Honor. While claiming that petitioner's discussions with the President on the NBN Project involved sensitive diplomatic matters, petitioner does not even know if the Department of Foreign Affairs (DFA) was involved in the NBN negotiations. This is incredulous considering that under the Revised Administrative Code, the DFA "shall be the **lead agency** that shall advise and assist the President in planning, organizing, directing, coordinating and evaluating the total national effort in the field of foreign relations."

12. ID. ID.; ID.; ID.; WHEN INVOKED. — Executive privilege must be invoked **after** the question is asked by the legislative committee, not before. A witness cannot raise hypothetical questions that the committee may ask, claim executive privilege on such questions, and on that basis refuse to appear before the legislative committee. If the legislative committee furnished in advance the questions to the witness, the witness must bring with him the letter of the President or Executive Secretary invoking executive privilege and stating the reasons for such claim. If the legislative committee did not furnish in advance the questions, the witness must first appear before the legislative committee, wait for the question to be asked, and then raise executive privilege. The legislative committee must then give the witness sufficient time to consult the President or Executive Secretary whether the President will claim executive privilege. At the next hearing, the witness can bring with him the letter of the President or Executive Secretary, and if he fails to bring such letter, the witness must answer the question.

13. ID.; ID.; LEGISLATIVE DEPARTMENT; POWER OF INQUIRY. — The Legislature's fundamental function is to enact laws and oversee the implementation of existing laws. The Legislature must exercise this fundamental function consistent with the people's right to information on the need for the enactment of

laws and the status of their implementation. The principal tool used by the Legislature in exercising this fundamental function is the power of inquiry which is inherent in every legislative body. Without the power of inquiry, the Legislature cannot discharge its fundamental function and thus becomes inutile.

14. ID.; ID.; ID.; ID.; PURPOSES. — The Constitution expressly grants to the "Senate, the House of Representatives or any of its respective committees" the power to "conduct inquiries in aid of legislation." This power of legislative inquiry is so searching and extensive in scope that the inquiry need not result in any potential legislation, and may even end without any predictable legislation. The phrase "inquiries in aid of legislation" refers to inquiries to aid the enactment of laws, inquiries to aid in overseeing the implementation of laws, and even inquiries to expose corruption, inefficiency or waste in executive departments. Thus, the Legislature can conduct inquiries not specifically to enact laws, but specifically to oversee the implementation of laws. This is the mandate of various legislative oversight committees which admittedly can conduct inquiries on the status of the implementation of laws. In the exercise of the legislative oversight function, there is always the potential, even if not expressed or predicted, that the oversight committees may discover the need to improve the laws they oversee and thus recommend amendment of the laws. This is sufficient reason for the valid exercise of the power of legislative inquiry. Indeed, the oversight function of the Legislature may at times be as important as its law-making function.

15. ID.; ID.; ID.; ID.; OTHER LIMITATIONS.— Aside from the purpose of the inquiry, the Constitution imposes two other limitations on the power of legislative inquiry. *One*, the rules of procedure for the inquiry must be duly published. Publication of the rules of the inquiry is an **essential** requirement of due process. *Two*, the rights of persons appearing before the investigating committees, or affected by such inquiries, must be respected. These rights include the right against self-incrimination, as well as the right to privacy of communications and correspondence of a private nature. The power of legislative inquiry does not reach into the private affairs of citizens. Also protected is the right to due process, which means that a witness must be given "fair notice" of the subject of the legislative

inquiry. Fair notice is important because the witness may be cited in contempt, and even detained, if he refuses or fails to answer. Moreover, false testimony before a legislative body is a crime. Thus, the witness must be sufficiently informed of the nature of the inquiry so the witness can reasonably prepare for possible questions of the legislative committee. To avoid doubts on whether there is fair notice, the witness must be given in advance the questions pertaining to the basic nature of the inquiry. From these advance questions, the witness can infer other follow-up or relevant questions that the legislative committee may ask in the course of the inquiry.

16. ID.; ID.; ID.; ID.; INHERENT POWER TO ENFORCE BY COMPULSION.— The Legislature has the inherent power to enforce by compulsion its power of inquiry. The Legislature can enforce its power of inquiry through its own sergeant-at-arms without the aid of law enforcement officers of the Executive or resort to the courts. The two principal means of enforcing the power of inquiry are for the Legislature to order the arrest of a witness who refuses to appear, and to detain a witness who refuses to answer. A law that makes a crime the refusal to appear before the Legislature does not divest the Legislature of its inherent power to arrest a recalcitrant witness. The inherent power of the Legislature to arrest a recalcitrant witness remains despite the constitutional provision that "no warrant of arrest shall issue except upon probable cause to be determined personally by the judge." The power being inherent in the Legislature, **essential for self-preservation**, and not expressly withdrawn in the Constitution, the power forms part of the "legislative power x x x vested in the Congress." The Legislature asserts this power independently of the Judiciary. A grant of legislative power in the Constitution is a grant of all legislative powers, including inherent powers. The Legislature can cite in contempt and order the arrest of a witness who fails to appear pursuant to a subpoena *ad testificandum*. There is no distinction between direct and indirect contempt of the Legislature because both can be punished *motu propio* by the Legislature upon failure of the witness to appear or answer. Contempt of the Legislature is different from contempt of court.

17. ID.; ID.; ID.; ID.; RULES OF PROCEDURE OF THE SENATE GOVERNING INQUIRIES IN AID OF LEGISLATION; UNENFORCEABLE DUE TO NON-PUBLICATION.— The

present Senate under the 1987 Constitution is no longer a continuing legislative body. The present Senate has twenty-four members, twelve of whom are elected every three years for a term of six years each. Thus, the term of twelve Senators expires every three years, leaving **less than a majority of Senators to continue into the next Congress**. The 1987 Constitution, like the 1935 Constitution, requires a majority of Senators to "constitute a quorum to do business." Applying the same reasoning in *Arnault v. Nazareno*, the Senate under the 1987 Constitution is not a continuing body because less than majority of the Senators continue into the next Congress. The consequence is that the *Rules of Procedure* must be republished by the Senate after every expiry of the term of twelve Senators. The publication of the *Rules of Procedure* in the website of the Senate, or in pamphlet form available at the Senate, is not sufficient under the *Tañada v. Tuvera* , 230 pHIL. 528 ruling which requires publication either in the Official Gazette or in a newspaper of general circulation. The *Rules of Procedure* even provide that the rules "shall take effect seven (7) days after publication in two (2) newspapers of general circulation," precluding any other form of publication. Publication in accordance with *Tañada* is mandatory to comply with the due process requirement because the *Rules of Procedure* put a person's liberty at risk. A person who violates the *Rules of Procedure* could be arrested and detained by the Senate. Due process requires that "fair notice" be given to citizens before rules that put their liberty at risk take effect. The failure of the Senate to publish its *Rules of Procedure* as required in Section 22, Article VI of the Constitution renders the *Rules of Procedure* void. Thus, the Senate cannot enforce its *Rules of Procedure*. However, the Senate's Order of 30 January 2008 citing petitioner in contempt and ordering his arrest is void due to the non-publication of the *Rules of Procedure*.

PUNO, *C.J.*, *dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; SEPARATION OF POWERS; NOT ABSOLUTE. — The 1987 Constitution separates governmental power among the legislative, executive and judicial branches to avert tyranny by "safeguard(ding) against the encroachment or aggrandizement of one branch at the expense of the other." However, the principle of separation of powers recognized that a "hermetic sealing off of the three

branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively"; hence, the separation of powers between the branches is not absolute.

2. ID.; ID.; LEGISLATIVE DEPARTMENT; POWER OF CONGRESSIONAL OVERSIGHT.— This power of congressional oversight embraces all activities undertaken by Congress to enhance its understanding of and influence over implementation of legislation it has enacted. Oversight may be undertaken through review or investigation of executive branch action. One device of the legislature to review, influence and direct administration by the executive is legislation and the corollary power of investigation. The standard justification for an investigation is the presumed need for new or remedial legislation; hence, investigations ought to be made in aid of legislation.

3. ID.; ID.; ID.; ID.; SPECIFIC PROVISION IN 1987 CONSTITUTION. — The legislative power of investigation was recognized under the 1935 Constitution, although it did not explicitly provide for it. This power had its maiden appearance in the 1973 Constitution and was carried into the 1987 Constitution in Article VI, Section 21, *viz*: Sec. 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

4. ID.; ID.; ID.; REQUIREMENTS FOR A VALID EXERCISE OF POWER OF INVESTIGATION AND CONTEMPT OF WITNESSES. — Included in the legislative power of investigation is the power of contempt or process to enforce. Although the power of contempt is not explicitly mentioned in the provision, this power has long been recognized. In the 1950 landmark case *Arnault v. Nazareno,* the Court held, *viz*: **[T]he power of inquiry -with process to enforce it- is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information**

-which is not infrequently true- recourse must be had to others who do possess it. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; **so some means of compulsion is essential to obtain what is needed. x x x** There are **two requirements** for the valid exercise of the legislative power of investigation and contempt of witness for contumacy: ***first,* the existence of a legislative purpose,** *i.e.,* the inquiry must be in aid of legislation, and *second,* **the pertinency of the question propounded**.

5. ID.; ID.; ID.; LEGISLATIVE PURPOSE. — First, the legislative purpose. In the 1957 case *Watkins v. United States*, the U.S. Supreme Court held that the **power to investigate encompasses everything** that concerns the administration of existing laws, as well as proposed or possibly needed statutes. It further held that the **improper motives of members** of congressional investigating committees **will not vitiate** an investigation instituted by a House of Congress, if that assembly's legislative purpose is being served by the work of the committee. Two years later, the U.S. High Court held in *Barenblatt v. United States* , 360 U.S. 109 that the **power is not unlimited,** as Congress may only investigate those areas in which it may potentially legislate or appropriate. It cannot inquire into matters that are within the *exclusive* province of one of the other branches of government. The U.S. High Court ruled that the **judiciary has no authority to intervene on the basis of motives** that spurred the exercise of that power, even if it was exercised purely for the purpose of exposure, so long as Congress acts in pursuance of its constitutional power of investigation. There is, thus, legislative purpose when the **subject matter of the inquiry is one over which the legislature can legislate,** such as the appropriation of public funds; and the creation, regulation and abolition of government agencies and positions. It is **presumed that the facts are sought by inquiry, because the "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change."** The Court noted that the investigation gave rise to several bills recommended by the Special Committee and approved by the Senate.

6. ID.; ID.; ID.; ID.; PERTINENCY OF THE QUESTION PROPOUNDED. — Second, the pertinency of the question

propounded. The test of pertinency is whether a question itself is in the ultimate area of investigation; a question is pertinent also if it is "a usual and necessary stone in the arch of a bridge over which an investigation must go." In determining pertinency, the court looks to the history of the inquiry as disclosed by the record. **Arnault** states the **rule on pertinency,** *viz*: Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, we think the **investigating committee has the power to require a witness to answer any question pertinent to that inquiry, s**ubject of course to his constitutional right against self-incrimination. The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and **every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject matter of the inquiry or investigation.** So a witness may not be coerced to answer a question that obviously has no relation to the subject of the inquiry. But from this **it does not follow that every question that may be propounded to a witness be material to any proposed or possible legislation. In other words, the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.** The Court found that the question propounded to Arnault was not immaterial to the investigation or self-incriminatory; thus, the petition for *habeas corpus* was dismissed.

7. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; DEFINED.— "Executive privilege" has been **defined** as the right of the President and high-level executive branch officials to withhold information from Congress, the courts, and the public. Executive privilege is a direct descendant of the constitutionally designed separation of powers among the legislative, executive and judicial branches of government. The U.S. Constitution (and the Philippine Constitution) does not **directly mention**

"executive privilege," but commentators theorized that the privilege of confidentiality is **constitutionally based,** as it relates to the President's effective discharge of executive powers. The Founders of the American nation acknowledged an **implied** constitutional prerogative of Presidential secrecy, a power they believed was at times necessary and proper.

8. ID.; ID.; ID.; ID.; TYPES IN THE UNITED STATES OF AMERICA.— In the U.S., at least four kinds of **executive privilege can be identified in criminal and civil litigation and the legislative inquiry context:** (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges.

9. ID.; ID.; ID.; ID.; ID.; STATE SECRETS PRIVELEGE, EXPLAINED. — First, military and state secrets. The state secrets privilege "is a common law evidentiary rule" that allows the government to **protect "information from discovery when disclosure would be inimical to national security" or result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments."** To properly invoke the privilege, "(t)here must be a formal claim of privilege, lodged by the head of the department having control over the matter, after actual personal consideration by that officer." A court confronted with an assertion of the state secrets privilege must find "that there is a reasonable danger that disclosure of the particular facts . . . will jeopardize national security."

10. ID.; ID.; ID.; ID.; ID.; PRESIDENTIAL COMMUNICATIONS PRIVILEGE, EXPLAINED. — Second, Presidential communications privilege. The U.S. Supreme Court recognized in *U.S. v. Nixon* the there is "a presumptive privilege for Presidential communications" based on the "President's generalized interest in confidentiality." This ruling was made in the context of a criminal case. The Presidential communications privilege was also recognized in a civil proceeding, *Nixon v. Administrator of General Services.*

11. ID.; ID.; ID.; ID.; ID.; DELIBERATIVE PROCESS PRIVILEGE, EXPLAINED.— Third, deliberative process. Of the various kinds of executive privilege, the deliberative process privilege is the most frequently litigated in the United States. It entered the portals of the federal courts in the 1958 case **Kaiser**

Aluminum & Chem. Corp. The privilege "rests most fundamentally on the belief that there were agencies forced to operate in a fishbowl, frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer." Of common law origin, the deliberative process privilege allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." Courts have identified three purposes in support of the privilege: (1) it protects candid discussions within an agency; (2) it prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy; and (3) it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions. For the privilege to be validly asserted, the material must be pre-decisional and deliberative.

12. ID.; ID.; ID.; ID.; ID.; LAW ENFORCEMENT PRIVILEGE, EXPLAINED. — Fourth, law enforcement privilege. The law enforcement privilege protects against the disclosure of confidential sources and law enforcement techniques, safeguards the privacy of those involved in a criminal investigation, and otherwise prevents interference with a criminal investigation.

13. ID.; ID.; ID.; ID.; WHEN VALIDLY INVOKED. — As enunciated in *Senate v. Ermita*, a claim of executive privilege may be valid or not depending on the **ground invoked** to justify it and the *context* in which it is made. The ground involved in the case at bar, as stated in the letter of Secretary Ermita, is *Presidential* **communications privilege** on information that "might impair our **diplomatic as well as economic relations** with the People's Republic of China." This particular issue is one of first impression in our jurisdiction. Adjudication on executive privilege in the Philippines is still in its infancy stage, with the Court having had only a few occasions to resolve cases that directly deal with the privilege.

14. ID.; ID.; ID.; ID.; ID.; *ALMONTE VS. VASQUEZ,* CITED. — The *1995 case Almonte v. Vasquez***,** 244 SCRA 286**,** involved an investigation by the Office of the Ombudsman of petitioner Jose T. Almonte, who was the former Commissioner of the Economic Intelligence and Investigation Bureau (EIIB) and

Villamor C. Perez, Chief of the EIIB's Budget and Fiscal Management Division. An anonymous letter from a purported employee of the bureau and a concerned citizen, alleging that funds representing savings from unfilled positions in the EIIB had been illegally disbursed, gave rise to the investigation. The Ombudsman required the Bureau to produce all documents relating to Personal Services Funds for the year 1988; and all evidence, such as vouchers (salary) for the whole plantilla of EIIB for 1988. Petitioners refused to comply. The Court found, however, that no military or diplomatic secrets would be disclosed by the production of records pertaining to the personnel of the EIIB. Nor was there any law making personnel records of the EIIB classified. Thus, the **Court concluded that the Ombudsman's need for the documents outweighed the claim of confidentiality of petitioners.**

15. ID.; ID.; ID.; ID.; ID.*; CHAVEZ VS. PCGG,* CITED.— The *1998 case Chavez v. PCGG*, 299 SCRA 744, concerned a **civil litigation**. The question posed before the Court was whether the government, through the Presidential Commission on Good Government (PCGG), could be required to reveal the proposed terms of a compromise agreement with the Marcos heirs as regards their alleged ill-gotten wealth. The petitioner, a concerned citizen and taxpayer, sought to compel respondents to make public all negotiations and agreement, be they ongoing or perfected, and all documents related to the negotiations and agreement between the PCGG and the Marcos heirs. On the issue whether petitioner could access the settlement documents, the Court ruled that it was incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they had decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, however, must pertain to definite propositions of the government, not necessarily to intra-agency or inter-agency recommendations or communications during the "exploratory" stage. At the same time, the Court noted the need to observe the same restrictions on disclosure of information in general, such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.

16. ID.; ID.; ID.; ID.; ID.; *SENATE VS. ERMITA,* CITED.— More recently, this Court decided the *2006 case Senate of the*

Philippines v. Ermita, 488 SCRA 1. At issue in this case was the constitutionality of Executive Order (EO) No. 464, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for Other Purposes." The presidential issuance was handed down at a time when the Philippine Senate was conducting investigations on the alleged overpricing of the North Rail Project; and the alleged fraud in the 2004 national elections, exposed through the much-publicized taped conversation allegedly between President Gloria Macapagal-Arroyo and Commission on Elections Commissioner Virgilio Garcillano.

17. ID.; ID.; ID.; ID.; PRESIDENTIAL COMMUNICATIONS PRIVILEGE; TWO REASONS IN *U.S. VS. NIXON* FOR QUALIFIED PRESUMPTION. — For the first time in 1974, the U.S. Supreme Court recognized the **Presidential communications perivilege presumption in its favor** in *U.S. v. Nixon*. The decision cited two reasons for the **privilege and the qualified presumption:** (1) the "necessity for protection of the **public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making"** and (2) it "… is **fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."**

18. ID.; ID.; ID.; ID.; ID.; ID.; CANDID, OBJECTIVE AND EVEN BLUNT OR HARSH OPINIONS EXPRESSED IN PRESIDENTIAL DECISION-MAKING. — In support of the first reason, the **Nixon Court** held that "a President and those who assist him must be **free to explore alternatives in the process of shaping policies and making decisions** and to do so in a way many would be unwilling to express except **privately**. The *Nixon Court* pointed to *two bases* of this need for confidentiality. The **first is common sense and experience**. In the words of the Court, "the importance of this confidentiality is **too plain to require further discussion**. Human experience teaches that those who expect **public dissemination** of their remarks may well **temper candor with a concern for appearances and for their own interests to the detriment of the decision-making process."**

19. ID.; ID.; ID.; ID.; ID.; ID.; IT IS FUNDAMENTAL TO OPERATION OF GOVERNMENT AND INEXPLICABLY ROOTED IN SEPARATION OF POWERS. — The **Nixon Court** used **separation of powers** as the second ground why presidential communications enjoy a privilege and qualified presumption. It explained that while the **Constitution divides power among the three coequal branches of government and affords independence to each branch in its own sphere, it does not intend these powers to be exercised with absolute independence**. It held, *viz*: "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a **comprehensive system**, but the **separate powers were not intended to operate with absolute independence**. 'While the Constitution diffuses power the better to secure liberty, it also contemplates that **practice will integrate the dispersed powers into a workable government**. It enjoins upon its branches **separateness but interdependence, autonomy but reciprocity**.'"

20. ID.; ID.; ID.; ID.; ID.; OVERCOMING QUALIFIED PRESUMPTION. — The **Nixon Court** held that to overcome the qualified presumption, there must be "sufficient showing or demonstration of specific need" for the withheld information on the branch of government seeking its disclosure. *Two* **standards** must be met to show the specific need: one is **evidentiary**; the other is **constitutional**.

21. ID.; ID; ID.; ID.; ID.; ID.; EVIDENTIARY STANDARD OF NEED.— In **U.S. v. Nixon**, the High Court first determined whether the subpoena ordering the disclosure of Presidential communications satisfied the evidentiary requirements of **relevance, admissibility and specificity** under Rule 17(c) of the Federal Rules of Criminal Procedure. Rule 17(c) governs all subpoenas for documents and materials made in criminal proceedings. In the 1997 In re Sealed Case (Espy), 121 F3d 729 at 754, the D.C. Court of Appeals held that there must also be a showing that **"evidence is not available with due diligence elsewhere"** or that the **evidence is particularly and apparently useful as in that case where an immediate** White House **advisor** was being investigated for criminal behavior. It explained that the information covered by Presidential communication privilege should not be treated as just another specie of information.

Presidential communications are treated with confidentiality to strengthen the President in the performance of his duty.

22. ID.; ID.; ID.; ID.; MILITARY AND STATE SECRETS; INVOCATION AND ASSESSMENT OF VALIDITY OF INVOCATION; PROCEDURE. — In *U.S. v. Reynolds,* 345 U.S.1, the U.S. Supreme Court laid down the **procedure** for invoking and assessing the validity of the invocation of the military secrets privilege, **a privilege based on the nature and content of the information,** which can be analogized to the diplomatic secrets privilege, also a **content-based** privilege. In **Reynolds**, it was held that there must be a **formal claim** of privilege lodged by the head of the department that has control over the matter after actual personal consideration by that officer. The court must thereafter **determine whether the circumstances are appropriate for the claim of privilege, without forcing a disclosure of the very thing the privilege is designed to protect.** It was stressed that "(j)udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers…" It is possible for these officers "to satisfy the court, **from all the circumstances** of the case, that there is a **reasonable danger** that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the **occasion for the privilege is appropriate,** and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." It was further held that "(i)n each case, **the showing of necessity which is made will determine how far the court should probe** in satisfying itself that the occasion for invoking the privilege is appropriate."

23. ID.; ID.; ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — In the case at bar, we cannot assess the validity of the claim of the Executive Secretary that disclosure of the withheld information may impair our diplomatic relations with the People's Republic of China. There is but a **bare assertion** in the letter of Executive Secretary Ermita that the **"context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China."** There is absolutely **no explanation** offered by the Executive Secretary on how diplomatic secrets will be exposed at the expense of our national interest if petitioner

answers the three disputed questions propounded by the respondent Senate Committees. In the Oral Argument on March 4, 2008, petitioner Neri similarly failed to explain how diplomatic secrets will be compromised if the three disputed questions are answered by him. Considering this paucity of explanation, the Court cannot **determine whether there is reasonable danger** that petitioner's answers to the three disputed questions would **reveal privileged diplomatic secrets**. **The Court cannot engage in guesswork in resolving this important issue.** But even assuming *arguendo* that petitioner Neri can properly invoke the privilege covering "national security" and "military affairs," still, the records will show that he failed to provide the Court knowledge of the **circumstances** with which the Court can **determine whether there is reasonable danger** that his answers to the three disputed questions would indeed **divulge secrets** that would compromise our national security. In the Oral Argument on March 4, 2008, petitioner's counsel argued the basis for invoking executive privilege covering diplomatic, military and national security secrets, but those are arguments of petitioner's counsel and can hardly stand for the "formal claim of privilege lodged by the head of the department which has control over the matter after actual personal consideration by that officer" that **Reynolds** requires. Needless to state, the diplomatic, military or national security privilege claimed by the petitioner has no leg to stand on.

24. ID.; ID.; ID.; ID.; ID.; PRESIDENTIAL COMMUNICATIONS ARE PRESUMPTIVELY PRIVILEGED; RECOGNIZED.— In their Comment, respondent Senate Committees contend that petitioner has the burden of overcoming the *presumption against executive privilege*, citing *Senate v. Ermita*, 488 SCRA 1, 51, *viz*: The statement in *Senate v. Ermita* , 488 SCRA 1, 51, that the "extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure" must therefore be read to mean that there is a general disfavor of government privileges as held in **In Re Subpoena for Nixon**, especially considering the bias of the 1987 Philippine Constitution towards full public disclosure and transparency in government. In fine, *Senate v. Ermita,* 488 SCRA 1, 51, recognized the Presidential communications privilege in *U.S. v. Nixon* and the qualified presumptive status that the U.S. High Court gave that privilege. **Thus, respondent**

Senate Committees' argument that the burden is on petitioner to overcome a presumption against executive privilege cannot be sustained.

25. ID.; ID.; ID.; ID.; ID.; ID.; STRENGTH OF THE QUALIFIED PRESUMPTION MUST BE DETERMINED.— A primary factor to consider in determining the strength of the presumption is to look where the Constitution textually committed the power in question. *U.S. v. Nixon* stressed that the Presidential communications privilege flows from the enumerated powers of the President. The **more concentrated power is in the President**, the greater the need for confidentiality and the **stronger the presumption**; contrariwise, the more *s***hared or diffused the powe***r* is with other branches or agencies of government, the **weaker the presumption**. For, indisputably, there is less need for confidentiality considering the likelihood and expectation that the branch or agency of government sharing the power will need the same information to discharge its constitutional duty. **There are other factors** to be considered in determining the strength of the presumption of confidentiality of Presidential communications. They pertain to the **nature of the disclosure** sought, namely: (1) time of disclosure, whether contemporaneous disclosure or open deliberation, which has a greater chilling effect on rendering candid opinions, as opposed to subsequent disclosure; (2) level of detail, whether full texts or whole conversations or summaries; (3) audience, whether the general public or a select few; (4) certainty of disclosure, whether the information is made public as a matter of course or upon request as considered by the U.S. Supreme Court in *Nixon v. Administrator of General Services;* 418 U.S. 1; (5) frequency of disclosure as considered by the U.S. Supreme Court in *U.S. v. Nixon* and *Cheney v. U.S. District Court for the District of Columbia*; (542 U.S. 367) and (6) form of disclosure, whether live testimony or recorded conversation or affidavit. The **type of information** should also be considered, whether involving military, diplomatic or national security secrets.

26. ID.; ID.; ID.; ID.; ID.; ID.; ID.; RULE ON PERTINENCY. — In legislative investigations, the requirement is that the question seeking the withheld information must be **pertinent**. As held in **Arnault**, the following is the **rule on pertinency,** (87 Phil. 29, 48) *viz*: Once an inquiry is admitted or established to be

within the jurisdiction of a legislative body to make, we think the **investigating committee has the power to require a witness to answer any question pertinent to that inquiry,** subject of course to his constitutional right against self-incrimination. x x x In other words, **the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.**

27. ID.; ID.; ID.; ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — It is self-evident that the **three assailed questions** are **pertinent** to the subject matter of the legislative investigation being undertaken by the respondent Senate Committees. More than the **Arnault** standards, the questions to petitioner have **direct relation not only to the subject of the inquiry, but also to the pending bills thereat**. The three assailed questions seek information on how and why the NBN-ZTE contract — an international agreement embodying a foreign loan for the undertaking of the NBN Project — was consummated. The three questions are **pertinent to at least three subject matters of the Senate inquiry:** (1) possible anomalies in the consummation of the NBN-ZTE Contract in relation to the Build-Operate-Transfer Law and other laws (P.S. Res. No. 127); (2) national security implications of awarding the NBN Project to ZTE, a foreign-owned corporation (P.S. Res. No. 129); and (3) legal and economic justification of the NBN Project (P.S. Res. No. 136). The three questions are **also pertinent to pending legislation in the Senate,** namely: (1) the subjection of international agreements involving funds for the procurement of infrastructure projects, goods and consulting services to Philippine procurement laws (Senate Bill No. 1793); (2) the imposition of safeguards in the contracting of loans classified under Official Development Assistance (Senate Bill No. 1794); and (3) the concurrence of the Senate in international and executive agreements (Senate Bill No. 1317).

28. ID.; ID.; ID.; ID.; ID.; ID.; ID.; WHETHER THERE IS AN EFFECTIVE SUBSTITUTE FOR THE INFORMATION SOUGHT. — As afore-discussed, to establish a "demonstrable

specific need," there must be a showing that **"evidence is not available with due diligence elsewhere" or that the evidence is particularly and apparently useful.** This requirement of **lack of effective substitute** is meant to decrease the frequency of incursions into the confidentiality of Presidential communications, to enable the President and the Presidential advisers to communicate in an atmosphere of necessary confidence while engaged in decision-making. It will also help the President to focus on an energetic performance of his or her constitutional duties.

29. ID.; ID.; ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — The second inquiry relates to whether there is an effective substitute for the information sought. There is none. The three questions demand information on how the President **herself** weighed options and the factors she considered in concluding the NBN-ZTE Contract. In particular, the information sought by the **first question** - "Whether the President followed up the (NBN) project" - cannot be effectively substituted as it refers to the **importance of the project to the President herself.** This information relates to the inquiry on the legal and economic justification of the NBN project (P.S. Res. No. 136). Similarly, the **second question** – "Were you dictated to prioritize the ZTE?" - seeks **information on the factors considered by the President herself in opting for NBN-ZTE, which involved a foreign loan.** Petitioner testified that the President had initially given him directives that **she preferred a no-loan, no-guarantee unsolicited Build-Operate-Transfer (BOT) arrangement,** which according to petitioner, was being offered by Amsterdam Holdings, Inc. The information sought cannot be effectively substituted in the inquiry on the legal and economic justification of the NBN project (P.S. Res. No. 136), the inquiry on a possible violation of the BOT Law (P.S. Res. No. 127); and in the crafting of pending bills, namely, Senate Bill No. 1793 tightening procurement processes and Senate Bill No. 1794 imposing safeguards on contracting foreign loans. The information sought by the **third question** - "Whether the President said to go ahead and approve the project after being told about the alleged bribe?" - cannot be effectively substituted for the same reasons discussed on both the first and second questions. In fine, all three disputed questions seek information **for which there is no effective substitute.**

30. ID.; ID.; ID.; ID.; ID.; ID.; FUNCTION IMPAIRMENT TEST, EXPLAINED. — The claim of executive privilege must then be balanced with the specific need for disclosure of the communications on the part of the other branch of government. The "**function impairment test**" was utilized in making the balance albeit it was not the term used by the Court. By this test, the **Court weighs how the disclosure of the witheld information would impair the President's ability to perform his constitutional duties more than nondisclosure would impair the other branch's ability to perform its constitutional functions.**

31. ID.; ID.; ID.; ID.; ID.; ID.; ID.; ASSESSMENT OF HOW SIGNIFICANT THE ADVERSE EFFECT OF DISCLOSURE IS ON PERFORMANCE OF FUNCTIONS OF PRESIDENT. — First, it assessed how significant the adverse effect of disclosure is on the performance of the functions of the President. While affording great deference to the President's need for complete candor and objectivity from advisers, the *Nixon Court* found that the **interest in confidentiality of Presidential communications is not significantly diminished by production of the subject tape recordings for in camera inspection**, with all the **protection** that a district court will be obliged to provide in **infrequent occasions of a criminal proceeding**. x x x

32. ID.; ID.; ID.; ID.; ID.; ID.; ID.; CASE AT BAR. — From the above exchange (TSN, Oral Argument, March 4, 2008, pp. 297-306), it is clear that petitioner's invocation of the Presidential communications privilege is based on a **general claim** of a chilling effect on the President's performance of her functions if the three questions are answered. The general claim is unsubstantiated by specific proofs that the performance of the functions of the President will be adversely affected in a significant degree. Indeed, petitioner's counsel can only manage to submit his **own impression and personal opinion on the subject**. Summing it up, on one end of the balancing scale is the President's **generalized** claim of confidentiality of her communications, and petitioner's failure to justify a claim that his conversations with the President involve diplomatic, military and national security secrets. We accord Presidential communications a presumptive privilege but the strength of this **privilege is weakened by the fact that the subject of the**

communication involves a contract with a foreign loan. **The power to contract foreign loans** is a power not exclusively vested in the President, but is shared with the Monetary Board (Central Bank). We also consider the **chilling effect** which may result from the disclosure of the information sought from petitioner Neri but the chilling effect is **diminished by the nature of the information sought, which is narrow, limited as it is to the three assailed questions**. We take judicial notice also of the fact that in a Senate inquiry, there are *safeguards* against an indiscriminate conduct of investigation.

33. ID.; ID.; ID.; ID.; ID.; ID.; ID.; ILL EFFECT OF NON-DISCLOSURE ON PERFORMANCE OF FUNCTIONS OF THE JUDICIARY. — It considered the ill effect of nondisclosure of the withheld information on the performance of functions of the judiciary. The Nixon Court found that an absolute, unqualified privilege would **impair the judiciary's performance of its constitutional duty to do justice in criminal prosecutions.** In balancing the competing interests of the executive and the judiciary using the function impairment test, it held: The impediment that an absolute, unqualified privilege would place in the way of the **primary constitutional duty of the Judicial Branch to do justice** in criminal prosecutions would plainly conflict with the **function of the courts under Art. III. xxx xxx** xxx To read the **Art. II powers of the President** as providing an absolute privilege as against a subpoena essential to **enforcement of criminal statutes** on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would **upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III. xxx xxx xxx …** the allowance of the privilege to withhold evidence that is **demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality** in the communications of his office is **general** in nature, whereas the **constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice**. Without access to specific facts a criminal prosecution may be **totally frustrated**. The **President's broad interest in confidentiality of communications will not be vitiated by**

disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases. We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on **the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice.** The generalized assertion of privilege must yield to the **demonstrated, specific need** for evidence in a pending **criminal trial.**

34. ID.; ID.; ID.; ID.; ID.; ID.; ID.; CASE AT BAR; ILL EFFECT OF NON-DISCLOSURE ON PERFORMANCE OF FUNCTIONS OF THE SENATE.— We assess whether nondisclosure of the information sought will seriously impair the performance of the constitutional function of the Senate to legislate. In their Comment, respondent Senate Committees assert that "there is an urgent need for remedial legislation to regulate the obtention (sic) and negotiation of official development assisted (ODA) projects because these have become rich source of 'commissions' secretly pocketed by high executive officials." It cannot be successfully disputed that the information sought from the petitioner relative to the NBN Project is essential to the proposed amendments to the Government Procurement Reform Act and Official Development Assistance Act to enable Congress to plug the loopholes in these statutes and prevent financial drain on our Treasury. Respondent Senate Committees well point out that Senate Bill No. 1793, Senate Bill No. 1794, and Senate Bill No. 1317 will be crafted on the basis of the information being sought from petitioner Neri. Indisputably, these questions are **pertinent** to the subject matter of their investigation, and there is **no effective substitute** for the information coming from a reply to these questions. In the absence of the information they seek, the Senate Committees' **function of intelligently enacting laws** "to remedy what is called 'dysfunctional procurement system of the government'" and to possibly include "executive agreements for Senate concurrence" to prevent them from being used to circumvent the requirement of public bidding in the existing Government Procurement Reform Act **cannot but be seriously impaired**.

35. ID.; ID.; ID.; ID.; ID.; ID.; ID.; NATURE OR CONTENT OF COMMINICATION SOUGHT TO BE WITHHELD.— The Court examined the **nature or content of the communication sought**

to be withheld. It found that the Presidential communications privilege invoked by President Nixon "depended **solely** on the broad, **undifferentiated** claim of public interest in the confidentiality" of his conversations. He did not claim the need to protect **military, diplomatic, or sensitive national security secrets. x x x.**

36. ID.; ID.; NOT A SHIELD AGAINST AN INVESTIGATION OF WRONGDOING. — Two centuries thence, the principle that executive privilege cannot hide a wrongdoing remains unchanged. While very few cases on the Presidential communications privilege have reached the U.S. Supreme Court, the District of Columbia Court of Appeals, being the appellate court in the district where the federal government sits has been more visible in this landscape. In several of its prominent decisions on the Presidential communications privilege, the D.C. Court of Appeals reiterated the rule that executive privilege cannot cover up wrongdoing. In *Nixon v. Sirica,* the D.C. Circuit Court of Appeals rejected the contention of President Nixon that executive privilege was absolute and held that, if it were so, "the head of an executive department would have the power on his own say so to **cover up all evidence of fraud and corruption** when a federal court or grand jury was investigating malfeasance in office, and **this is not the law**." In *Senate Select Committee v. Nixon*, the Appellate Court reiterated its pronouncement in *Sirica* that the "Executive **cannot**…invoke a general confidentiality privilege to **shield its officials and employees** from investigations by the proper governmental institutions into **possible criminal wrongdoing**."

37. ID.; ID.; ID.; ID; ID.; ID.; SHOWING OF A NEED FOR INFORMATION BY AN INSTITUTION TO ENABLE IT TO PERFORM ITS CONSTITUTIONAL FUNCTIONS WOULD PIERCE PRIVILEGE. — Nonetheless, while confirming the time-honored principle that executive privilege is not a shield against an investigation of wrongdoing, the D.C. Circuit Court of Appeals, in both **Sirica** and **Senate Select Committee**, also made it clear that **this time-honored principle was not the sword that would pierce the Presidential communications privilege;** it was instead the **showing of a need for information by an institution to enable it to perform its constitutional functions.**

38. ID.; ID.; ID.; ID.; ID.; ID.; ID.; CASE AT BAR.— Here also **our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity**. On the contrary, we think the **sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions**." That a wrongdoing — which the Presidential communications privilege should not shield — has been committed is an allegation to be proved with the required evidence in a proper forum. The Presidential communications privilege can be pierced by a showing of a specific need of the party seeking the Presidential information in order to perform its functions mandated by the Constitution. It is after the privilege has been pierced by this demonstrated need that one can discover if the privilege was used to shield a wrongdoing, or if there is no wrongdoing after all. We should not put the cart before the horse.

39. ID.; ID.; SEPARATION OF POWERS; IN THE UNITED STATES OF AMERICA, MOST CONGRESSIONAL REQUESTS FOR INFORMATION ARE HANDLED THROUGH AN INFORMAL PROCESS OF ACCOMMODATION AND NEGOTIATION, AWAY FROM JUDICIAL PORTALS.— In the U.S. where we have derived the doctrine of executive privilege, most congressional requests for information from the executive branch are handled through an informal process of accommodation and negotiation, away from the judicial portals. **The success of the accommodation process hinges on the balance of interests between Congress and the executive branch.** The more diffused the interest of the executive branch in withholding the disputed information, the more likely that this interest will be overcome by a specifically articulated congressional need related to the effective performance of a legislative function. Conversely, the less specific the congressional need for the information and the more definite the need for secrecy, the more likely that the dispute will be resolved in favor of the executive. In arriving at accommodations, what is "required is **not simply an exchange of concessions or a test of political strength**. It is an **obligation of each branch** to make a **principled effort to acknowledge**, and if possible to **meet, the legitimate needs of the other branch**."

40. ID.; ID.; ID.; CONSTITUTIONAL CRISES ARE AVOIDED, IF SUCCESSFUL. — In facilitating a settlement, the court should

consider intermediate positions, such as ordering the executive to produce document summaries, indices, representative samples, or redacted documents; or allowing Congressional committee members to view documents but forbidding members from obtaining physical custody of materials or from taking notes. The lesson is that collisions in the exercise of constitutional powers should be avoided in view of their destabilizing effects. Reasonable efforts at negotiation and accommodation ought to be exerted, for when they succeed, constitutional crises are avoided.

41. ID.; ID.; LEGISLATURE; INQUIRIES IN AID OF LEGISLATION; RULES OF PROCEDURE GOVERNING INQUIRIES IN AID OF LEGISLATION; INTERNAL RULES OF A CO-EQUAL BRANCH OF GOVERNMENT; PRUDENCE DICTATES THE COURT SHOULD BE WARY OF STRIKING THEM DOWN.— The Senate Rules of Procedure Governing Inquiries in Aid of Legislation is assailed as invalid allegedly for failure to be re-published. It is contended that the said rules should be re-published as the Senate is not a continuing body, its membership changing every three years. The assumption is that there is a new Senate after every such election and it should not be bound by the rules of the old. We need not grapple with this contentious issue which has far reaching consequences to the Senate. The precedents and practice of the Senate should instead guide the Court in resolving the issue. For one, the Senators have traditionally considered the Senate as a continuing body despite the change of a part of its membership after an election. It is for this reason that the Senate does not cease its labor during the period of such election. Its various Committees continue their work as its officials and employees. For another, the Rules of the Senate is silent on the matter of re-publication. Section 135, Rule L of the Rules of the Senate provides that, "if there is no Rule applicable to a specific case, the precedents of the Legislative Department of the Philippines shall be resorted to xxx." It appears that by tradition, custom and practice, the Senate does not re-publish its rules especially when the same has not undergone any material change. In other words, existing rules which have already undergone publication should be deemed adopted and continued by the Senate regardless of the election of some new members. Their re-publication is thus an unnecessary ritual. We are dealing with internal rules of a co-

equal branch of government and unless they clearly violate the Constitution, prudence dictates we should be wary of striking them down. The consequences of striking down the rules involved in the case at bar may spawn serious and unintended problems for the Senate.

42. ID.; ID.; ID.; ID.; IN CASE AT BAR, SUBJECT INQUIRY IS WITHIN THE POWER OF THE SENATE TO CONDUCT.— To reiterate, there is no doubt about the **legislative purpose** of the subject Senate inquiry. It is evident in the title of the resolutions that spawned the inquiry. **P.S. Res. No. 127 and the privilege speech of Senator Panfilo Lacson** seek an investigation into the circumstances leading to the approval of the NBN-ZTE Contract and to make persons accountable for any anomaly in relation thereto. That the subject matter of the investigation is the expenditure of public funds in an allegedly anomalous government contract leaves no doubt that the investigation comes within the pale of the Senate's power of investigation in aid of legislation. Likewise, the following are all within the purview of the Senate's investigative power: subject matter of **P.S. Res. No. 129** concerning the national sovereignty, security and territorial integrity implications of the NBN-ZTE Contract, of **P.S. Res. No. 136** regarding the legal and economic justification of the National Broadband Network (NBN) project of the government, of **P.S. Res. No. 144** on the cancellation of the ZTE Contract, and the **Privilege Speech of Senator Miriam Defensor Santiago** on international agreements in constitutional law. The Court also takes note of the fact that there are three pending bills in relation to the subject inquiry: **Senate Bill No. 1793**, **Senate Bill No. 1794 and Senate Bill No. 1317**. It is not difficult to conclude that the subject inquiry is within the power of the Senate to conduct and that the respondent Senate Committees have been given the authority to so conduct, the inquiry.

43. ID.; ID.; ID.; ID.; ARREST ORDER; VALIDITY. — The Order of arrest refers to several dates of hearing that petitioner failed to attend, for which he was ordered arrested, namely: **Tuesday**, **September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007; and Tuesday, November 20, 2007**. The "failure to explain satisfactorily (Neri letter of 29 November 2007)," however, refers only to the **November 20, 2007** hearing, as it was in reference to this particular date of hearing that

respondent Senate Committees required petitioner to show cause why he should not be cited for contempt. This is clear from respondent Senate Committees' letter to petitioner dated November 22, 2007. The records are bereft of any letter or order issued to petitioner by respondent Senate Committees for him to show cause why he should not be cited for contempt for failing to attend the hearings on **Tuesday, September 18, 2007; Thursday, September 20, 2007; and Thursday, October 25, 2007.** *Vis-a-vis* the composition of respondent Senate Committees, the January 30, 2008 Order of arrest shows the satisfaction of the requirement of a majority vote of each of the respondent Senate Committees for the contempt of witness under Sec. 18 of the Rules Governing Inquiries in Aid of Legislation, *viz*: 1. Committee on Accountability of Public Officers and Investigations: nine (9) out of seventeen (17) 2. Committee on National Defense and Security: ten (10) out of nineteen (19) 3. Committee on Trade and Commerce: five (5) out of nine (9) Even assuming *arguendo* that *ex-officio* members are counted in the determination of a majority vote, the majority requirement for each of the respondent Senate Committees was still satisfied, as all the *ex-officio* members signed the Order of arrest.

CARPIO MORALES, *J.*, *dissenting opinion*:

1. REMEDIAL LAW; CIVIL PROCEDURE; ACTIONS; GROUNDS FOR DISMISSAL; CASE AT BAR. — Even assuming *arguendo* that the claim of privilege is valid, it bears noting that the coverage thereof is clearly limited to the three questions. Thus limited, the only way this privilege claim could have validly excused petitioner's not showing up at the November 20 hearing was if respondent Committees had nothing else to ask him except the three questions. Petitioner assumed that this was so, but without any valid basis whatsoever. It was merely his inference from his own belief that he had already given an exhaustive testimony during which he answered all the questions of respondent Committees except the three. And even if petitioner were the only resource person for the entire November 20 hearing, he would still have had no basis to believe that the only questions the senators were to ask him would all involve his conversations with the President. Surely, it could not have escaped his notice that the questions asked him during the September 26 hearing were wide ranging, from his professional

opinion on the projected economic benefits of the NBN project to the role of the NEDA in the approval of projects of that nature. Thus, insofar as petitioner can still provide respondent Committees with pertinent information on matters not involving his conversations with the President, he is depriving them of such information without a claim of privilege to back up his action. Following the ruling in *Senate v. Ermita* that "[w]hen Congress exercises its power of inquiry, the only way for department heads to exempt themselves therefrom is by a valid claim of privilege," petitioner had no legal basis for failing to appear in the November 20 hearing. He should have appeared in the hearing and refused to answer the three questions as they were asked. On that score alone, the petition should be dismissed.

2. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; CONTEMPT POWER; FULL AND COMPLETE TO DEAL WITH ANY AFFRONT COMMITTED AGAINST OR ANY DEFIANCE OF LEGISLATIVE AUTHORITY OR DIGNITY.— Petitioner, however, claims that the power of respondent Committees to punish witnesses is limited to "direct contempt" for acts committed while present before these committees, and not for "indirect contempt," citing Section 18 of their Rules of Procedure Governing Inquiries in Aid of Legislation which seemingly limits the contempt power of the Senate to witnesses who are "before it." It bears noting that petitioner raised this claim only in its January 30, 2007 letter to the Senate but not in its main and supplemental petitions before the Court. In fact, petitioner concedes to this incidental power to punish for contempt. At all events, the *sui generis* nature of the legislature's contempt power precludes such point of comparison with the judiciary's contempt power. The former is broad enough, nay, "full and complete" to deal with any affront committed against or any defiance of legislative authority or dignity, in the exercise of its power to obtain information on which to base intended legislation.

3. ID.; ID.; ID.; INQUIRIES IN AID OF LEGISLATION; RULES OF PROCEDURE GOVERNING INQUIRIES; NON-PUBLICATION; INCONSEQUENTIAL AS IN *SABIO V. GORDON*. — In another vein, petitioner claims that the Rules of Procedure Governing Inquiries in Aid of Legislation has not been published. Suffice it to state that the same argument was raised by the PCGG

Commissioners who were petitioners in *Sabio v. Gordon*, and the Court considered the same as inconsequential in light of the more significant issue calling for resolution therein, namely, whether Section 4(b) of E.O. No. 1 was repealed by the 1987 Constitution. The argument deserves the same scant consideration in the present case.

4. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; PRESIDENTIAL COMMUNICATIONS PRIVILEGE; DIPLOMATIC SECRETS PRIVILEGE; CASE AT BAR. — The President does not want petitioner to answer the three questions on the ground of executive privilege. Respecting the specific basis for the privilege, Sec. Ermita states that the same questions "fall under conversations and correspondence between the President and public officials which are considered executive privilege." Sec. Ermita goes on to state that "the context in which the privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China." Evidently, this statement was occasioned by the ruling in *Senate v. Ermita* that a claim of privilege may be valid or not depending on the ground invoked to justify it and the context in which it is made. **What was meant by "context" *in Senate v. Ermita* has more to do with the degree of need shown by the person or agency asking for information, than with additional reasons which the Executive may proffer for keeping the same information confidential.** Sec. Ermita apparently understood "context" in the latter sense and proceeded to point out circumstances that reinforced the claim of privilege. Sec. Ermita's statement that disclosure of the information being asked by respondent Committees might impair our diplomatic and economic relations with China, albeit proffered as the context of his claim of the presidential communications privilege, is actually a claim of privilege by itself, it being an invocation of the diplomatic secrets privilege.

5. ID.; ID.; LEGISLATURE; INQUIRIES IN AID OF LEGISLATION; THREE QUESTIONS; THRUST – TO DETERMINE THE REASONS WHY THE NBN PROJECT, DESPITE THE APPARENT OVERPRICING, ENDED UP BEING APPROVED BY THE EXECUTIVE AND FINANCED VIA A GOVERNMENT LOAN, CONTRARY TO THE ORIGINAL INTENTION TO FOLLOW A BOT SCHEME. — From the foregoing excerpts

of the September 26 hearing, it may be gleaned that the three questions fairly represent the questions actually posed by the senators respecting which petitioner invoked executive privilege. Moreover, the same excerpts adequately provide the necessary backdrop for understanding the thrust of the three questions. While only the third question – Whether the President said to go ahead and approve the project after being told about the alleged bribe? – mentions the perceived bribe offer, it is clear from the context that the first question of whether the President followed up the NBN project was also asked in relation to the same alleged bribe. What Senator Pangilinan wanted to know was whether petitioner and the President had further discussions on the NBN project **after** petitioner informed her about the alleged bribe. The second question – Were you dictated to prioritize the ZTE? – which was asked by Senator Legarda, was evidently aimed towards uncovering the reason why, in spite of the Executive's initial plan to implement the NBN project on a Build Operate and Transfer (BOT) basis, it ended up being financed via a foreign loan, with the ZTE as the chosen supplier. This was also the concern of Senator Lacson when he asked petitioner whether the bribe offer had anything to do with the change in the scheme of implementation from BOT to a foreign loan taken by the Philippine government. **Indeed, it may be gathered that all three questions were directed toward the same end, namely, to determine the reasons why the NBN project, despite the apparent overpricing, ended up being approved by the Executive and financed via a government loan, contrary to the original intention to follow a BOT scheme. The three questions should be understood in this light**.

6. ID.; ID.; EXECUTIVE DEPARTMENT; EXECUTIVE PRIVILEGE; PRESIDENTIAL COMMUNICATIONS PRIVILEGE; EVIDENT FROM QUESTIONS BEING ASKED THAT INFORMATION DEMANDED PERTAINS TO CONVERSATIONS BETWEEN THE PRESIDENT AND HER ADVISER; CASE AT BAR. — When the privilege being invoked against a subpoena *ad testificandum* is that for presidential communications, such specificity requirement is not difficult to meet, for it need only be evident from the questions being asked that the information being demanded pertains to conversations between the President and her adviser. In petitioner's case, the three questions posed by respondent Committees clearly require disclosure of his

conversations with the President in his capacity as adviser. This is obvious from Senator Pangilinan's question as to whether the President followed up on the issue of the NBN project – meaning, whether there were further discussions on the subject between the President and petitioner. Likewise, both Senator Legarda's query on whether petitioner discouraged the President from pursuing the project, and Senator Pia Cayetano's question on whether the President directed petitioner to approve the project even after being told of the alleged bribe, manifestly pertain to his conversations with the President. While Senator Legarda's question – "Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority"? – does not necessarily require disclosure of petitioner's conversations with the President, petitioner has interpreted the same to mean "Has the President dictated you to prioritize the ZTE project"? The invocation of privilege is thus limited to this more specific question. Limited in this manner, requiring the Executive to explain more precisely how this question would involve petitioner's conversation with the President might compel him to disclose the very thing which the privilege was meant to protect. The reasons already provided must thus be considered sufficiently precise.

7. ID.; ID.; ID.; ID.; DIPLOMATIC SECRETS PRIVILEGE; CLAIM OF PRIVILEGE FOR DIPLOMATIC SECRETS OF THIS CASE FAILS TO ESTABLISH THIS CONNECTION. — Compared to claims of the presidential communications privilege, it is more difficult to meet the specificity requirement in claims of the diplomatic secrets privilege, for the Executive must be able to establish a connection between the disclosure of the information being sought with the possible impairment of our diplomatic relations with other nations. The claim of privilege for diplomatic secrets subject of this case fails to establish this connection. It has not been shown how petitioner's response to any of the three questions may be potentially injurious to our diplomatic relations with China. Even assuming that the three questions were answered in the negative – meaning that the President did not follow up on the NBN project, did not dictate upon petitioner to prioritize the ZTE, and did not instruct him to approve the NBN project – it is not clear how our diplomatic relations with China can be impaired by the disclosure thereof, especially given that the supply contract with ZTE was, in fact,

eventually approved by the President. If, on the other hand, the answers to the three questions are in the affirmative, it would be even more difficult to see how our relations with China can be impaired by their disclosure.

8. ID.; ID.; ID.; ID.; MAY BE OVERCOME WHEN ENTITY ASKING FOR INFORMATION IS ABLE TO SHOW THAT THE PUBLIC INTEREST IN ITS DISCLOSURE IS GREATER THAN THAT IN UPHOLDING THE PRIVILEGE. — **A claim of privilege, even a legitimate one, may be overcome when the entity asking for information is able to show that the** public interest in the disclosure thereof is **greater** than that in upholding the privilege. Thus, a government agency that seeks to overcome a claim of the presidential communications privilege must be able to demonstrate that access to records of presidential conversations, or to testimony pertaining thereto, is **vital** to the responsible performance of that agency's official functions.

9. ID.; ID.; ID. ID.; ID.; RESPONDENT, SENATE COMMITTEES ARE ACTING WITHIN THEIR RIGHTS IN TRYING TO FIND OUT WHY THE NBN PROJECT, DESPITE THE APPARENT OVERPRICING, ENDED UP BEING APPROVED BY THE EXECUTIVE AND FINANCED VIA A GOVERNMENT LOAN, CONTRARY TO THE ORIGINAL INTENTION TO FOLLOW A BOT SCHEME. — If the three questions were understood apart from their context, a case can perhaps be made that petitioner's responses, whatever they may be, would not be crucial to the intelligent crafting of the legislation intended in this case. As earlier discussed, however**, it may be perceived from the context that they are all attempts to elicit information as to why the NBN project, despite the apparent overpricing, ended up being approved by the Executive and financed via a government loan, contrary to the original intention to follow a BOT scheme**. This is the fundamental query encompassing the three questions. This query is not answerable by a simple yes or no. Given its implications, it would be unreasonable to expect respondent Committees to merely hypothesize on the alternative responses and come up with legislation on that basis. This is a situation where at least a credible, if not precise, reconstruction of what really happened is necessary for the intelligent crafting of the intended legislation. Why is it that, after petitioner reported the alleged bribe to the President, things proceeded as if nothing was reported? Respondent Senate

Committees are certainly acting within their rights in trying to find out the reasons for such a turn of events. If it was in pursuit of the public interest, respondents surely have a right to know what this interest was so that it may be taken into account in determining whether the laws on government procurement, BOT, ODA and other similar matters should be amended and, if so, in what respects. It is certainly reasonable for respondents to believe that the information which they seek may be provided by petitioner. **This is all the more so now that petitioner, contrary to his earlier testimony before the respondent Committees that he had no further discussions with the President on the issue of the bribe offer, has admitted in his petition that he had other discussions with the President regarding "the bribery scandal involving high Government officials."** These are the very same discussions which he now refuses to divulge to respondents on the ground of executive privilege.

10. ID.; ID.; LEGISLATURE; INQUIRIES IN AID OF LEGISLATION; SUFFICIENT FOR CONGRESS TO SHOW THAT INQUIRY IS IN AID OF LEGISLATION WHERE CONGRESS HAS GATHERED EVIDENCE THAT A GOVERNMENT TRANSACTION IS ATTENDED BY CORRUPTION AND INFORMATION IS BEING WITHHELD – ON THE BASIS OF EXECUTIVE PRIVILEGE – ON THE PRESIDENT'S INVOLVEMENT IN SAID TRANSACTION. — Finally, the following statement of Dorsen and Shattuck is instructive: x x x there should be no executive privilege when the Congress has already acquired substantial evidence that the information requested concerns criminal wrong-doing by executive officials or presidential aides. There is obviously an overriding policy justification for this position, since the opposite view would permit criminal conspiracies at the seat of government to be shrouded by a veil of an advice privilege. While the risk of abusive congressional inquiry exists, as the McCarthy experience demonstrates, the requirement of "substantial evidence" of criminal wrong-doing should guard against improper use of the investigative power. When, as in this case, Congress has gathered evidence that a government transaction is attended by corruption, and the information being withheld on the basis of executive privilege has the potential of revealing whether the Executive merely tolerated the same, or worse, is

responsible therefor, it should be sufficient for Congress to show – for overcoming the privilege – that its inquiry is in aid of legislation.

APPEARANCES OF COUNSEL

Antonio R. Bautista & Partners for petitioner.
Pacifico A. Agabin, Jose Anselmo I. Cadiz, Carlos P. Medina, Jr., and *David Jonathan V. Yap* for respondents.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

At bar is a petition for *certiorari* under Rule 65 of the Rules of Court assailing the show cause **Letter**[1] dated November 22, 2007 and contempt **Order**[2] dated January 30, 2008 concurrently issued by respondent Senate Committees on Accountability of Public Officers and Investigations,[3] Trade and Commerce,[4] and National Defense and Security[5] against petitioner Romulo L. Neri, former Director General of the National Economic and Development Authority (NEDA).

The facts, as culled from the pleadings, are as follows:

On April 21, 2007, the Department of Transportation and Communication (DOTC) entered into a contract with Zhong Xing Telecommunications Equipment (ZTE) for the supply of equipment and services for the National Broadband Network (NBN) Project in the amount of U.S. $ 329,481,290 (approximately ₱16 Billion Pesos). The Project was to be financed by the People's Republic of China.

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[1] *Rollo,* pp. 12-14.

[2] *Rollo,* pp. 85-86. Through the *Supplemental Petition for Certiorari (With Urgent Application for Temporary Restraining Order/Preliminary Injunction)*.

[3] Chaired by Hon. Senator Alan Peter S. Cayetano.

[4] Chaired by Hon. Senator Manuel A. Roxas II.

[5] Chaired by Hon. Senator Rodolfo G. Biazon.

In connection with this NBN Project, various Resolutions were introduced in the Senate, as follows:

(1) **P.S. Res. No. 127**, introduced by Senator Aquilino Q. Pimentel, Jr., entitled RESOLUTION DIRECTING THE BLUE RIBBON COMMITTEE AND THE COMMITTEE ON TRADE AND INDUSTRY TO INVESTIGATE, IN AID OF LEGISLATION, THE CIRCUMSTANCES LEADING TO THE APPROVAL OF THE BROADBAND CONTRACT WITH ZTE AND THE ROLE PLAYED BY THE OFFICIALS CONCERNED IN GETTING IT CONSUMMATED AND TO MAKE RECOMMENDATIONS TO HALE TO THE COURTS OF LAW THE PERSONS RESPONSIBLE FOR ANY ANOMALY IN CONNECTION THEREWITH AND TO PLUG THE LOOPHOLES, IF ANY IN THE BOT LAW AND OTHER PERTINENT LEGISLATIONS.

(2) **P.S. Res. No. 144**, introduced by Senator Mar Roxas, entitled A RESOLUTION URGING PRESIDENT GLORIA MACAPAGAL ARROYO TO DIRECT THE CANCELLATION OF THE ZTE CONTRACT.

(3) **P.S. Res. No. 129**, introduced by Senator Panfilo M. Lacson, entitled RESOLUTION DIRECTING THE COMMITTEE ON NATIONAL DEFENSE AND SECURITY TO CONDUCT AN INQUIRY IN AID OF LEGISLATION INTO THE NATIONAL SECURITY IMPLICATIONS OF AWARDING THE NATIONAL BROADBAND NETWORK CONTRACT TO THE CHINESE FIRM ZHONG XING TELECOMMUNICATIONS EQUIPMENT COMPANY LIMITED (ZTE CORPORATION) WITH THE END IN VIEW OF PROVIDING REMEDIAL LEGISLATION THAT WILL PROTECT OUR NATIONAL SOVEREIGNTY, SECURITY AND TERRITORIAL INTEGRITY.

(4) **P.S. Res. No. 136**, introduced by Senator Miriam Defensor Santiago, entitled RESOLUTION DIRECTING THE PROPER SENATE COMMITTEE TO CONDUCT AN INQUIRY, IN AID OF LEGISLATION, ON THE LEGAL AND ECONOMIC JUSTIFICATION OF THE NATIONAL BROADBAND NETWORK (NBN) PROJECT OF THE NATIONAL GOVERNMENT.

At the same time, the investigation was claimed to be relevant to the consideration of three (3) pending bills in the Senate, to wit:

1. **Senate Bill No. 1793**, introduced by Senator Mar Roxas, entitled AN ACT SUBJECTING TREATIES,

INTERNATIONAL OR EXECUTIVE AGREEMENTS INVOLVING FUNDING IN THE PROCUREMENT OF INFRASTRUCTURE PROJECTS, GOODS, AND CONSULTING SERVICES TO BE INCLUDED IN THE SCOPE AND APPLICATION OF PHILIPPINE PROCUREMENT LAWS, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 9184, OTHERWISE KNOWN AS THE GOVERNMENT PROCUREMENT REFORM ACT, AND FOR OTHER PURPOSES;

2. **Senate Bill No. 1794**, introduced by Senator Mar Roxas, entitled AN ACT IMPOSING SAFEGUARDS IN CONTRACTING LOANS CLASSIFIED AS OFFICIAL DEVELOPMENT ASSISTANCE, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 8182, AS AMENDED BY REPUBLIC ACT NO. 8555, OTHERWISE KNOWN AS THE OFFICIAL DEVELOPMENT ASSISTANCE ACT OF 1996, AND FOR OTHER PURPOSES; and

3. **Senate Bill No. 1317**, introduced by Senator Miriam Defensor Santiago, entitled AN ACT MANDATING CONCURRENCE TO INTERNATIONAL AGREEMENTS AND EXECUTIVE AGREEMENTS.

Respondent Committees initiated the investigation by sending invitations to certain personalities and cabinet officials involved in the NBN Project. Petitioner was among those invited. He was summoned to appear and testify on September 18, 20, and 26 and October 25, 2007. However, he attended only the September 26 hearing, claiming he was "out of town" during the other dates.

In the September 18, 2007 hearing, businessman Jose de Venecia III testified that several high executive officials and power brokers were using their influence to push the approval of the NBN Project by the NEDA. It appeared that the Project was initially approved as a Build-Operate-Transfer (BOT) project but, on March 29, 2007, the NEDA acquiesced to convert it into a government-to-government project, to be financed through a loan from the Chinese Government.

On September 26, 2007, petitioner testified before respondent Committees for eleven (11) hours. He disclosed that then Commission on Elections (COMELEC) Chairman Benjamin Abalos offered him ₱200 Million in exchange for his approval of the NBN Project. He further narrated that he informed President Arroyo about the bribery attempt and that she instructed him not to accept the bribe. However, when probed further on what they discussed about the NBN Project, petitioner refused to answer, invoking "executive privilege." In particular, he refused to answer the questions on **(a)** whether or not President Arroyo followed up the NBN Project,[6] **(b)** whether or not she directed him to prioritize it,[7] and **(c)** whether or not she directed him to approve.[8]

Unrelenting, respondent Committees issued a *Subpoena Ad Testificandum* to petitioner, requiring him to appear and testify on November 20, 2007.

However, in the Letter dated November 15, 2007, Executive Secretary Eduardo R. Ermita requested respondent Committees to dispense with petitioner's testimony on the ground of executive privilege. The pertinent portion of the letter reads:

> With reference to the *subpoena ad testificandum* issued to Secretary Romulo Neri to appear and testify again on 20 November 2007 before the Joint Committees you chair, it will be recalled that Sec. Neri had already testified and exhaustively discussed the ZTE / NBN project, including his conversation with the President thereon last 26 September 2007.
>
> Asked to elaborate further on his conversation with the President, Sec. Neri asked for time to consult with his superiors in line with the ruling of the Supreme Court in *Senate v. Ermita*, 488 SCRA 1 (2006).
>
> Specifically, Sec. Neri sought guidance on the possible invocation of executive privilege on the following questions, to wit:

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[6] Transcript of the September 26, 2007 Hearing of the respondent Committees, pp. 91-92.

[7] *Id.*, pp. 114-115.

[8] *Id.*, pp. 276-277.

a) Whether the President followed up the (NBN) project?
b) Were you dictated to prioritize the ZTE?
c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

Following the ruling in *Senate v. Ermita*, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (*Almonte v. Vasquez*, G.R. 95367, 23 May 1995; *Chavez v. PEA*, G.R. 133250, July 9, 2002). Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly.

Considering that Sec. Neri has been lengthily interrogated on the subject in an unprecedented 11-hour hearing, wherein he has answered all questions propounded to him except the foregoing questions involving executive privilege, we therefore request that his testimony on 20 November 2007 on the ZTE / NBN project be dispensed with.

On November 20, 2007, petitioner did not appear before respondent Committees. Thus, on November 22, 2007, the latter issued the show cause **Letter** requiring him to explain why he should not be cited in contempt. The Letter reads:

Since you have failed to appear in the said hearing, the Committees on Accountability of Public Officers and Investigations (Blue Ribbon), Trade and Commerce and National Defense and Security require you to show cause why you should not be cited in contempt under Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).

The Senate expects your explanation on or before 2 December 2007.

On November 29, 2007, petitioner replied to respondent Committees, manifesting that it was not his intention to ignore the Senate hearing and that he thought the only remaining questions were those he claimed to be covered by executive privilege, thus:

It was not my intention to snub the last Senate hearing. In fact, I have cooperated with the task of the Senate in its inquiry in aid of legislation as shown by my almost 11 hours stay during the hearing on 26 September 2007. During said hearing, I answered all the questions that were asked of me, save for those which I thought was covered by executive privilege, and which was confirmed by the Executive Secretary in his Letter 15 November 2007. In good faith, after that exhaustive testimony, I thought that what remained were only the three questions, where the Executive Secretary claimed executive privilege. Hence, his request that my presence be dispensed with.

Be that as it may, should there be new matters that were not yet taken up during the 26 September 2007 hearing, may I be furnished in advance as to what else I need to clarify, so that as a resource person, I may adequately prepare myself.

In addition, petitioner submitted a letter prepared by his counsel, Atty. Antonio R. Bautista, stating, among others that: **(1)** his (petitioner) non-appearance was upon the order of the President; and **(2)** his conversation with President Arroyo dealt with delicate and sensitive national security and diplomatic matters relating to the impact of the bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines. The letter ended with a reiteration of petitioner's request that he "be furnished in advance" as to

what else he needs to clarify so that he may adequately prepare for the hearing.

In the interim, on December 7, 2007, petitioner filed with this Court the present petition for *certiorari* assailing the show cause **Letter** dated November 22, 2007.

Respondent Committees found petitioner's explanations unsatisfactory. Without responding to his request for advance notice of the matters that he should still clarify, they issued the **Order** dated January 30, 2008, citing him in contempt of respondent Committees and ordering his arrest and detention at the Office of the Senate Sergeant-At-Arms until such time that he would appear and give his testimony. The said Order states:

ORDER

For failure to appear and testify in the Committee's hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007; and Tuesday, November 20, 2007, despite personal notice and Subpoenas *Ad Testificandum* sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007), herein attached) **ROMULO L. NERI is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.**

The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.

SO ORDERED.

On the same date, petitioner moved for the reconsideration of the above Order.[9] He insisted that he has not shown "any contemptible conduct worthy of contempt and arrest." He emphasized his willingness to testify on new matters, however,

[9] See Letter dated January 30, 2008.

respondent Committees did not respond to his request for advance notice of questions. He also mentioned the petition for *certiorari* he filed on December 7, 2007. According to him, this should restrain respondent Committees from enforcing the show cause **Letter** "through the issuance of declaration of contempt" and arrest.

In view of respondent Committees' issuance of the contempt **Order**, petitioner filed on February 1, 2008 a *Supplemental Petition for Certiorari (With Urgent Application for TRO/ Preliminary Injunction),* seeking to restrain the implementation of the said contempt **Order**.

On February 5, 2008, the Court issued a *Status Quo Ante Order* **(a)** enjoining respondent Committees from implementing their *contempt Order,* **(b)** requiring the parties to observe the *status quo* prevailing prior to the issuance of the assailed order, and **(c)** requiring respondent Committees to file their comment.

Petitioner contends that respondent Committees' show cause **Letter** and contempt **Order** were issued with grave abuse of discretion amounting to lack or excess of jurisdiction. He stresses that his conversations with President Arroyo are "**candid discussions meant to explore options in making policy decisions**." According to him, these discussions "**dwelt on the impact of the bribery scandal involving high government officials on the country's diplomatic relations and economic and military affairs and the possible loss of confidence of foreign investors and lenders in the Philippines**." He also emphasizes that his claim of executive privilege is upon the order of the President and within the parameters laid down in *Senate v. Ermita*[10] and *United States v. Reynolds.*[11] Lastly, he argues that he is precluded from disclosing communications made to him in official confidence under Section 7[12] of Republic Act No. 6713, otherwise known

[10] 488 SCRA 1 (2006).

[11] 345 U.S. 1 (1953).

[12] **Section 7. Prohibited Acts and Transactions.** – In addition to acts and omissions of public officials and employees now prescribed in

as *Code of Conduct and Ethical Standards for Public Officials and Employees,* and Section 24[13] (e) of Rule 130 of the Rules of Court.

Respondent Committees assert the contrary. They argue that **(1)** petitioner's testimony is material and pertinent in the investigation conducted *in aid of legislation*; **(2)** there is no valid justification for petitioner to claim executive privilege; **(3)** there is no abuse of their authority to order petitioner's arrest; and **(4)** petitioner has not come to court with clean hands.

In the oral argument held last March 4, 2008, the following issues were ventilated:

1. What communications between the President and petitioner Neri are covered by the principle of 'executive privilege'?

1.a Did Executive Secretary Ermita correctly invoke the principle of executive privilege, by order of the President, to cover **(i)** conversations of the President in the exercise of her executive and policy decision-making and **(ii)** information, which might impair our diplomatic as well as economic relations with the People's Republic of China?

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the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful: x x x

(c) Disclosure and/or misuse of confidential information. -

Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

(1) To further their private interests, or give undue advantage to anyone; or

(2) To prejudice the public interest.

[13] **SEC. 24. Disqualification by reason of privileged communication**. – The following persons cannot testify as to matters learned in confidence in the following cases. **(e)** A public officer cannot be examined during his term of office or afterwards, as to communications made to him in official confidence, when the court finds that the public interest would suffer by disclosure.

1.b Did petitioner Neri correctly invoke executive privilege to avoid testifying on his conversations with the President on the NBN contract on his assertions that the said conversations **"dealt with delicate and sensitive national security and diplomatic matters relating to the impact of bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines"** x x x within the principles laid down in *Senate v. Ermita* (488 SCRA 1 [2006])?

1.c Will the claim of executive privilege in this case violate the following provisions of the Constitution:

Sec. 28, Art. II (Full public disclosure of all transactions involving public interest)

Sec. 7, Art. III (The right of the people to information on matters of public concern)

Sec. 1, Art. XI (Public office is a public trust)

Sec. 17, Art. VII (The President shall ensure that the laws be faithfully executed)

and the due process clause and the principle of separation of powers?

2. What is the proper procedure to be followed in invoking executive privilege?

3. Did the Senate Committees gravely abuse their discretion in ordering the arrest of petitioner for non-compliance with the subpoena?

After the oral argument, the parties were directed to manifest to the Court within twenty-four (24) hours if they are amenable to the Court's proposal of allowing petitioner to immediately resume his testimony before the Senate Committees to answer the other questions of the Senators without prejudice to the decision on the merits of this pending petition. It was understood that petitioner may invoke executive privilege in the course of the Senate Committees proceedings, and if the respondent Committees disagree thereto, the unanswered questions will be the subject of a supplemental pleading to be resolved along

with the three (3) questions subject of the present petition.[14] At the same time, respondent Committees were directed to submit several pertinent documents.[15]

The Senate did not agree with the proposal for the reasons stated in the Manifestation dated March 5, 2008. As to the required documents, the Senate and respondent Committees manifested that they would not be able to submit the latter's "Minutes of all meetings" and the "Minute Book" because it has never been the "historical and traditional legislative practice to keep them."[16] They instead submitted the Transcript of Stenographic Notes of respondent Committees' joint public hearings.

On March 17, 2008, the Office of the Solicitor General (OSG) filed a *Motion for Leave to Intervene and to Admit Attached Memorandum,* founded on the following arguments:

(1) The communications between petitioner and the President are covered by the principle of "executive privilege."

(2) Petitioner was not summoned by respondent Senate Committees in accordance with the law-making body's power to conduct inquiries in aid of legislation as laid down in Section 21, Article VI of the Constitution and *Senate v. Ermita.*

(3) Respondent Senate Committees gravely abused its discretion for alleged non-compliance with the *Subpoena* dated November 13, 2007.

The Court granted the OSG's motion the next day, March 18, 2007.

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[14] TSN of the Oral Argument, March 4, 2008, p. 455.

[15] **(1)** Minutes of all meetings of the three (3) committees held in January and February, 2008; **(2)** Notice for joint meeting of three (3) committees held on 30 January 2008 duly received by the members of the committees; **(3)** Minute Books of the three (3) committees; **(4)** Composition of the three (3) committees; and **(5)** Other documents required of them in the course of the oral argument.

[16] See Manifestation, *rollo,* pp.170-174.

As the foregoing facts unfold, related events transpired.

On March 6, 2008, President Arroyo issued Memorandum Circular No. 151, revoking Executive Order No. 464 and Memorandum Circular No. 108. She advised executive officials and employees to follow and abide by the Constitution, existing laws and jurisprudence, including, among others, the case of *Senate v. Ermita*[17] when they are invited to legislative inquiries *in aid of legislation*.

At the core of this controversy are the two (2) crucial queries, to wit:

***First*,** are the communications elicited by the subject three (3) questions covered by executive privilege?

And ***second,*** did respondent Committees commit grave abuse of discretion in issuing the contempt **Order**?

We grant the petition.

At the outset, a glimpse at the landmark case of *Senate v. Ermita*[18] becomes imperative. *Senate* draws in bold strokes the distinction between the **legislative** and **oversight** powers of the Congress, as embodied under Sections 21 and 22, respectively, of Article VI of the Constitution, to wit:

SECTION 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries **in aid of legislation** in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

SECTION 22. The heads of department may upon their own initiative, with the consent of the President, or upon the request of either House, or as the rules of each House shall provide, appear before and be heard by such House on any matter pertaining to their departments. Written questions shall be submitted to the President of the Senate or the Speaker of the House of Representatives at least three days before their scheduled appearance. Interpellations shall

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[17] G.R. No. 169777, April 20, 2006 (488 SCRA 1).

[18] G.R. No.169777, April 20, 2006 (488 SCRA 1).

not be limited to written questions, but may cover matters related thereto. When the security of the state or the public interest so requires and the President so states in writing, the appearance shall be conducted in executive session.

Senate cautions that while the above provisions are closely related and complementary to each other, they should not be considered as pertaining to the same power of Congress. Section 21 relates to the power to conduct inquiries *in aid of legislation,* its aim is to elicit information that may be used for legislation. On the other hand, Section 22 pertains to the power to conduct a question hour, the objective of which is to obtain information in pursuit of Congress' oversight function.[19] Simply stated, while both powers allow Congress or any of its committees to conduct inquiry, their **objectives** are different.

This distinction gives birth to another distinction with regard to the use of compulsory process. Unlike in Section 21, Congress **cannot** compel the appearance of executive officials under Section 22. The Court's pronouncement in *Senate v. Ermita*[20] is clear:

> When Congress merely seeks to be informed on how department heads are implementing the statutes which it has issued, its right to such information is not as imperative as that of the President to whom, as Chief Executive, such department heads must give a report of their performance as a matter of duty. In such instances, Section 22, in keeping with the separation of powers, states that Congress may only *request* their appearance. Nonetheless, when the inquiry in which Congress requires their appearance is 'in aid of legislation' under Section 21, the appearance is *mandatory* for the same reasons stated in *Arnault.*
>
> **In fine, the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation.** This is consistent with the intent discerned from the deliberations of the Constitutional Commission

Ultimately, the power of Congress to compel the appearance of executive officials under Section 21 and the lack of it under

[19] *Ibid.*
[20] *Ibid.*

Section 22 find their basis in the principle of separation of powers. While the executive branch is a co-equal branch of the legislature, it cannot frustrate the power of Congress to legislate by refusing to comply with its demands for information. (Emphasis supplied.)

The availability of the power of judicial review to resolve the issues raised in this case has also been settled in *Senate v. Ermita*, when it held:

As evidenced by the American experience during the so-called "McCarthy era," however, the right of Congress to conduct inquiries in aid of legislation is, in theory, no less susceptible to abuse than executive or judicial power. It may thus be subjected to judicial review pursuant to the Court's *certiorari* powers under Section 1, Article VIII of the Constitution.

Hence, this decision.

I

The Communications Elicited by the Three (3) Questions are Covered by Executive Privilege

We start with the basic premises where the parties have conceded.

The power of Congress to conduct inquiries *in aid of legislation* is broad. This is based on the proposition that a legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change.[21] Inevitably, adjunct thereto is the compulsory process to enforce it. But, the power, broad as it is, has limitations. To be valid, it is imperative that it is done in accordance with the Senate or House duly published rules of procedure and that the rights of the persons appearing in or affected by such inquiries be respected.

The power extends even to executive officials and the only way for them to be exempted is through a valid claim of executive privilege.[22] This directs us to the consideration of the question

[21] *Arnault v. Nazareno*, 87 Phil. 32 (1950)

[22] *Senate v. Ermita,* p. 58.

— is there a recognized claim of executive privilege despite the revocation of E.O. 464?

A- There is a Recognized Claim of Executive Privilege Despite the Revocation of E.O. 464

At this juncture, it must be stressed that the revocation of E.O. 464 does not in any way diminish our concept of executive privilege. This is because this concept has Constitutional underpinnings. Unlike the United States which has further accorded the concept with statutory status by enacting the *Freedom of Information Act*[23] and the *Federal Advisory Committee Act,*[24] the Philippines has retained its constitutional origination, occasionally interpreted only by this Court in various cases. The most recent of these is the case of *Senate v. Ermita* where this Court declared unconstitutional substantial portions of E.O. 464. In this regard, it is worthy to note that Executive Ermita's Letter dated November 15, 2007 limits its bases for the claim of executive privilege to *Senate v. Ermita, Almonte v. Vasquez,*[25] and *Chavez v. PEA.*[26] There was never a mention of E.O. 464.

While these cases, especially *Senate v. Ermita,*[27] have comprehensively discussed the concept of executive privilege, we deem it imperative to explore it once more in view of the clamor for this Court to clearly define the communications covered by executive privilege.

The *Nixon* and *post-Watergate cases* established the broad contours of the **presidential communications privilege**.[28] In *United States v. Nixon,*[29] the U.S. Court recognized a great

[23] 5 U.S. C. § 552

[24] 51 U.S. C. app.

[25] 433 Phil. 506 (2002).

[26] G.R. No. 130716, December 9, 1998, (360 SCRA 132).

[27] *Supra.*

[28] CRS Report for Congress, Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments at p. 2.

[29] 418 U.S. 683.

public interest in preserving **"the confidentiality of conversations that take place in the President's performance of his official duties."** It thus considered presidential communications as "**presumptively privileged**." Apparently, the presumption is founded on the "**President's generalized interest in confidentiality**." The privilege is said to be necessary to guarantee the candor of presidential advisors and to provide "**the President and those who assist him… with freedom to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately**."

In *In Re: Sealed Case,*[30] the U.S. Court of Appeals delved deeper. It ruled that there are two (2) kinds of executive privilege; one is the **presidential communications privilege** and, the other is the **deliberative process privilege**. The former pertains to **"communications, documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential."** The latter includes **"advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."**

Accordingly, they are characterized by marked distinctions. **Presidential communications privilege** applies to **decision-making of the President** while, the **deliberative process privilege**, to **decision-making of executive officials**. The **first** is rooted in the constitutional principle of separation of power and the President's unique constitutional role; the **second** on common law privilege. Unlike the **deliberative process privilege**, the **presidential communications privilege** applies **to documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones**[31] As a consequence, congressional or judicial negation of the **presidential communications privilege** is always subject to greater scrutiny than denial of the **deliberative process privilege**.

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[30] *In Re: Sealed Case No.* 96-3124, June 17, 1997.

[31] *Id*.

Turning on who are the officials covered by the **presidential communications privilege**, *In Re: Sealed Case* confines the privilege only to White House Staff that has "operational proximity" to direct presidential decision-making. Thus, the privilege is meant to encompass only those functions that form the core of presidential authority, involving what the court characterized as "quintessential and non-delegable Presidential power," such as commander-in-chief power, appointment and removal power, the power to grant pardons and reprieves, the sole-authority to receive ambassadors and other public officers, the power to negotiate treaties, *etc*.[32]

The situation in *Judicial Watch, Inc. v. Department of Justice*[33] tested the *In Re: Sealed Case* principles. There, while the presidential decision involved is the exercise of the President's pardon power, a non-delegable, core-presidential function, the Deputy Attorney General and the Pardon Attorney were deemed to be too remote from the President and his senior White House advisors to be protected. The Court conceded that functionally those officials were performing a task directly related to the President's pardon power, but concluded that an organizational test was more appropriate for confining the potentially broad sweep that would result from the *In Re: Sealed Case's* functional test. The majority concluded that, the lesser protections of the deliberative process privilege would suffice. That privilege was, however, found insufficient to justify the confidentiality of the 4,341 withheld documents.

But more specific classifications of communications covered by executive privilege are made in older cases. Courts ruled early that the Executive has a right to withhold documents that might reveal **military or state secrets,**[34] **identity of**

[32] CRS Report for Congress, Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments at pp. 18-19.

[33] 365 F.3d 1108, 361 U.S.App. D.C. 183, 64 Fed. R. Evid. Serv. 141.

[34] See *United States v. Reynolds,* 345 U.S. 1, 6-8 (1953); *Chicago v. Airlines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 111; *Totten v. United States,* 92 U.S. 105, 106-107 (1875).

government informers in some circumstances,[35] and **information related to pending investigations**.[36] An area where the privilege is highly revered is in **foreign relations**. In *United States v. Curtiss-Wright Export Corp.*[37] the U.S. Court, citing President George Washington, pronounced:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy, and even when brought to a conclusion, a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic, for this might have a pernicious influence on future negotiations or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which the body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all the papers respecting a negotiation with a foreign power would be to establish a dangerous precedent.

Majority of the above jurisprudence have found their way in our jurisdiction. In *Chavez v. PCGG,*[38] this Court held that there is a "governmental privilege against public disclosure with respect to state secrets regarding military, diplomatic and other security matters." In *Chavez v. PEA,*[39] there is also a recognition of the confidentiality of Presidential conversations, correspondences, and discussions in closed-door Cabinet meetings. In *Senate v. Ermita*, the concept of **presidential communications privilege** is fully discussed.

As may be gleaned from the above discussion, the claim of executive privilege is highly recognized in cases where the subject

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[35] *Roviaro v. United States*, 353 U.S. 53, 59-61.

[36] See *Friedman v. Bache Halsey Stuart Shields, Inc.* 738 F. 2d 1336,1341-43 (D.C. Cir. 1984).

[37] 14 F. Supp. 230, 299 U.S. 304 (1936).

[38] 360 Phil. 133 (1998).

[39] 314 Phil. 150 (1995).

of inquiry relates to a power textually committed by the Constitution to the President, such as the area of military and foreign relations. Under our Constitution, the President is the repository of the commander-in-chief,[40] appointing,[41] pardoning,[42] and diplomatic[43] powers. Consistent with the doctrine of separation of powers, the information relating to these powers may enjoy greater confidentiality than others.

The above cases, especially, *Nixon, In Re:Sealed Case* and *Judicial Watch,* somehow provide the elements of **presidential communications privilege**, to wit:

1) The protected communication must relate to a "quintessential and non-delegable presidential power."

2) The communication must be authored or "solicited and received" by a close advisor of the President or the President himself. The judicial test is that an advisor must be in "operational proximity" with the President.

3) The **presidential communications privilege** remains a qualified privilege that may be overcome by a showing of adequate need, such that the information sought "likely contains important evidence" and by the unavailability of the information elsewhere by an appropriate investigating authority.[44]

In the case at bar, Executive Secretary Ermita premised his claim of executive privilege on the ground that the communications elicited by the three (3) questions "fall under conversation and correspondence between the President and public officials" necessary in "her executive and policy decision-making process" and, that "the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China." Simply put, the bases are

[40] Section 18, Article VII.

[41] Section 16, Article VII.

[42] Section 19, Article VII.

[43] Sections 20 and 21, Article VII.

[44] CRS Report for Congress, Presidential Claims of Executive Privilege: History, Law Practice and Recent Developments, *supra.*

presidential communications privilege and executive privilege on matters relating to **diplomacy or foreign relations**.

Using the above elements, we are convinced that, indeed, the communications elicited by the three (3) questions are covered by the **presidential communications privilege**. ***First***, the communications relate to a "quintessential and non-delegable power" of the President, *i.e.,* the power to enter into an executive agreement with other countries. This authority of the President to enter into *executive agreements* without the concurrence of the Legislature has traditionally been recognized in Philippine jurisprudence.[45] ***Second,*** the communications are "received" by a close advisor of the President. Under the "operational proximity" test, petitioner can be considered a close advisor, being a member of President Arroyo's cabinet. *And* ***third***, there is no adequate showing of a compelling need that would justify the limitation of the privilege and of the **unavailability** of the information elsewhere by an appropriate investigating authority.

The third element deserves a lengthy discussion.

United States v. Nixon held that a claim of executive privilege is subject to **balancing against other interest**. In other words, confidentiality in executive privilege is **not absolutely** protected by the Constitution. The U.S. Court held:

> [N]either the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances.

The foregoing is consistent with the earlier case of *Nixon v. Sirica,*[46] where it was held that **presidential communications** are presumptively privileged and that the presumption can be overcome only by mere showing of public need by the branch seeking access to conversations. The courts are enjoined to resolve the competing interests of the political branches of the

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[45] Bernas, *S.J., The 1987 Constitution of the Republic of the Philippines, A Commentary*, 2003 Ed. p. 903.

[46] 159 U.S. App. DC. 58, 487 F. 2d 700 (D.C. Cir. 1973).

government "in the manner that preserves the essential functions of each Branch."[47] Here, the record is bereft of any categorical explanation from respondent Committees to show a compelling or citical need for the answers to the three (3) questions in the enactment of a law. Instead, the questions veer more towards the exercise of the legislative oversight function under Section 22 of Article VI rather than Section 21 of the same Article. *Senate v. Ermita* ruled that the **"the oversight function of Congress may be facilitated by compulsory process only to the extent that it is performed in pursuit of legislation."** It is conceded that it is difficult to draw the line between an inquiry *in aid of legislation* and an inquiry in the exercise of oversight function of Congress. In this regard, much will depend on the content of the questions and the manner the inquiry is conducted.

Respondent Committees argue that a claim of executive privilege does not guard against a possible disclosure of a crime or wrongdoing. We see no dispute on this. It is settled in *United States v. Nixon*[48] that "demonstrated, specific need for evidence in **pending criminal trial**" outweighs the President's "generalized interest in confidentiality." However, the present case's distinction with the *Nixon* case is very evident. In *Nixon*, there is a pending criminal proceeding where the information is requested and it is the demands of due process of law and the fair administration of criminal justice that the information be disclosed. This is the reason why the U.S. Court was quick to "**limit the scope of its decision**." It stressed that it is **"not concerned here with the balance between the President's generalized interest in confidentiality x x x and congressional demands for information."** Unlike in *Nixon*, the information here is elicited, not in a criminal proceeding, but in a legislative inquiry. In this regard, *Senate v. Ermita* stressed that the validity of the claim of executive privilege depends not only on the ground invoked but, also, on the **procedural setting** or the **context** in which the claim is made.

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[47] *U.S. v. Nixon*, 418 U.S. 683 (1974)

[48] *Supra*.

Furthermore, in *Nixon,* the President did not interpose any claim of need to protect military, diplomatic or sensitive national security secrets. In the present case, Executive Secretary Ermita categorically claims executive privilege on the grounds of **presidential communications privilege** in relation to her executive and policy decision-making process and diplomatic secrets.

The respondent Committees should cautiously tread into the investigation of matters which may present a conflict of interest that may provide a ground to inhibit the Senators participating in the inquiry if later on an impeachment proceeding is initiated on the same subject matter of the present Senate inquiry. Pertinently, in *Senate Select Committee on Presidential Campaign Activities v. Nixon*[49] it was held that since an impeachment proceeding had been initiated by a House Committee, the Senate Select Committee's immediate oversight need for five presidential tapes should give way to the House Judiciary Committee which has the constitutional authority to inquire into presidential impeachment. The Court expounded on this issue in this wise:

> It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing. The Congress learned this as to its own privileges in *Gravel v. United States*, as did the judicial branch, in a sense, in *Clark v. United States*, and the executive branch itself in *Nixon v. Sirica*. **But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned,** not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, **on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is**

[49] 498 F. 2d 725 (D.C. Cir.1974).

demonstrably critical to the responsible fulfillment of the Committee's functions.

In its initial briefs here, the Committee argued that it has shown exactly this. It contended that resolution, on the basis of the subpoenaed tapes, of the conflicts in the testimony before it 'would aid in a determination whether legislative involvement in political campaigns is necessary' and 'could help engender the public support needed for basic reforms in our electoral system.' Moreover, Congress has, according to the Committee, power to oversee the operations of the executive branch, to investigate instances of possible corruption and malfeasance in office, and to expose the results of its investigations to public view. The Committee says that with respect to Watergate-related matters, this power has been delegated to it by the Senate, and that to exercise its power responsibly, it must have access to the subpoenaed tapes.

We turn first to the latter contention. In the circumstances of this case, we need neither deny that the Congress may have, quite apart from its legislative responsibilities, a general oversight power, nor explore what the lawful reach of that power might be under the Committee's constituent resolution. Since passage of that resolution, the House Committee on the Judiciary has begun an inquiry into presidential impeachment. The investigative authority of the Judiciary Committee with respect to presidential conduct has an express constitutional source. x x x **We have been shown no evidence indicating that Congress itself attaches any particular value to this interest. In these circumstances, we think the need for the tapes premised solely on an asserted power to investigate and inform cannot justify enforcement of the Committee's subpoena.**

The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress' legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. **While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events**; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause

to believe that certain named individuals did or did not commit specific crimes. If, for example, as in *Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. **We see no comparable need in the legislative process, at least not in the circumstances of this case.** Indeed, whatever force there might once have been in the Committee's argument that the subpoenaed materials are necessary to its legislative judgments has been substantially undermined by subsequent events. (Emphasis supplied)

Respondent Committees further contend that the grant of petitioner's claim of executive privilege violates the constitutional provisions on the right of the people to information on matters of public concern.[50] We might have agreed with such contention if petitioner did not appear before them at all. But petitioner made himself available to them during the September 26 hearing, where he was questioned for eleven (11) hours. Not only that, he expressly manifested his willingness to answer more questions from the Senators, with the exception only of those covered by his claim of executive privilege.

The right to public information, like any other right, is subject to limitation. Section 7 of Article III provides:

> The right of the people to information on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, **subject to such limitations as may be provided by law**.

The provision itself expressly provides the limitation, *i.e.* **as may be provided by law**. Some of these laws are Section 7 of Republic Act (R.A.) No. 6713,[51]

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[50] Citing Section 7, Article 3 of the Constitution.

[51] Section 7. *Prohibited Acts and Transactions*. – In addition to acts and omissions of public officials and employees now prescribed in the Constitution and existing laws, the following shall constitute prohibited acts and transactions of any public official and employee and are hereby declared to be unlawful: x x x

Article 229[52] of the Revised Penal Code, Section 3 (k)[53] of R.A. No. 3019, and Section 24(e)[54] of Rule 130 of the Rules of Court. These are in addition to what our body of jurisprudence classifies as confidential[55] and what our Constitution considers as belonging to the larger concept of executive privilege. Clearly,

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(c) Disclosure and/or misuse of confidential information. - Public officials and employees shall not use or divulge, confidential or classified information officially known to them by reason of their office and not made available to the public, either:

(1) To further their private interests, or give undue advantage to anyone; or

(2) To prejudice the public interest.

[52] **Article 229. Revelation of secrets by an officer. –** Any public officer who shall reveal any secret known to him by reason of his official capacity, or shall wrongfully deliver papers or copies of papers of which he may have charge and which should not be published, shall suffer the penalties of *prision correccional* in its medium and maximum periods, perpetual special disqualification and a fine not exceeding 2,000 pesos if the revelation of such secrets or the delivery of such papers shall have caused serious damage to the public interest; otherwise, the penalties of *prision correccional* in its minimum period, temporary special disqualification and a fine not exceeding 500 pesos shall be imposed.

[53] **Section 3. Corrupt practices of public officers.** – In addition to acts or omissions of public officers already penalized by existing law, the following shall constitute corrupt practices of any public officer and are hereby declared to be unlawful:

(k) Divulging valuable information of a confidential character, acquired by his office or by him on account of his official position to unauthorized persons, or releasing such information in advance of its authorized release date.

[54] **Sec. 24 Disqualification by reason of privileged communications.** – The following persons cannot testify as to matters learned in confidence in the following case: x x x

(a) A public officer cannot be examined during his term of office or afterwards, as to communications made to him in official confidence, when the court finds that the public interest would suffer by the disclosure.

[55] In *Chavez v. Public Estates Authority*, *supra.,* the Supreme Court recognized matters which the Court has long considered as confidential such as "information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law

there is a recognized public interest in the confidentiality of certain information. We find the information subject of this case belonging to such kind.

More than anything else, though, the right of Congress or any of its Committees to obtain information *in aid of legislation* cannot be equated with the people's right to public information. The former cannot claim that every legislative inquiry is an exercise of the people's right to information. The distinction between such rights is laid down in *Senate v. Ermita:*

> There are, it bears noting, clear distinctions between the right of Congress to information which underlies the power of inquiry and the right of people to information on matters of public concern. For one, the demand of a citizen for the production of documents pursuant to his right to information does not have the same obligatory force as a *subpoena duces tecum* issued by Congress. Neither does the right to information grant a citizen the power to exact testimony from government officials. These powers belong only to Congress, not to an individual citizen.
>
> **Thus, while Congress is composed of representatives elected by the people, it does not follow, except in a highly qualified sense, that in every exercise of its power of inquiry, the people are exercising their right to information.**

The members of respondent Committees should not invoke as justification in their exercise of power a right properly belonging to the people in general. This is because when they discharge their power, they do so as public officials and members of Congress. Be that as it may, the right to information must be balanced with and should give way, in appropriate cases, to constitutional precepts particularly those pertaining to delicate interplay of executive-legislative powers and privileges which is the subject of careful review by numerous decided cases.

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enforcement agencies before the prosecution of the accused." It also stated that "presidential conversations, correspondences, or discussions during close-door cabinet meetings which, like internal deliberations of the Supreme Court or other collegiate courts, or executive sessions of either House of Congress, are recognized as confidential. Such information cannot be pried-open by a co-equal branch of government.

B- The Claim of Executive Privilege is Properly Invoked

We now proceed to the issue — ***whether the claim is properly invoked by the President.*** Jurisprudence teaches that for the claim to be properly invoked, there must be a formal claim of privilege, lodged by the head of the department which has control over the matter."[56] A formal and proper claim of executive privilege requires a "precise and certain reason" for preserving their confidentiality.[57]

The Letter dated November 17, 2007 of Executive Secretary Ermita satisfies the requirement. It serves as the formal claim of privilege. There, he expressly states that "**this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly**." Obviously, he is referring to the Office of the President. That is more than enough compliance. In *Senate v. Ermita*, a less categorical letter was even adjudged to be sufficient.

With regard to the existence of "precise and certain reason," we find the grounds relied upon by Executive Secretary Ermita specific enough so as not "to leave respondent Committees in the dark on how the requested information could be classified as privileged." The case of *Senate v. Ermita* only requires that an allegation be made "whether the information demanded involves military or diplomatic secrets, closed-door Cabinet meetings, *etc*." The particular ground must only be specified. The enumeration is not even intended to be comprehensive."[58] The following statement of grounds satisfies the requirement:

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these

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[56] *United States v. Reynolds*, *supra*.

[57] *Unites States v. Article of Drug*, 43 F.R.D. at 190.

[58] *Senate v. Ermita, supra.,* p. 63.

information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

At any rate, as held further in *Senate v. Ermita,*[59] the Congress must not require the executive to state the reasons for the claim with such particularity as to compel disclosure of the information which the privilege is meant to protect. This is a matter of respect to a coordinate and co-equal department.

II

Respondent Committees Committed Grave Abuse of Discretion in Issuing the Contempt Order

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."[60]

It must be reiterated that when respondent Committees issued the show cause **Letter** dated November 22, 2007, petitioner replied immediately, manifesting that it was not his intention to ignore the Senate hearing and that he thought the only remaining questions were the three (3) questions he claimed to be covered by executive privilege. In addition thereto, he submitted Atty. Bautista's letter, stating that his non-appearance was upon the order of the President and specifying the reasons why his conversations with President Arroyo are covered by executive privilege. **Both correspondences include an expression of his willingness to testify again, provided he "be furnished in advance" copies of the questions.** Without responding to his request for advance list of questions,

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[59] *Id*., citing *U.S. v. Reynolds,* 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727, 32 A.L. R. 2d 382 (1953).

[60] *Freedom from Debt Coalition v. Energy Regulatory Commission,* G.R. No. 161113. June 15, 2004.

respondent Committees issued the **Order** dated January 30, 2008, citing him in contempt of respondent Committees and ordering his arrest and detention at the Office of the Senate Sergeant-At-Arms until such time that he would appear and give his testimony. Thereupon, petitioner filed a motion for reconsideration, informing respondent Committees that he had filed the present petition for *certiorari*.

Respondent Committees committed grave abuse of discretion in issuing the contempt **Order** in view of five (5) reasons.

First, there being a legitimate claim of executive privilege, the issuance of the contempt Order suffers from constitutional infirmity.

Second, respondent Committees did not comply with the requirement laid down in *Senate v. Ermita* that the invitations should contain the "possible needed statute which prompted the need for the inquiry," along with "the usual indication of the subject of inquiry and the **questions** relative to and in furtherance thereof." Compliance with this requirement is imperative, both under Sections 21 and 22 of Article VI of the Constitution. This must be so to ensure that the rights of both persons **appearing in or affected** by such inquiry are respected as mandated by said Section 21 and by virtue of the express language of Section 22. Unfortunately, despite petitioner's repeated demands, respondent Committees did not send him an advance list of questions.

Third, a reading of the transcript of respondent Committees' January 30, 2008 proceeding reveals that only a minority of the members of the Senate Blue Ribbon Committee was present during the deliberation.[61] Section 18 of the *Rules of Procedure Governing Inquiries in Aid of Legislation* provides that:

"The Committee, **by a vote of majority** of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer proper questions by the Committee or any of its members."

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[61] Trancript of the January 30, 2008 proceedings, p. 29.

Clearly, the needed vote is a **majority** of all the members of the Committee. Apparently, members who did not actually participate in the deliberation were made to sign the contempt Order. Thus, there is a cloud of doubt as to the validity of the contempt Order dated January 30, 2008. We quote the pertinent portion of the transcript, thus:

THE CHAIRMAN (SEN. CAYETANO, A). For clarification. x x x The Chair will call either a caucus or will ask the Committee on Rules if there is a problem. Meaning, if we do not have the sufficient numbers. But if we have a sufficient number, we will just hold a caucus to be able to implement that right away because…Again, our Rules provide that any one held in contempt and ordered arrested, need the concurrence of a majority of all members of the said committee and we have three committees conducting this.

So thank you very much to the members…

SEN. PIMENTEL. Mr. Chairman.

THE CHAIRMAN (SEN. CAYETANO, A). May I recognize the Minority Leader and give him the floor, Senator Pimentel.

SEN. PIMENTEL. Mr. Chairman, there is no problem, I think, with consulting the other committees. But I am of the opinion that the Blue Ribbon Committee is the lead committee, and therefore, it should have preference in enforcing its own decisions. Meaning to say, it is not something that is subject to consultation with other committees. I am not sure that is the right interpretation. I think that once we decide here, we enforce what we decide, because otherwise, before we know it, our determination is watered down by delay and, you know, the so-called "consultation" that inevitably will have to take place if we follow the premise that has been explained.

So my suggestion, Mr. Chairman, is the Blue Ribbon Committee should not forget it's the lead committee here, and therefore, the will of the lead committee prevails over all the other, you, know reservations that other committees might have who are only secondary or even tertiary committees, Mr. Chairman.

THE CHAIRMAN (SEN. CAYETANO, A.) Thank you very much to the Minority Leader. And I agree with the wisdom of his statements. I was merely mentioning that under Section 6 of the Rules of the

Committee and under Section 6, "The Committee by a vote of a majority of all its members may punish for contempt any witness before it who disobeys any order of the Committee."

So the Blue Ribbon Committee is more than willing to take that responsibility. **But we only have six members here today, I am the seventh as chair and so we have not met that number.** So I am merely stating that, sir, that when we will prepare the documentation, if a majority of all members sign and I am following the Sabio v. Gordon rule wherein I do believe, if I am not mistaken, Chairman Gordon prepared the documentation and then either in caucus or in session asked the other members to sign. And once the signatures are obtained, solely for the purpose that Secretary Neri or Mr. Lozada will not be able to legally question our subpoena as being insufficient in accordance with law.

SEN. PIMENTEL. Mr. Chairman, the caution that the chair is suggesting is very well-taken. But I'd like to advert to the fact that the quorum of the committee is only two as far as I remember. Any two-member senators attending a Senate committee hearing provide that quorum, and therefore there is more than a quorum demanded by our Rules as far as we are concerned now, and acting as Blue Ribbon Committee, as Senator Enrile pointed out. In any event, the signatures that will follow by the additional members will only tend to strengthen the determination of this Committee to put its foot forward – put down on what is happening in this country, Mr. Chairman, because it really looks terrible if the primary Committee of the Senate, which is the Blue Ribbon Committee, cannot even sanction people who openly defy, you know, the summons of this Committee. I know that the Chair is going through an agonizing moment here. I know that. But nonetheless, I think we have to uphold, you know, the institution that we are representing because the alternative will be a disaster for all of us, Mr. Chairman. So having said that, I'd like to reiterate my point.

THE CHAIRMAN (SEN. CAYETANO, A.) First of all, I agree 100 percent with the intentions of the Minority Leader. **But let me very respectfully disagree with the legal requirements. Because, yes, we can have a hearing if we are only two but both under Section 18 of the Rules of the Senate and under Section 6 of the Rules of the Blue Ribbon Committee, there is a need for a majority of all members if it is a case of contempt and arrest.** So, I am simply trying to avoid the court rebuking the Committee, which will instead of strengthening will weaken us. But I do agree, Mr. Minority Leader, that we should push

for this and show the executive branch that the well-decided – the issue has been decided upon the Sabio versus Gordon case. And it's very clear that we are all allowed to call witnesses. And if they refure or they disobey not only can we cite them in contempt and have them arrested. x x x[62]

Fourth, we find merit in the argument of the OSG that respondent Committees likewise violated Section 21 of Article VI of the Constitution, requiring that the inquiry be in accordance with the "**duly published rules of procedure**." We quote the OSG's explanation:

> The phrase 'duly published rules of procedure' requires the Senate of every Congress to publish its rules of procedure governing inquiries in aid of legislation because every Senate is distinct from the one before it or after it. Since Senatorial elections are held every three (3) years for one-half of the Senate's membership, the composition of the Senate also changes by the end of each term. Each Senate may thus enact a different set of rules as it may deem fit. **Not having published its *Rules of Procedure*, the subject hearings in aid of legislation conducted by the 14th Senate, are therefore, procedurally infirm.**

And fifth, respondent Committees' issuance of the contempt Order is arbitrary and precipitate. It must be pointed out that respondent Committees did not **first** pass upon the claim of executive privilege and inform petitioner of their ruling. Instead, they curtly dismissed his explanation as "unsatisfactory" and simultaneously issued the Order citing him in contempt and ordering his immediate arrest and detention.

A fact worth highlighting is that **petitioner is not an unwilling witness**. He manifested several times his readiness to testify before respondent Committees. He refused to answer the three (3) questions because he was ordered by the President to claim executive privilege. It behooves respondent Committees to first rule on the claim of executive privilege and inform petitioner of their finding thereon, instead of peremptorily dismissing his explanation as "unsatisfactory." Undoubtedly, respondent

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[62] Trancript of the January 30, 2008 Proceeding of the respondent Senate Committees, pp. 26-31.

Committees' actions constitute grave abuse of discretion for being arbitrary and for denying petitioner due process of law. The same quality afflicted their conduct when they **(a)** disregarded petitioner's motion for reconsideration alleging that he had filed the present petition before this Court and **(b)** ignored petitioner's repeated request for an advance list of questions, if there be any aside from the three (3) questions as to which he claimed to be covered by executive privilege.

Even the courts are repeatedly advised to exercise the power of contempt judiciously and sparingly with utmost self-restraint with the end in view of utilizing the same for correction and preservation of the dignity of the court, not for retaliation or vindication.[63] Respondent Committees should have exercised the same restraint, after all petitioner is not even an ordinary witness. He holds a high position in a co-equal branch of government.

In this regard, it is important to mention that many incidents of judicial review could have been avoided if powers are discharged with circumspection and deference. Concomitant with the doctrine of separation of powers is the mandate to observe respect to a co-equal branch of the government.

One last word.

The Court was accused of attempting to abandon its constitutional duty when it required the parties to consider a proposal that would lead to a possible compromise. The accusation is far from the truth. The Court did so, only to test a tool that other jurisdictions find to be effective in settling similar cases, to avoid a piecemeal consideration of the questions for review and to avert a constitutional crisis between the executive and legislative branches of government.

In *United States v. American Tel. & Tel Co.,*[64] the court refrained from deciding the case because of its desire to avoid

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[63] *Rodriguez v. Judge Bonifacio,* A.M. No. RTJ-99-1510, November 6, 2000, 344 SCRA 519.

[64] 179 U.S. App. Supp. D.C. 198, 551 F 2d. 384 (1976).

a resolution that might disturb the balance of power between the two branches and inaccurately reflect their true needs. Instead, it remanded the record to the District Court for further proceedings during which the parties are required to negotiate a settlement. In the subsequent case of *United States v. American Tel. & Tel Co.,*[65] it was held that "much of this spirit of compromise is reflected in the generality of language found in the Constitution." It proceeded to state:

> Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.

It thereafter concluded that: **"The Separation of Powers often impairs efficiency, in terms of dispatch and the immediate functioning of government. It is the long-term staying power of government that is enhanced by the mutual accommodation required by the separation of powers."**

In rendering this decision, the Court emphasizes once more that the basic principles of constitutional law cannot be subordinated to the needs of a particular situation. As magistrates, our mandate is to rule objectively and dispassionately, always mindful of Mr. Justice Holmes' warning on the dangers inherent in cases of this nature, thus:

> "some accident of immediate and overwhelming interest…appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend."[66]

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[65] 567 F 2d 121 (1977).

[66] *Northern Securities Co. v. United States*, 193 U.S. 197, 48 L. Ed. 679, 24 S Ct. 436 (1904).

In this present crusade to "search for truth," we should turn to the fundamental constitutional principles which underlie our tripartite system of government, where the Legislature enacts the law, the Judiciary interprets it and the Executive implements it. They are considered separate, co-equal, coordinate and supreme within their respective spheres but, imbued with a system of checks and balances to prevent unwarranted exercise of power. The Court's mandate is to preserve these constitutional principles at all times to keep the political branches of government within constitutional bounds in the exercise of their respective powers and prerogatives, even if it be in the search for truth. This is the only way we can preserve the stability of our democratic institutions and uphold the Rule of Law.

WHEREFORE, the petition is hereby *GRANTED*. The subject Order dated January 30, 2008, citing petitioner Romulo L. Neri in contempt of the Senate Committees and directing his arrest and detention, is hereby nullified.

SO ORDERED.

Ynares-Santiago, J., C. *Puno* certifies that *J. Ynares-Santiago* filed her separate opinion.

Corona, Tinga, Velasco, Jr., and Nachura, JJ., please *s*ee separate concurring opinions.

Chico-Nazario, J., with reservation to file a separate concurring opinion.

Quisumbing and Reyes, JJ., in the result.

Carpio, J., see dissenting and concurring opinion.

Puno and Carpio Morales, JJ., please see dissenting opinions.

Austria-Martinez and Azcuna, JJ., joint *C.J., Puno* in his dissenting opinion.

SEPARATE OPINION

YNARES-SANTIAGO, *J.*:

The President does not have an unlimited discretionary privilege to withhold information from Congress, the Judiciary or the public, even if the claim is founded on one of the traditional privileges covered by the doctrine on executive privilege. It was clearly stated in *Senate v. Ermita*[1] that a claim of executive privilege may be valid or not depending on the ground invoked to justify it and the context in which it is made. In this sense, therefore, executive privilege is not absolute.

Petitioner justified his non-appearance before the respondent Senate Committees on the ground that the information sought by these committees pertain to conversations he had with the President. These conversations, if disclosed, would allegedly affect our "diplomatic relations and economic and military affairs" and would result to "possible loss of confidence of foreign investors and lenders." Specifically, petitioner assumed that he was being summoned by the Senate Committees for the purpose of responding to three questions which he refused to answer when he testified during the September 26, 2007 Senate hearing. These questions are: (1) whether the President followed up the ZTE-NBN project after petitioner informed her of the ₱200M bribery attempt allegedly committed by then COMELEC Chairman Benjamin Abalos;[2] (2) whether the President instructed or dictated upon him to prioritize the ZTE-NBN project;[3] and (3) whether the President instructed petitioner to go ahead and approve the project despite being told of the alleged bribery attempt.[4]

First, it was wrong for petitioner to assume that he was being summoned by the Senate Committees only to answer the three

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[1] G.R. No. 169777, April 20, 2006, 488 SCRA 1.

[2] Senate TSN, September 26, 2007, p. 91.

[3] *Id*. at 114-116.

[4] *Id*. at 275-276.

questions cited above. It may be true that he had exhaustively testified on the ZTE-NBN project during the September 26, 2007 hearing, however, it is not for him to conclude that the Senate Committees have gathered all the necessary information that they needed. He cannot refuse to appear before the Senate Committees on the assumption that he will testify only on matters that are privileged. The Senate Committees, in the exercise of their constitutionally-mandated functions, can inquire into any matter that is pertinent and relevant to the subject of its investigation.

Indeed, presidential conversations and correspondences have been recognized as presumptively privileged under case law.[5] In *US v. Nixon*,[6] the US Supreme Court upheld the privilege by reasoning that a "President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." However, the privilege attached to presidential communications was not regarded as absolute. For while the President's need for complete candor and objectivity from advisers calls for great deference from the courts, a generalized claim of confidentiality, without more, cannot prevail over a specific need for evidence in a pending criminal trial.[7]

Thus, presidential conversations and correspondences are not entirely confidential and the privilege attached to this type of information may yield to other considerations. In *US v. Nixon*, it was the "fundamental demands of due process of law in the fair administration of criminal justice" that was the overriding consideration which led to the disallowance of the claim of privilege. In the instant case, I submit that the grave implications on public accountability and government transparency justify the rejection of the claim of executive privilege.

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[5] See *Almonte v. Vasquez*, 314 Phil. 150 (1995).

[6] 418 U.S. 683 (1974).

[7] *Id*.

The doctrine of executive privilege applies only to certain types of information of a sensitive character that would be against the public interest to divulge. As held in *Senate v. Ermita*,[8] the doctrine is premised on the fact that certain information must, **as a matter of necessity**, be kept confidential in pursuit of the public interest. Considering that the privilege is an exemption from the obligation to disclose information, the necessity for non-disclosure must be of such high degree as to outweigh public interest.

Petitioner miserably failed to demonstrate that the reasons for his non-disclosure far outweigh public interest. He has not sufficiently shown that there is an imperative need to keep confidential his conversations with the President regarding the ZTE-NBN scandal. He failed to show how disclosure of the presidential conversations would affect the country's military, diplomatic and economic affairs, as he so asserted to the Senate Committees and before this Court. In fact, his counsel admitted that no military secrets were involved in the conversations, only military "concerns."[9] Neither did the conversations necessarily refer to diplomatic secrets, but only to "our relationship in general with a friendly foreign power."[10] These generalized claims do not suffice to justify his refusal to disclosure.

Moreover, petitioner's legal consultant, Atty. Paul Lentejas, admitted during the oral arguments that there was nothing legally or morally wrong if the President followed up on the status of the ZTE-NBN project because she is, after all, the chairperson of the NEDA Board. It was likewise admitted that by virtue of her position in the NEDA, the President could justifiably prioritize the ZTE-NBN project. Petitioner could have also pointed out that, as NEDA Director General, he had no authority to approve the project, as that power belonged to the NEDA Board which is headed by the President.[11] Evidently, petitioner had

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[8] *Senate v. Ermita*, *supra* note 1 at 68.

[9] Senate TSN, September 26, 2007, p. 42.

[10] *Id*. at 51.

[11] *Id*. at 321-328.

no valid reason not to answer the three questions propounded by the Senators.

Except for generally claiming that to require petitioner to answer the three questions would have a "chilling effect" on the President, in that she would be apprehensive to consult her advisers for fear of being scrutinized by third parties, petitioner has not established any compelling and demonstrable ground for claiming executive privilege. The following exchange between Chief Justice Reynato S. Puno and petitioner's counsel, Atty. Antonio R. Bautista, is enlightening:

CHIEF JUSTICE PUNO:

In the functional test, the t(h)rust is to balance what you said as the benefits versus the harm on the two branches of government making conflicting claims of their powers and privileges. Now, using the functional test, please tell the Court how the Office of the President will be seriously hampered in the performance of its powers and duties, if petitioner Neri would be allowed to appear in the Senate and answer the three questions that he does not want to answer?

ATTY. BAUTISTA:

Your Honor, the effect, the chilling effect on the President, she will be scared to talk to her advisers any longer, because for fear that anything that the conversation that she had with them will be opened to examination and scrutiny by third parties, and that includes Congress. And (interrupted)

CHIEF JUSTICE PUNO:

Let us be more specific. Chilling effect, that is a conclusion. The first question is, whether the President followed up the NBN Project. If that question is asked from petitioner Neri, and he answers the question, will that seriously affect the way the Chief Executive will exercise the powers and privileges of the Office?
ATTY. BAUTISTA:

Well, if the answer to that question were in the affirmative, then it would imply, Your Honor, that the President has some undue interest in the contract.

CHIEF JUSTICE PUNO:

The President may have interest, but not necessarily undue interest.

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How about the second question, which reads, were you dictated to prioritize the ZTE, again, if this question is asked to petitioner Neri, and responds to it?

ATTY. BAUTISTA:

In the affirmative?

CHIEF JUSTICE PUNO:

I don't know how he will respond.

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How will that affect the functions of the President, will that debilitate the Office of the President?

ATTY. BAUTISTA:

Very much so, Your Honor.

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Because there are lists of projects, which have to be-which require financing from abroad. And if the President is known or it's made public that she preferred this one project to the other, then she opens herself to condemnation by those who were favoring the other projects which were not prioritized.

CHIEF JUSTICE PUNO:

Is this not really an important project, one that is supposed to benefit the Filipino people? So if the President says you prioritize this project, why should the heavens fall on the Office of the President?

ATTY. BAUTISTA:

Well, there are also other projects which have, which are supported by a lot of people. Like the Cyber Ed project, the Angat Water Dam project. If she is known that she gave low priority to these other projects, she opens herself to media and public criticism, not only media but also in rallies, Your Honor.

xxx xxx xxx

CHIEF JUSTICE PUNO:

How about the third question, whether the President said to go ahead and approve the project after being told of the alleged bribe? Again, how will that affect the functions of the President using that balancing test of functions?

ATTY. BAUTISTA:

Well, if the answer is in the affirmative, then it will be shown, number one, that she has undue interest in this thing, because she sits already on the ICC and the Board.

CHIEF JUSTICE PUNO:

Again, when you say undue interest, that is your personal opinion.

ATTY. BAUTISTA:

Yes, Your Honor.[12]

I do not see how public condemnation and criticism can have an adverse effect on the President's performance of her powers and functions as Chief Executive. In a democracy such as ours, it is only to be expected that official action may be met with negative feedback or even outrage from a disapproving public. If at all, the public's opinion, negative or otherwise, should enhance the President's performance of her constitutionally-mandated duties. It is through open discussion and dialogue that the

[12] *Id*. at 297-304.

government better responds to the needs of its citizens and the ends of government better achieved.

At this point, it would not be amiss to state that it was petitioner who provided the Senate Committees with information that, prior to the signing of the ZTE-NBN contract, he had told the President of the ₱200M bribery attempt allegedly perpetrated by Chairman Abalos. As admitted by petitioner's counsel during the oral arguments of this case, the allegation, if proven, would constitute a crime under our penal laws.[13] To allow the details of this alleged crime to be shrouded by a veil of secrecy "would permit criminal conspiracies at the seat of government."[14] Needless to say, the Constitution could never sanction executive privilege as a shield for official wrongdoing.

Finally, in his treatise on *Executive Privilege and Congressional Investigatory Power*,[15] Professor Bernard Schwartz[16] explained that the exercise of its authority to enact laws is but part of the work of a legislature like the Congress. He further discussed, to wit:

> The primary tasks of modern legislative assemblies may be arranged in four classes. First, but not necessarily foremost, is the function of lawmaking. At least equally important is the responsibility of supervising the Executive; the Legislature in this role may be compared to a board of directors of a business corporation which at least theoretically, endeavors to hold "administrative officers to a due accountability for the manner in which they perform their duties." A third legislative office, broad in its implications, involves activities as an organ of public opinion; a lawmaking body may serve as a national forum for the expression, formulation, or molding of opinion. The remaining function, which may be termed membership, concerns

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[13] *Id*. at 34.

[14] *Executive Privilege, the Congress and the Courts*, Norman Dorsen and John H.F. Shattuck, Ohio Law State Journal, Vol. 35 (1974), p. 33.

[15] California Law Review, Vol. 47 (1959), pp. 10-11.

[16] Professor of Law, New York University.

internal matters especially the judging of the qualifications and conduct of the delegates to the Legislative Assembly.[17]

I thus vote for the dismissal of the petition.

CONCURRING OPINION

CORONA, *J.*:

> The … deal which gave rise to petitioner's examination by a committee of the Senate was one that aroused popular indignation as few cases of graft and corruption have….
>
> All the more necessary it is that we should approach the consideration of this case with circumspection, lest the influence of strong public passions should get the better of our judgment. It is trite to say that public sentiment fades into insignificance before a proper observance of constitutional processes, the maintenance of the constitutional structure, and the protection of individual rights. Only thus can a government of laws, the foundation stone of human liberty, be strengthened and made secure for that very public.[1]

The history of liberty has largely also been a chronicle of the observance of procedural safeguards.[2] The annihilation of liberty, on the other hand, often begins innocently with a relaxation of those safeguards "in the face of plausible-sounding

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[17] Citing McGeary, *The Development of Congressional Investigative Power* 23 (1940).

[1] *Arnault v. Nazareno*, 87 Phil. 29 (1950), Justice Pedro Tuason, dissenting.

[2] *McNabb v. United States*, 318 U.S. 332 (1943).

governmental claims of a need to deal with widely frightening and emotion-freighted threats to the good order of society."[3]

With this in mind, I wish to address an aspect of this case distinct from but nonetheless just as important as the burning issue of executive privilege that is engrossing and deeply dividing the nation. This cannot be relegated to the sidelines as the Court settles the raging conflict between the executive and legislative departments.

In the middle of the struggle for power stands petitioner Romulo L. Neri, the man in the eye of the storm. As Citizen Neri, he has rights guaranteed by the Constitution. In other words, in the case of Neri as an individual and as a citizen, liberty is at stake. And individual liberty can never be overlooked, disregarded or taken for granted. Under our fundamental law, the constitution of liberty precedes the constitution of government. Thus, it is the Court's high duty not only to arbitrate the intense tug-of-war between the political branches but, more importantly, to keep the bell of liberty tolling amidst the noise of political turmoil.

FACTUAL BACKDROP

The Senate, through respondent Committees (the Senate Committees on Accountability of Public Officers and Investigations [Blue Ribbon Committee], on Trade and Commerce and on National Defense and Security), began an inquiry into the allegedly anomalous national broadband network (NBN) project. Respondent Committees vowed to pursue the truth behind the NBN project and what they believed to be the allegedly disadvantageous contract between the Republic of the Philippines, represented by the Department of Transportation and Communications, and Zhing Xing Telecommunications Equipment (ZTE). Respondent Committees claimed they wished to overhaul the purported "dysfunctional government procurement system."

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[3] Amsterdam, Anthony G., *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 354 (1973).

In connection with the legislative inquiry, Neri was issued an invitation to attend respondent Committees' proceedings to shed light on the NBN project and explain the government's agreement with ZTE. Neri honored the invitation and attended the hearing on September 26, 2007. For 11 hours, he testified on matters which he personally knew, except on those matters which he believed to be covered by executive privilege.

On November 13, 2007, respondent Committees issued a *subpoena ad testificandum* to Neri requiring him to appear before them and to testify again on November 20, 2007.

In a letter dated November 15, 2007, Executive Secretary Eduardo R. Ermita requested Senator Alan Peter S. Cayetano, chairman of respondent Blue Ribbon Committee,[4] to dispense with the testimony of Neri on the ground of executive privilege which he (as Executive Secretary) was invoking "by order of the President."

As he was ordered by the President not to appear before respondent Committees, Neri did not attend the November 20, 2007 hearing. But respondent Committees issued an order dated November 22, 2007 directing Neri to show cause why he should not be cited in contempt under Section 6, Article 6 of the Rules of the Blue Ribbon Committee for his non-appearance in the November 20, 2007 hearing. In response, Neri submitted his explanation in a letter dated November 29, 2007. On December 7, 2007, he filed this petition for *certiorari* with prayer for the issuance of a temporary restraining order and/or preliminary injunction assailing the November 22, 2007 show cause order for having been issued with grave abuse of discretion.

Neri's explanation and this petition notwithstanding, respondent Committees cited him in contempt in an order dated January 30, 2008. They ordered his arrest and detention until such time that he should appear and testify.

[4] The lead committee in the joint legislative inquiry.

STRICT OBSERVANCE OF RULES OF PROCEDURE GOVERNING LEGISLATIVE INQUIRIES

Section 21, Article VI of the Constitution provides:

> Section 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation **in accordance with its duly published rules of procedure**. The rights of persons appearing in, or affected by, such inquiries shall be respected. (emphasis supplied)

This recognizes the power of Congress to conduct inquiries in aid of legislation. This power is intimately connected with the express power of legislation and does not even have to be expressly granted.[5] Nonetheless, the drafters of the Constitution saw it fit to include a provision that would clearly spell out this power. The incorporation of the rule on legislative inquiry in the Constitution, however, was not intended to authorize the conduct of such inquiries but to **limit** them[6] and to forestall possible abuse. On this account, Justice Isagani Cruz commented:

> The reason is that in the past this power was much abused by some legislators who used it for illegitimate ends or to browbeat or intimidate witnesses, usually for grandstanding purposes only. There were also times when the subject of the inquiry was purely private in nature and therefore outside the scope of the powers of the Congress.
>
> **To correct these excesses**, it is now provided that the legislative inquiry must be in aid of legislation, whether it be under consideration already or still to be drafted. Furthermore, **the conduct of the investigation must be strictly in conformity with the rules of procedure** that must have been published in advance for the information and protection of the witnesses.[7] (emphasis supplied)

Section 21, Article VI regulates the power of Congress to conduct legislative investigations by providing a three-fold limitation: (1) the power must be exercised in aid of legislation; (2) it

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[5] Cruz, Isagani A., *PHILIPPINE POLITICAL LAW*, 2002 edition, Central Lawbook Publishing Co., Inc., p. 163.

[6] *Id*.

[7] *Id*., pp. 163-164.

must be in accordance with the duly published rules of procedure and (3) the rights of persons appearing in or affected by such inquiries shall be respected.

The first limitation ensures that no person can be punished for contumacy as a witness unless his testimony is required in a matter which Congress or any of its committees has jurisdiction to inquire into.[8] This is an essential element of the jurisdiction of the legislative body.[9]

The second limitation means that either House of Congress or any of its committees must follow its duly published rules of procedure. **Violation of the rules of procedure by Congress or any of its committees contravenes due process.**[10]

The third limitation entails that legislative investigation is circumscribed by the Constitution, particularly by the Bill of Rights. As such, this limitation does not create a new constitutional right.[11] It simply underscores fundamental rights such as the rights against self-incrimination, unreasonable searches and seizures and to demand that Congress observe its own rules as part of due process.[12] Thus, the respected American constitutional scholar Lawrence H. Tribe observed:

> Although only loosely restricting the *substantive* scope of congressional investigations, [Congress is required] to adopt important *procedural* safeguards in the conduct of its investigations. Because the Bill of Rights limits the lawmaking process as well as the content of resulting legislation, congressional investigators must respect the Fifth Amendment privilege against compelled self-incrimination, the Fourth Amendment prohibition against unreasonable searches and seizures, and **the requirement of due process that, if government**

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[8] *Arnault v. Nazareno*, *supra* note 1.

[9] Bernas S.J., Joaquin G., *THE 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY*, 2003 edition, Rex Bookstore, Inc., p. 737.

[10] *Id*., p. 740.

[11] *Id*.

[12] *Id*., pp. 740-741.

actors promulgate rules limiting their own conduct, they must comply with such rules.[13] (emphasis supplied)

In this case, the Senate promulgated Rules of Procedure of the Senate Governing Inquiries in Aid of Legislation (Rules of Procedure of the Senate) as well as the Rules of the Committee on Accountability of Public Officers and Investigations (Rules of the Blue Ribbon Committee) pursuant to Section 21, Article VI. **These rules of procedure serve as procedural safeguards in legislative investigations**. They guarantee that proceedings are orderly, effective and efficient. More importantly, they shield the witnesses appearing before the Senate or its committees from unnecessary, unreasonable or arbitrary action on the part of the inquiring body or its members. Hence, **they are the standards upon which the validity of any action undertaken by the Senate or its committees shall be measured**.

The rules of procedure are required to be promulgated and published not so much to impose a duty on the witness appearing in a legislative inquiry but to enforce restrictions on Congress regarding the manner it conducts its inquiry. Thus, the Senate or any of its committees are bound to observe the very rules they themselves established to govern their own conduct. **Since this obligation is imposed by the Constitution itself, it cannot be ignored, trifled with or violated without transgressing the fundamental law.**

In sum, Congress has the inherent power to conduct inquiries in aid of legislation. However, as a condition for the exercise of this power, the Constitution requires Congress to lay down and publish specific and clear rules of procedure. No action which affects the substantial rights of persons appearing in legislative inquiries may be taken unless it is in accordance with duly published rules of procedure. In other words, before substantial rights may be validly affected, Congress or its committees must faithfully follow the relevant rules of procedure

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[13] Tribe, Lawrence H., *I AMERICAN CONSTITUTIONAL LAW* 794-795 (2000).

relating to it. This will ensure the constitutional intent of respect for the rights of persons appearing in or affected by legislative inquiries. **In the absence of a rule of procedure on any matter which is the subject of a legislative inquiry, any action which impinges on substantial rights of persons would be unconstitutional.**

ABSENCE OF POWER TO ORDER ARREST

The gravity of the consequences of respondent Committees' order to arrest Neri allegedly for being in contempt cannot be underestimated. It poses a serious threat to his liberty.

The Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee do not state that respondent Committees have the power to issue an order of arrest. Such omission is fatal to respondent Committees' cause. It negates their claim that the order to arrest Neri is valid, lawful and constitutional.

As stated previously, the second constitutional limitation to the power of legislative investigation is the promulgation and publication of rules of procedure that will serve as guidelines in the exercise of that power. Respondent Committees transgressed this constitutional constraint because there is no rule of procedure governing the issuance of an order of arrest.

Under the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee, respondent Committees are authorized only **to detain** a witness found guilty of contempt. On the other hand, **nowhere does the word "arrest" appear in either rules of procedure**.

There is a whale of a difference between the power to detain and the power to arrest.

To detain means to hold or keep in custody.[14] On the other hand, to arrest means to seize, capture or to take in custody

[14] Webster's *Third New International Dictionary*, 1993 edition, p. 616.

by authority of law.[15] Thus, the power to detain is the power to keep or maintain custody while the power to arrest is the power to take custody. The power to detain implies that the contumacious witness is in the premises (or custody) of the Senate and that he will be kept therein or in some other designated place. In contrast, the power to arrest presupposes that the subject thereof is not before the Senate or its committees but in some other place outside.

The distinction is not simply a matter of semantics. It is substantial, not conceptual, for it affects the fundamental right to be free from unwarranted governmental restraint.

Since the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee speak only of a power to order the detention of a contumacious witness, it cannot be expanded to include the power to issue an order of arrest. Otherwise, the constitutional intent to limit the exercise of legislative investigations to the procedure established and published by the Senate or its committees will be for naught.

In this connection, respondent Committees cannot rely on *Arnault v. Nazareno* to justify the order to arrest Neri. *Arnault* was explicit:

> **Like the Constitution of the United States, ours does not contain an express provision empowering either of the two Houses of Congress to punish nonmembers for contempt.** It may also be noted that whereas in the United States the legislative power is shared between the Congress of the United States, on the one hand, and the respective legislatures of the different States, on the other — the powers not delegated to the United States by the Constitution nor prohibited by it to States being reserved to the states, respectively, or to the people — in the Philippines, the legislative power is vested in the Congress of the Philippines alone. It may therefore be said that the Congress of the Philippines has a wider range of legislative field than the Congress of the Unites States or any State Legislature.

Our form of government being patterned after the American system — the framers of our Constitution having been drawn largely from American institution and practices — we can, in this case, properly draw also from American precedents in interpreting analogous

[15] *Id.*, p. 121.

provisions of our Constitution, as we have done in other cases in the past.

Although **there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions advisedly and effectively**, such power is so far incidental to the legislative function as to be implied. In other words, the power of inquiry — with process to enforce it — is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislations is intended to affect or change; and where the legislative body does not itself possess the requisite information — which is not frequently true — recourse must be had to others who do possess it. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion is essential to obtain what is needed. (*McGrain vs. Daugherty*, 273 U.S., 135; 71 L. ed., 580; 50 A. L. R., 1.) The fact that the Constitution expressly hives to congress the power to punish its Members for disorderly behaviour, does not by necessary implication exclude the power to punish for contempt any other person. (*Anderson vs. Dunn,* 6 Wheaton. 204; 5 L ed., 242.)[16] (emphasis supplied)

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[16] *Id*. The principle was further explained in *Arnault v. Balagtas* (97 Phil. 358 [1955]):

The principle that Congress or any of its bodies has the power to punish recalcitrant witnesses is founded upon reason and policy. Said power must be considered implied or incidental to the exercise of legislative power. How could a legislative body obtain the knowledge and information or, which to base intended legislation if it cannot require and compel the disclosure of such knowledge and information, if it is impotent to punish a defiance of its power and authority? When the framers of the Constitution adopted the principle of separation of powers, making each branch supreme within the realm of its respective authority, it must have intended each department's authority to be full and complete, independently of the other's authority or power. And how could the authority and power become complete if for every act of refusal, every act of defiance, every act of contumacy against it, the legislative body must resort to the judicial department for the appropriate remedy, because it is impotent by itself to punish or deal therewith, with the affronts committed against its authority or dignity. (emphasis supplied)

Arnault was decided under the 1935 Constitution in which Section 21, Article VI of the 1987 Constitution has no counterpart. Since there was no provision on legislative inquiry at that time, *Arnault* defined and delimited the power "partly by drawing from American precedents and partly by acknowledging the broader legislative power of the Philippine Congress as compared to the U.S. Federal Congress which shares legislative power with the legislatures of the different states of the American union."[17]

Under the 1987 Constitution, however, the power has been expressly subjected to three limitations. Thus, while Congress cannot be deprived of its inherent contempt power (and the corollary power to order the arrest of a contumacious party) in relation to legislative investigations, the power must be wielded subject to constitutional constraints. In this case, the Senate or any of its committees may order the arrest of a contemnor only in accordance with its duly published rules of procedure. In the absence of a provision stating how, why and when arrest may be ordered, no order of arrest may validly be issued.

Nor can respondent Committees seek refuge in *Senate v. Ermita*.[18] In that case, the Court declared:

> Section 21, Article VI likewise establishes crucial safeguards that proscribe the legislative power of inquiry. The provision requires that the inquiry be done in accordance with the Senate or House's duly published rules of procedure, necessarily implying the constitutional infirmity of an inquiry conducted without duly published rules of procedure.

An action as critical and as significant as an order of arrest must be done strictly in accordance with a specific provision in the duly published rules of procedure. Otherwise, it is constitutionally invalid.

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[17] *Negros Oriental II Electric Cooperative, Inc. v. Sangguniang Panlungsod of Dumaguete*, G.R. No. 72492, 05 November 1987, 155 SCRA 421.

[18] G.R. Nos. 169777/169659/169660/169667/169834/171246, 20 April 2006.

This interpretation does not unduly emasculate the power to conduct legislative investigations. Any evisceration results not from an interpretation which hews closely to the language of the Constitution but rather from the manifest failure to establish rules of procedure on a matter that infringes on the individual's liberty.

LACK OF SANCTION ON REFUSAL OR FAILURE TO OBEY *SUBPOENA AD TESTIFICANDUM*

Neri was ordered arrested and detained allegedly for ontempt because of his refusal or failure to comply with a *subpoena ad testificandum*. However, a careful reading of the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee shows that they do not provide for a sanction on the refusal or failure to obey a *subpoena ad testificandum*. Respondent Committees are authorized to detain a person only in the exercise of their contempt power. Section 18 of the Rules of Procedure of the Senate and Section 6, Article 6 of the Rules of the Blue Ribbon Committee respectively provide:

Sec. 18. Contempt

The Committee, by a vote of a majority of all its members, may punish for contempt **any witness before it** who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate. Such witness **may be ordered by the Committee to be detained** in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself on that contempt. (emphasis supplied)

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SECTION 6. *Contempt* – (a) The Committee, by a vote of a majority of all its members, may punish for contempt **any witness before it** who disobeys any order of the Committee, including refusal to produce documents pursuant to a *subpoena duces tecum*, or refuses to be sworn or to testify or to answer a proper question by the Committee

or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate. Such witness **may be ordered by the Committee to be detained** in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself on that contempt.

(b) A report of the detention of any person for contempt shall be submitted by the Sergeant-at-Arms to the Committee and the Senate. (emphasis supplied)

The absence of a provision penalizing refusal or failure to comply with a *subpoena ad testificandum* should be interpreted against respondent Committees. Neri cannot be punished for contempt for lack of, again, the requisite published rules of procedure.

This deficiency becomes all the more pronounced when compared to Section 9, Rule 21 of the Rules of Court:

SEC. 9. Contempt. – Failure by any person without adequate cause to obey a subpoena served upon him shall be deemed a contempt of the court from which the subpoena is issued. If the subpoena was not issued by a court, the disobedience thereto shall be punished in accordance with the applicable law or Rule.

The contempt provision of Rule 21 expressly penalizes the unwarranted failure to obey a subpoena (whether *ad testificandum* or *duces tecum*) as contempt of court. In contrast, the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee cover only the following acts of a witness before it: disobedience of any committee order including refusal to produce documents pursuant to a *subpoena duces tecum*, refusal to be sworn or to testify or to answer a proper question and giving of false or evasive testimony.

LIMITED SCOPE OF POWER TO PUNISH FOR CONTEMPT

In relation to legislative investigations, the contempt power of Congress or its committees is recognized as an essential

and appropriate auxiliary to the legislative function.[19] However, the power to punish for contempt is not limitless. It must be used sparingly with caution, restraint, judiciousness, deliberation and due regard to the provisions of the law and the constitutional rights of the individual.[20] Strict compliance with procedural guidelines governing the contempt power is **mandatory**.[21]

Pursuant to the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee, the proper subject of the contempt power is "any witness before" the concerned committee(s) of the Senate. This means that the witness must be in attendance or physically present at the legislative inquiry. It is in this context (and this context alone) that the respective provisions of the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee speak of the witness's disobedience of any committee order, refusal to be sworn or to testify or to answer a proper question and giving of false or evasive testimony. Likewise, it is only in accordance with such premise that a witness may be ordered detained.

In this case, **Neri was not before the respondent Committees**. That was why respondent Committees ordered his arrest. Indeed, the *subpoena ad testificandum* issued to Neri commanded him to appear and testify before the Blue Ribbon Committee on November 20, 2007. The December 2, 2007 show cause order was issued because he "failed to appear" in the November 20, 2007 hearing while the January 30, 2008 arrest order was issued on account of his "failure to appear and testify."

Respondent Committees try to downplay the nature of their contempt power as "coercive, not punitive." However, the language of the Rules of Procedure of the Senate and the Rules of the Blue Ribbon Committee indicates otherwise. The respective provisions on contempt identically state that respondent

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[19] *Arnault v. Nazareno*, *supra*; *Senate v. Ermita*, *supra*.

[20] *Regalado v. Go*, G.R. No. 167988, February 6, 2007.

[21] *Id*.

Committees "may **punish** for contempt." Thus, the contempt power of respondent Committees is meant as a punishment, not merely as an instrument of coercion. And something which inflicts a punishment or penalty is punitive.[22]

Moreover, while the contempt power of the legislature is *sui generis*,[23] it is analogous to that exercised by courts of justice.[24] As a rule, proceedings against a purported contemnor are commonly treated as **criminal in nature**.[25] This being so, the order holding Neri in contempt for his alleged failure or refusal to obey a *subpoena ad testificandum* notwithstanding the absence of duly promulgated rules of procedure on that matter was tantamount to an *ex post facto* act.

The power to declare a person in contempt has serious implications on the rights of the supposed contemnor, particularly on his liberty. Thus, when a committee rule relates to a matter of such importance, it must be strictly observed.[26]

A FINAL WORD

The hands that wield the power of legislative investigations are powerful. Section 21, Article VI of the Constitution cushions the impact by providing substantive as well as procedural limitations. Unfortunately, in Machiavellian fashion, respondent Committees disregarded the procedural safeguards purportedly in the name of truth and good governance. In so doing, they dealt a devious blow not only on Neri but also on our cherished traditions of liberty.

Accordingly, I vote to *GRANT* the petition.

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[22] *See* Black's *Law Dictionary*, 4th edition, p. 1399.

[23] *Negros Oriental II Electric Cooperative, Inc. v. Sangguniang Panlungsod of Dumaguete*, *supra*.

[24] *Anderson v. Dunn*, 19. U.S. [6 Wheat.] 204 (1821) cited in *Sabio v. Gordon*, G.R. Nos. 174340/ 174318/174177, 17 October 2006.

[25] *Regalado v. Go*, *supra*.

[26] *Yellin v. United States*, 374 U.S. 109; *Gojack v. United States*, 384 U.S. 702 (1966).

SEPARATE CONCURRING OPINION

TINGA, *J.*:

The determination of this petition must rest in part on the constitutional character and purpose of the legislative inquiry function of Congress, as delineated in Section 21, Article VI of the Constitution. That such function is constitutionally vested in and plenary to the legislature[1] is indubitable. Yet the mere existence of the function does not mean that it is insusceptible to appreciable limitations.

The purpose of legislative inquiry is constitutionally and jurisprudentially linked to the function of legislation, *i.e.*, the task of formulating laws. The method of enacting sensible laws necessarily requires a legislature that is well-informed of the factual background behind the intended legislation. It is for such purpose, morally or politically neutral as it may be, that the function exists as a constitutional principle.

Given the wide publicity some legislative inquiries are able to attract, especially when they call attention to wrongdoings on the part of government officials or private individuals, there is somehow a public perception that legislative inquiries are primarily vital in their truth-seeking faculty. Perhaps the legislators who function as inquisitors feel ennobled by that perception as well. Can this purpose, which admittedly is neither morally nor politically neutral, be accommodated in the constitutional function of legislative inquiries? Facially yes, since the goal of legislative oversight is integrally wedded to the function of legislative inquiries. In aiming to create effective laws, it is necessary for our lawmakers to identify the flaws in our present statutes. To the extent that such flaws are linked to the malperformance of public officials, the resultant public exposure and embarrassment of such officials retain relevance to the legislative oversight and inquiry process.

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[1] See *Arnault v. Nazareno*, 87 Phil. 29, 45 (1950); *Senate v. Ermita*, G.R. No. 169777, 20 April 2006, 488 SCRA 1, 42.

Yet all the righteous, divinely-inspired fulminations that find expression in the legislative inquiry cannot bestow on that process a higher or different purpose than that intended by the Constitution. Contrary as it may be to the public expectation, legislative inquiries do not share the same goals as the criminal trial or the impeachment process. The orientation of legislative inquiries may be remedial in nature, yet they cannot be punitive in the sense that they cannot result in legally binding deprivation of a person's life, liberty or property. No doubt that a legislative inquiry conducted under the glare of klieg lights can end up destroying one's life, livelihood or public reputation – as many suspected American leftists discovered when they were caught in the dragnet of persecution during the McCarthy era – yet such unfortunate results should only incidentally obtain as a result of an inquiry aimed not at specific persons, but at the framework of the laws of the land.

It is vital to draw the distinction between legislative inquiries and the other legal processes, such as impeachment or criminal trials, that are oriented towards imposing sanctions in the name of the State. As the latter processes embody the avenue of the State to impose punishment, the Constitution establishes elaborate procedural safeguards, also subsumed under the principles of due process and equal protection, to assure a fair proceeding before sanction is levied. In contrast, since the end result of a legislative inquiry is not constitutionally intended to be legally detrimental to persons subject of or participatory to the inquiry, the procedural safeguards attached to it are more lenient. The Constitution does require that "[t]he rights of persons appearing in or affected by such inquiries shall be respected," but such expression is less definitive than the rights assured to persons subject to criminal procedure. For example, there is no explicit constitutional assurance that persons appearing before legislative inquiries are entitled to counsel, though Congress in its wisdom may impose such a requirement.

Then there are the bald realities that a legislative inquiry is legally animated not by any recognizable legislative function to seek out the truth, but the existence of a political majority that desires to constitute the inquiry. In the same manner that it is

the legislative majority rule that breathes life to, prolongs or shortens deliberation of legislation, or simply dictates the legislative path, the same nakedly political considerations drive the life, length and breadth of legislative inquiries. Investigations are viable avenues for legislators to exploit the headlines of the day for political capital, whether they may concern rising oil prices, the particular diplomatic ties with one or some nations, or the spectacle of Filipina actresses making entertainment trips to Brunei. For as long as that political majority exists, only the innate good sense of our legislators may inhibit the inquiry, and certainly it is beyond the province of the courts to prevent Congress from conducting inquiries on any or all matters.

Thus, it may be conceded that a legislative inquiry is not constrained by the same strictures that bind the criminal investigation process for the benefit of an accused, and that such laxer standards may operate to the detriment of persons appearing in or affected by legislative inquiries. Yet this relative laxity is set off by the recognition of the constitutional limitations on legislative inquiries even to the extent of affirming that it cannot embody official State expression of moral outrage, or of the State's punitive functions. As compared to the State processes that encapsulate the moral virtues of truth and justice, the legislative process, including the inquiry function, is ultimately agnostic. There can be no enforceable demand that a legislative inquiry seek out the truth, or be an implement of justice, in the same way that the legislature cannot be judicially compelled to enact just or truth-responsive laws. The courts cannot sanction the legislative branch for simply being morally dense, even at the expense of appearing morally dense itself.

A different judicial attitude should obtain in analyzing State functions allocated towards the investigation of crimes and, concurrently, the determination of the truth, for the ultimate purpose of laying down the full force of the law. For such purpose, the courts may not be morally neutral, since the very purpose of the criminal justice system is to enforce the paragon virtues of equal justice, truth, and fair retribution. We are impelled to assume that the prosecutors and judges proceed from rectitude,

fair-mindedness and impartiality; and necessarily must be quick to condemn if they instead act upon socio-political motives or tainted considerations.

In view of the differing constitutive purposes and constitutional considerations between legislative inquiries and criminal trials, there can be differing applicable standards that the courts may appreciate between these two processes. In the case at bar, if the question involved were a claim of executive privilege invoked against a criminal investigation, my analysis would be vastly different. If what was involved was a criminal investigation, attendant as that function is to the right of the State to punish wrongdoing, then any claim of executive privilege designed to countermand the investigation could easily be quashed. After all, our democracy is founded on the consensual rule of a civilian president who is not above the law, rather than a monarch who, by divine right, is the law himself.

But if the claim of executive privilege is invoked against a legislative inquiry, run by a body that bears vastly different attributes from those tasked with conducting criminal inquiries and one which is, quite frankly, politically animated by constitutional design, then the claim deserves greater deference. After all, such claim at that instance cannot result in evasion of wrongdoers from punishment by the State. At most, it would retard the ability of Congress to acquire information that may be necessary for it to enact informed legislation. It is against such constitutional purpose of Congress that the claim of executive privilege should be tested.

To recall, the respondent Senate committees had asked petitioner Neri three questions which he declined to answer, invoking executive privilege, during his testimony on 26 September 2007. The three questions were: (1) whether the President followed up on the NBN project; (2) whether the petitioner was dictated upon to prioritize ZTE; and (3) whether the president said go ahead and approve the project after being told about the bribe attempt by former COMELEC Chairman Benjamin Abalos.

Inescapably, all three questions pertain to the content of the conversations of the president with petitioner Neri, who then was the Chairman of the National Economic Development Authority. They involve a government contract, the negotiation, review and approval of which was related to the official functions of petitioner Neri and the president.

In *Senate v. Ermita*, the Court stated, as a general proposition, that "the extraordinary character of the exemptions indicates that the presumption inclines heavily against executive privilege and in favor of disclosure."[2] The pronouncement was necessary in *Ermita*, which involved a wrongheaded attempt by the President to shield executive officials from testifying before Congress with a blanket claim of executive privilege, irrespective of context. However, when the claim is rooted in a conversation with the president and an executive official relating to their official functions, should the presumption against executive privilege apply? After all, not just six years ago, the Court, through Justice Carpio, acknowledged that "Presidential conversations, correspondences, or discussions during closed-door Cabinet meetings which, like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, are recognized as confidential."[3]

In the United States, perhaps the leading case on executive privilege is *U.S. v. Nixon,*[4] where the claim was posed against the enforcement of a judicial subpoena to produce tapes of conversations with then-President Richard Nixon, issued after seven individuals were indicted as criminal conspirators in relation to the Watergate scandal. Manifestly, *Nixon* pertained to an invocation of executive privilege to evade compliance with a judicial order issued in a criminal proceeding, and not, as in this case, in a legislative inquiry; indeed, the U.S. Supreme Court firmly moored its ruling against President Nixon on the character of the criminal investigation. Still, the U.S. Supreme Court

[2] *Senate v. Ermita,* G.R. No. 169777, 20 April 2006, 488 SCRA 1, 51.

[3] *Chavez v. Public Estates Authority*, 433 Phil. 506, 534 (2002).

[4] 418 U.S. 683 (1974).

acknowledged that there was "a presumptive privilege for Presidential communications," such being "fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[5] That point, which the parties in *Nixon* acceded to without contest, was justified, thus:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.[6]

The existence of a presumption is hardly a foolproof shelter for the president since it can be overturned, as was done in *Nixon*. Still, it would be highly useful for the Court to acknowledge that the presumption exists. Otherwise, the traditional exercise of functions by all three branches of government will falter. If the president is denied the presumption of confidentiality of his communications and correspondence, there is no reason to extend such presumption of confidentiality to executive sessions conducted by Congress, or to judicial deliberations of this Court and all other lower courts. After all, the three branches of government are co-equals.

Thus, at bar, the conversations between the president and petitioner Neri should enjoy the presumptive privilege, on the same level as any other official conversation or correspondence between the president and her executive officials. They enjoy the same presumptive privilege as the conversations or correspondence between the members of this Court who used to work for the executive branch of government and the presidents under whom they served.

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[5] *Id*. at 708.

[6] *Ibid*.

The presumptive privilege attaching to presidential conversations or correspondences falls under what the Court, in *Ermita*, had characterized as "generic privilege," which covers the internal deliberations within the government, including "intragovernmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated."[7] In such a case, the privilege attaches not because of the content of the correspondence, but because of the process under which such correspondence has come into existence. In contrast, there are varieties of executive privilege that pertain to the specific content of the information. Most striking of these is the so-called "state secrets privilege" which is predicated on the ground that "the information is of such nature that its disclosure would subvert crucial military or diplomatic objectives."[8] The state secrets privilege is undoubtedly content-based in character, such that there would be no way of assessing whether the information is indeed of such crucial character unless one is actually familiar with the information.

Petitioner Neri also cites diplomatic and state secrets as basis for the claim of executive privilege, alluding for example to the alleged adverse impact of disclosure on national security and on our diplomatic relations with China. The argument hews closely to the state secrets privilege. The problem for petitioner Neri though is that unless he informs this Court the contents of his questioned conversations with the president, the Court would have no basis to accept his claim that diplomatic and state secrets would indeed be compromised by divulging the same in a public Senate hearing.

Indeed, if the claim of executive privilege is predicated on the particular content of the information, such as the state secrets privilege, which the claimant refuses to divulge, there is no way to assess the validity of the claim unless the court judging the case becomes privy to such information. If the claimant fails or refuses to divulge such information, I submit that the courts

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[7] *Senate v. Ermita,* G.R. No. 169777, 20 April 2006, 488 SCRA 1, 46; citing I L. Tribe, *AMERICAN CONSTITUTIONAL LAW* (3rd ed., 2000), at 770-771.

[8] *Ibid*.

may not pronounce such information as privileged on content-based grounds, such as the state secrets privilege. Otherwise, there simply would be no way to dispute such claim of executive privilege. All the claimant would need to do is to invoke the state secrets privilege even if no state secret is at all involved, and the court would then have no way of ascertaining whether the claim has been validly raised, absent judicial disclosure of such information.

Still, just because the claim of executive privilege in this case is invoked as to the contents of presidential conversations with executive officials, we must consider the presumptive privilege extant and favorable to petitioner Neri. There is now need for respondents to demonstrate that this presumptive privilege is outweighed by the constituent functions of its own subject legislative inquiries.

How do we assess whether respondents have been able to overcome the presumptive privilege? If the test is simply the need to divulge "the truth," then the presumption will always be defeated, without any consideration to the valid concerns that gave rise to the presumption in the first place. A more sophisticated approach is called for.

In *Nixon*, the U.S. Supreme Court weighed the presumptive privilege against the aims of the criminal justice system, since the claim was invoked in a criminal proceeding:

> We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.[9]

[9] *Supra* note 4 at 709.

By the same measure, the present claim of executive privilege should be tested against the function of the legislative inquiry, which is to acquire insight and information for the purpose of legislation. Simply put, would the divulgence of the sought-after information impede or prevent the Senate from enacting legislation?

I submit, with respect to the three questions asked of petitioner Neri, that the Senate will not be impeded from crafting and enacting any legislation it may link to the present inquiries should the privilege be upheld. **There is no demonstration on the part of respondents that legislation will be rendered necessary or unnecessary should petitioner Neri refuse to answer those questions. If respondents are operating under the premise that the president and/or her executive officials have committed wrongdoings that need to be corrected or prevented from recurring by remedial legislation, the answers to those three questions will not necessarily bolster or inhibit respondents from proceeding with such legislation. They could easily presume the worst of the president in enacting such legislation.**

Likewise material to my mind is the well-reported fact that the subject NBN-ZTE contract has since been scuttled by the president. If this contract were still in existence and binding, there comes a greater legislative purpose in scrutinizing the deal since Congress has sufficient capability to enact legislation or utilize the power of appropriations to affect the contract's enforcement. Under such circumstances, which do not obtain at present, the case for rejecting the presumptive privilege would be more persuasive.

Let me supply a contrasting theoretical example. Congress has a well-founded suspicion that the president and the executive officials have not been candid about the state of the economy and have manipulated official records in order to reflect an inaccurate economic picture. Congress, in passing economic legislation, must necessarily be informed of the accurate economic realities in order to pass laws that are truly responsive to the state of the economy. In such a case, the right of Congress to

particular information related to the economic state of affairs, as a means of passing appropriate legislation, will supersede the presumptive privilege. Thus, whatever conversations or correspondences the president may have had with executive officials regarding the true state of the economy will not be sheltered by executive privilege in the face of a duly constituted legislative inquiry.

But at bar, respondents failed to demonstrate how the refusal of petitioner Neri to answer the three subject questions would hamper its ability to legislate. As such, the general presumptive privilege that attaches to the conversations of the president with executive officials supersedes the right of respondents to such information for the purpose of its legislative inquiry.

The assailed Show-Cause Order, premised as it is on an improper rejection of the claim of executive privilege, must thus be invalidated. This does not mean that petitioner Neri should be accordingly exempted from further appearing before the respondents, but that he may not be compelled to answer those three questions or similar variants thereof concerning his conversations with the president.

My position would have been vastly different had the three questions arisen in the context of a criminal inquiry or an impeachment proceeding. Because the constitutive purposes of such proceedings are to ascertain the true set of facts for the purpose of prosecuting criminal or impeachment trials, such purposes would outweigh the generic, presumptive privilege that attaches to presidential conversations. In such instance, if it is still desired to invoke the privilege, there would be no choice but to compel the claimant to adduce before a court the precise information asserted as privileged, so that such court can decide whether the content of such conversation justifies the privilege.

I vote to *GRANT* the petition and the supplemental petition, and concur in the *ponencia* of Mme. Justice Teresita L. De Castro.

CONCURRING OPINION

CHICO-NAZARIO, *J.*:

I express my concurrence in the majority opinion as written by my colleague Justice Teresita J. Leonardo-De Castro. In addition to the ratiocination already presented therein, I still wish to stress particular points which convinced me that the Petition for *Certiorari* of petitioner Romulo L. Neri should be granted.

Once again, this Court finds itself in the same position it held just two years ago in the landmark case of *Senate of the Philippines v. Ermita*,[1] standing judge over a dispute between the Executive and Legislative branches of the Government.

Even the antecedent facts giving rise to the present Petition seem familiar. They involve the conflict between, on one hand, the right of the Senate to compel the appearance and testimony of executive officials in hearings in aid of legislation; and, on the other, the right of the President and the executive officials she so authorizes to invoke executive privilege to protect and keep certain information confidential.

In *Ermita*, cabinet members and military officials declined to appear before the Senate for hearings held in aid of legislation, invoking Executive Order No. 464 issued by President on "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for other Purposes," which basically made it mandatory for them to obtain the President's permission prior to attending said hearings. Without the President's permission, they will not go.

In the Petition at bar, petitioner Neri, by virtue of his position as the former Director General of the National Economic Development Authority, testified on 26 September 2007 in an

[1] G.R. No. 169777, 20 April 2006, 488 SCRA 1.

11-hour hearing conducted by the respondent Senate Committees on the alleged anomalies in the award of the National Broadband Network (NBN) Project to Zhing Xing Telecommunications Equipment (ZTE). During said hearing, he already invoked executive privilege when he refused to answer three specific questions propounded to him:

a) Whether the President followed up the (NBN) project?

b) Were you dictated to prioritize the ZTE?

c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

He failed to return and face further inquiry before the respondent Senate Committees in the hearing set for 20 November 2007. Executive Secretary Eduardo A. Ermita and Atty. Antonio R. Bautista, as petitioner Neri's counsel, sent separate letters to the respondent Senate Committees consistently asserting that petitioner Neri's non-appearance at the hearing was upon the President's order; and his conversations with the President on the NBN Project, the apparent subject of further inquiry by the respondent Senate Committees, were covered by executive privilege since they involved national security and diplomatic matters. Respondent Senate Committees found unsatisfactory petitioner Neri's explanation for his non-attendance at the hearing, thus, in an Order dated 30 January 2008, cited him for contempt and directed his arrest and detention in the Office of the Senate Sergeant-At-Arms "until such time that he will appear and give his testimony."

Faced with either disobeying the President's order or being arrested by the Senate, petitioner Neri sought relief from this Court by filing a Petition for *Certiorari* and a Supplemental Petition for *Certiorari*, under Rule 65 of the Rules of Court, alleging grave abuse of discretion on the part of the respondent Senate Committees for first issuing a show cause Order, dated 22 November 2007, against petitioner Neri for his failure to attend the 20 November 2007 hearing; and subsequently issuing the contempt and arrest Order, dated 30 January 2008 against petitioner Neri after finding his explanation unsatisfactory.

This Court shall not shirk from its duty, impressed upon it by no less than the Constitution, to exercise its judicial power "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."[2] It was clearly intended by the framers of the Constitution that the judiciary be the final arbiter on the question of whether or not a branch of government or any of its officials has acted without jurisdiction or in excess of jurisdiction or so capriciously as to constitute an abuse of discretion amounting to excess of jurisdiction.[3] And when the Judiciary mediates to allocate constitutional boundaries, it does not assert any superiority over the other departments, but only asserts the solemn and sacred obligation entrusted to it by the Constitution to determine conflicting claims of authority under the Constitution and to establish for the parties in an actual controversy the rights which the instrument secures and guarantees to them.[4]

By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It must be grave abuse of discretion as when the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and must be so patent and so gross 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.[5]

Considering the factual background of the Petition at bar, respondent Senate Committees did commit grave abuse of discretion in issuing the assailed Orders for having done so without basis, with undue haste, and in violation of due process.

Our republican system of Government is composed of three independent and co-equal branches, the Executive, Legislative,

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[2] Article VIII, Section 1.

[3] *Tañada v. Angara*, G.R. No. 118295, 2 May 1997, 272 SCRA 18, 48.

[4] *In re: Wenceslao Laureta*, G.R. No. 68635, 12 March 1987, 148 SCRA 382, 419, citing *Angara v. Electoral Commission*, 63 Phil. 139, 158 (1936).

[5] *Id*.

and Judiciary. One of the fundamental tenets underlying our constitutional system is the principle of separation of powers, pursuant to which the powers of government are mainly divided into three classes, each of which is assigned to a given branch of the service. The main characteristic of said principle is not, however, this allocation of powers among said branches of the service, but the fact that: 1) each department is independent of the others and supreme within its own sphere; and 2) the powers vested in one department cannot be given or delegated, either by the same or by Act of Congress, to any other department.[6]

The fundamental power of the Senate, as one of the Houses of the Legislative Branch, is to make laws, and within this sphere, it is supreme. Hence, this Court had long before upheld the power of inquiry of the Legislature in aid of legislation. In *Arnault v. Nazareno*,[7] this Court pronounced:

> Although there is no provision in the Constitution expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative functions advisedly and effectively, such power is so far incidental to the legislative function as to be implied. In other words, the power of inquiry with process to enforce it-is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information which is not infrequently true-recourse must be had to others who do possess it. Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion is essential to obtain what is needed. (*McGrain vs. Daugherty*, 273 U. S., 135; 71 L. ed., 580; 50 A. L. R., 1.) The fact that the Constitution expressly gives to Congress the power to punish

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[6] See the Concurring Opinion of J. Concepcion in *Guevara v. Inocentes*, 123 Phil. 200, 217-218 (1966).

[7] 87 Phil. 29 (1950).

its Members for disorderly behaviour, does not by necessary implication exclude the power to punish for contempt any other person. (*Anderson vs. Dunn*, 6 Wheaton, 204; 5 L. ed., 242.)[8]

In the same case, the Court also qualified the extent of the Legislature's power of inquiry:

> But no person can be punished for contumacy as a witness before either House, unless his testimony is required in a matter into which that House has jurisdiction to inquire. (*Kilbourn vs. Thompson*, 26 L. ed., 377.)
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> Since, as we have noted, the Congress of the Philippines has a wider range of legislative field than either the Congress of the United States or a State Legislature, we think it is correct to say that the field of inquiry into which it may enter is also wider. It would be difficult to define any limits by which the subject matter of its inquiry can be bounded. It is not necessary for us to do so in this case. Suffice it to say that it must be coextensive with the range of the legislative power.[9]

In the Petition at bar, the Senate relies on its power of inquiry as embodied in Article VI, Section 21 of the Constitution, which reads:

> Section 21. The Senate or House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

In citing petitioner Neri in contempt and ordering his arrest, however, the respondent Senate Committees had overstepped the boundaries of its appointed sphere, for it persists to acquire information that is covered by executive privilege and beyond its jurisdiction to inquire.

Simply put, executive privilege is "the power of the Government to withhold information from the public, the courts, and the **Congress**." It is also defined as "the right of the President and high-level executive branch officers to withhold

[8] *Id*. at 45.

[9] *Id*. at 45-46.

information from **Congress**, the courts, and ultimately the public."[10] It must be stressed that executive privilege is a right vested in the President which she may validly exercise within her sphere of executive power. The President can validly invoke executive privilege to keep information from the public and even from co-equal branches of the Government, *i.e.*, the Legislature and the Judiciary.

In *Chavez v. Public Estates Authority*,[11] this Court recognized that:

> The right to information, however, does not extend to matters recognized as privileged information under the separation of powers. The right does not also apply to information on military and diplomatic secrets, information affecting national security, and information on investigations of crimes by law enforcement agencies before the prosecution of the accused, which courts have long recognized as confidential. The right may also be subject to other limitations that Congress may impose by law.
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> There is no claim by PEA that the information demanded by petitioner is privileged information rooted in the separation of powers. The information does not cover Presidential conversations, correspondences, or discussions during closed-door Cabinet meetings which, like internal deliberations of the Supreme Court and other collegiate courts, or executive sessions of either house of Congress, 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. This is not the situation in the instant case. (Emphasis ours.)

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[10] *Senate of the Philippines v. Ermita*, *supra* note 1 at 45, citing B. SCHWARTZ, *EXECUTIVE PRIVILEGE AND CONGRESSIONAL INVESTIGATORY POWER*, 47 Cal. L. Rev. 3, and M. ROZELL, *Executive Privilege and the Modern Presidents: In Nixon's Shadow* (83 Minn. L. Rev. 1069).

[11] 433 Phil. 506, 534 (2002).

A more extensive explanation for the rationale behind the executive privilege can be found in *United States v. Nixon*,[12] to wit:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. **A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.** These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.
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> Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.' It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. x x x (Emphasis ours.)

It is clear from the foregoing that executive privilege is not meant to personally protect the President, but is inherent in her position to serve, ultimately, the public interest. It is not an evil thing that must be thwarted at every turn. Just as acts of the Legislature enjoy the presumption of validity, so must also the acts of the President. Just all other public officers are afforded

[12] 418 US 1039, 1063-1068 (1974).

the presumption of regularity in the exercise of their official functions, then what more the President, the highest Executive official of the land. Hence, when the President claims that certain information is covered by executive privilege, then rightfully, said information must be presumptively privileged.[13]

Respondent Senate Committees cite the statement made by this Court in *Ermita* that "the extraordinary character of the exemptions indicates that the presumption inclines heavily *against* executive secrecy and in favor of disclosure."[14] However, said declaration must be taken in the context of *Ermita* where EO No. 464 placed under the protection of executive privilege virtually **all** conversations, correspondences, and information of **all** executive and military officials, unless otherwise ordered by the President. *Ermita* firmly established that public disclosure is still the general rule while executive privilege is the exemption therefrom. But when the President does invoke executive privilege as regards certain information, the same must be deemed presumptively privileged.

Necessarily, it is the President who can make the initial determination of what information is covered by the executive privilege because only she and the executive officials involved are privy to the information. Although the President and/or her authorized executive official are obliged to clearly state the grounds for invoking executive privilege, they are not required to state the reasons for the claim with such particularity as to compel the disclosure of the information which the privilege is meant to protect.[15] The President, through petitioner Neri, claims that the conversation between the two of them as regards the NBN Project is privileged for it involves matters that may affect diplomatic and economic relations of the country with China. These are valid grounds rendered even more credible in light of the fact that the NBN Project is funded by a loan extended by the Chinese Government to our Government and awarded

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[13] *Id*.

[14] *Senate of the Philippines v. Ermita*, *supra* note 1 at 51.

[15] *Id*. at 66.

to ZTE, a Chinese firm. The respondent Senate Committees' demand for a deeper or more substantial justification for the claim of executive privilege could well lead to the revelation of the very same details or information meant to be protected by the privilege, hence, rendering the same useless. Furthermore, since the information the respondent Senate Committees seek is presumptively privileged, the burden is upon them to overcome the same by contrary evidence.

Also in support of my position that the respondent Senate Committees acted beyond their legislative jurisdiction is their continued avowal of "search for the truth." While the search for the truth is truly a noble aspiration, respondent Senate Committees must bear in mind that their inquiry and investigative powers should remain focused on the primary purpose of legislation.

Respondent Senate Committees present three pending Senate bills for which the investigative hearings are being held:

a. Senate Bill No. 1793, introduced by Senator Mar Roxas, entitled "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes."

b. Senate Bill No. 1794, introduced by Senator Mar Roxas, entitled "An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes."

c. Senate Bill No. 1317, introduced by Senator Miriam Defensor Santiago, entitled "An Act Mandating Concurrence to International Agreements and Executive Agreements."

Consistent with the requirement laid down in *Ermita*, petitioner Neri attended the 26 September 2007 investigative hearing on

the afore-mentioned Senate bills, even though he was obviously ill that day, answered all the other questions of the Senators regarding the NBN Project including the attempted bribery upon him, except the three questions for which he invoked executive privilege by order of the President. Respondent Senate Committees failed to establish that petitioner Neri's answers to these three questions are indispensable, or that they are not available from any other source, or that the absence thereof frustrates the power of the Senate to legislate.

Respondent Senate Committees lightly brushed aside petitioner Neri's claim of executive privilege with a general statement that such is an unsatisfactory reason for not attending the 20 November 2007 hearing. It likewise precipitately issued the contempt and arrest Order against petitioner Neri for missing only one hearing, the 20 November 2007, despite the explanation given by petitioner Neri, through Executive Secretary Ermita and counsel Atty. Bautista, for his non-appearance at said hearing, and the expression by petitioner Neri of his willingness to return before respondent Senate Committees if he would be furnished with the other questions they would still ask him. Petitioner Neri's request for advance copy of the questions was not unreasonable considering that in *Ermita*, this Court required:

> It follows, therefore, that when an official is being summoned by Congress on a matter which, in his own judgment, might be covered by executive privilege, he must be afforded **reasonable time** to inform the President or the Executive Secretary of the possible need for invoking the privilege. This is necessary in order to provide the President or Executive Secretary with fair opportunity to consider whether the matter indeed calls for a claim of executive privilege. **If, after the lapse of that reasonable time, neither the President nor the Executive Secretary invokes the privilege, Congress is no longer bound to respect the failure of the official to appear before Congress and may then opt to avail of the necessary legal means to compel his appearance.**[16] (Emphasis ours.)

[16] *Id*. at 69.

Yet the respondent Senate Committees unexplainably failed to comply therewith.

Another point militating against the issuance of the contempt and arrest Order is its issuance even without quorum and the required number of votes in the respondent Senate Committees. During oral arguments, Senator Francis N. Pangilinan asserted that whatever infirmities at the committee level were cured by the 2/3 votes of the entire Senate favoring the issuance of the contempt and arrest Order against petitioner Neri, since the committee is a mere agent of the entire chamber.[17] In their Memorandum, respondent Senate Committees no longer addressed said issue contending that petitioner Neri never assailed the procedure by which the contempt and arrest Order was issued. While this Court may not rule on an issue not raised in the Petition, it may take note of the apparent lack of clear and established rules for the issuance by the Senate of a contempt and arrest Order against a recalcitrant witness in hearings conducted in aid of legislation. Senators may very well be familiar with the practice or tradition of voting in such cases, but not necessarily the witness against whom the contempt and arrest Order may be issued and who shall suffer the loss of his liberty. Procedural due process requires that said witness be informed of the rules governing his appearance and testimony before the Senate Committees, including the possible issuance of a contempt and arrest Order against him, because only then can he be aware of any deviation from the established procedure and of any recourse available to him.

Finally, much has been said about this Court not allowing the executive privilege to be used to conceal a criminal act. While there are numerous suspicions and allegations of crimes committed by public officers in the NBN Project, these remain such until the determination by the appropriate authorities. Respondent Senate Committees are definitely without jurisdiction to determine that a crime was committed by the public officers involved in the NBN Project, for such authority is vested by

[17] TSN, 4 March 2008, pp. 706-709.

the Constitution in the Ombudsman. Again, it must be emphasized, that the Senate's power of inquiry shall be used to obtain information in aid of legislation, and not to gather evidence of a crime, which is evidently a prosecutorial, not a legislative, function.

In view of the foregoing, and in the exercise of this Court's power of judicial review, I vote to GRANT the Petition and *DECLARE* the Order dated 30 January 2008 of the respondent Senate Committees null and void for having been issued in grave abuse of discretion amounting to lack or excess of jurisdiction.

SEPARATE CONCURRING OPINION

VELASCO, JR., *J.*:

This case turns on the privileged nature of what the petitioner, as then NEDA Director-General, discussed with the President regarding the scuttled ZTE-NBN contract juxtaposed with the authority of respondents Senate committees to look, in aid of legislation, into what was discussed.

On September 26, 2007, petitioner, on invitation of the respondents, testified on the ZTE-NBN contract and the bribe dangled in connection thereto. When queried on what he discussed with the President after he divulged the bribe offer, petitioner declined to disclose details of their conversations which he deemed privileged. Anticipating to be asked on the same subject and on order of the President invoking executive privilege, petitioner sent regrets on his inability to appear in the November 20, 2007 hearing. Respondents then asked the petitioner to explain why he should not be cited for contempt. Explain petitioner did, with a request that he be furnished in advance with questionnaires should respondents desire to touch on new matters. The contempt threat, which would eventually be carried out with the issuance of an arrest order, is cast against a backdrop that saw petitioner staying for 11 straight hours with the investigation committees and answering all their questions, save those he deemed covered by executive privilege.

Congressional investigations to elicit information in aid of legislation are valid exercise of legislative power, just as the claim of executive privilege is a valid exercise of executive power. In the Philippine setting, the term "executive privilege" means the power of the President to withhold certain types information from the courts, the Congress, and ultimately the public.[1] Apart from diplomatic and military secrets and the identity of government informers, another type of information covered by executive privilege relates to information about internal deliberations comprising the process by which government decisions are reached or policies formulated.[2] *U.S. v. Nixon* explains the basis for the privilege in the following wise:

> The expectation of a President to the confidentiality of his conversation and correspondences, like the claim of confidentiality of judicial deliberations x x x has all the values to which we accord deference for the privacy of all citizens. x x x A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express privately. These are the considerations justifying a presumptive privilege for Presidential communications.[3]

Authorities are agreed that executive privilege is rooted on the doctrine of separation of powers, a basic postulate that forbids one branch of government to exercise powers belonging to another co-equal branch; or for one branch to interfere with the other's performance of its constitutionally-assigned functions. It is partly in recognition of the doctrine that "**presidential conversations,** correspondences, or discussions during closed-door Cabinet meetings which, like **internal-deliberations of the Supreme Court** x x x or **executive sessions** of either house **of Congress** x x x cannot be pried open by a co-equal branch of government."[4] And as the Court aptly observed in

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[1] *Senate v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1.

[2] *Id*.

[3] 418 U.S. 683 (1974); cited in *Almonte v. Vasquez,* G.R. No. 95367, May 23, 1995, 244 SCRA 286.

[4] *Chavez v. Public Estates Authority*, G.R. No. 133250, July 9, 2002, 384 SCRA 152, 188-189.

Gudani v. Senga,[5] the fact that the executive branch is an equal branch to the legislative creates a "wrinkle" to any basic rule that persons summoned to testify before Congress must do so.

So, was the eventual issuance of the assailed citation and arrest order justified when the duly subpoenaed petitioner declined to appear before the respondents' hearing through a claim of executive privilege "By Order of the President"? I turn to the extent and limits of the legislative power of inquiry in aid of legislation.

What was once an implicit authority of Congress and its committees to conduct hearings in aid of legislation—with the concomitant power necessary and proper for its effective discharge[6]—is now explicit in the 1987 Constitution.[7] And this power of inquiry carries with it the authority to exact information on matters which Congress is competent to legislate, subject only to constitutional restrictions.[8] The Court, in *Arnault v. Nazareno*,[9] acknowledged that once an inquiry is established to be within the jurisdiction of a legislative body to make, the investigation committee has the power to require the witness to answer any question pertinent to the subject of the inquiry and punish a recalcitrant or unwilling witness for contempt. But *Bengson v. Senate Blue Ribbon Committee*[10] made it abundantly clear that the power of Congress to conduct inquiries in aid of legislation is not "absolute or unlimited."

Section 21, Article VI of the Constitution providing:

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[5] G.R. No. 170165, August 15, 2006, 498 SCRA 671.

[6] *Sabio v. Gordon*, G.R. No. 174340, October 17, 2006, 504 SCRA 704; citing *McGrain v. Daugherty*, 273 U.S. 135, 47 S. Ct.

[7] Art. VI, Sec. 21.

[8] *Briggs v. MacKellar*, 2 Abb. Pr. 30 (N.Y.) 1864), cited in *Sabio v. Gordon*, *supra*.

[9] 87 Phil. 29 (1950).

[10] G.R. No. 89914, November 20, 1991; 203 SCRA 767, citing *Arnault.*

The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

establishes what we tagged in *Senate v. Ermita (Ermita)* as "crucial safeguards" that circumscribe the legislative power of inquiry. The provision thus requires the inquiry to: (1) properly be **in aid of legislation**, else, the investigating committee acts beyond its power; without a valid legislative purpose, a congressional committee is without authority to use the compulsory process otherwise available in the conduct inquiry in aid of legislation;[11] (2) be done in accordance with duly published rules of procedure, irresistibly implying the constitutional infirmity of an inquiry conducted without or in violation of such published rules; and (3) respect the rights of persons invited or subpoenaed to testify, such as their right against self-incrimination and to be treated in accordance with the norms individuals of good will observe.

The Communications between Petitioner and the President are Covered by Executive Privilege; the Privilege was Properly Claimed by and for Petitioner

Executive Secretary Ermita, in line with *Ermita*, duly invoked, by order of the President, executive privilege, noting, in a letter[12] to the Chairperson of the Blue Ribbon Committee that the following questions:

(1) Whether the President followed up the (NBN) project?
(2) Were you dictated to prioritize the ZTE? and
(3) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

previously addressed to petitioner Neri, but left unanswered, "[fall] under conversations and correspondence between the

[11] *Bengson v. Senate Blue Ribbon Committee*, *supra*.

[12] Sec. Ermita's letter dated Nov. 15, 2007 to Sen. Alan Peter Cayetano, Annex "C", Petition.

President and public officials which are considered executive privilege." And explaining in some detail the confidential nature of the conversations, Sec. Ermita's letter further said:

> The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, [Sec. Neri] cannot provide the Committee any further details of these conversations without disclosing the very thing the privilege is designed to protect.

The information the petitioner sought to keep undisclosed regarding the ZTE-NBN project dealt with high-level presidential communications with a subordinate over a matter involving a foreign power. Allowing such information to be extracted in an open-ended Senate committee investigation after an 11-hour grilling Neri was subjected to is tantamount to allowing a substantial, and unreasonable, incursion into the President's recognized right to confidentiality and to candidly interact with her advisers, a right falling under the aegis of executive privilege. The concept and assertion of executive privilege are after all intended, following the *Ermita* precedent, to protect a basic interest of the President, that is, the necessity that she receives candid and unfettered advice from his subordinates and that the latter be able to communicate freely and openly with her and with each other.

Respondents, in their *Comment* and during the oral arguments, stressed, and correctly so, that executive privilege cannot validly be invoked to conceal a crime, the point apparently being that the President knew of, or worse, was a player in the alleged ZTE-NBN bribery drama. It ought to be pointed out, however, that it is a bit presumptuous to suppose that what President and the petitioner discussed was about a crime. And would not executive privilege be reduced into a meaningless concept if, to preempt its application, any congressional committee raises, if convenient, the crime angle?

In *Ermita*, the Court, citing US case law,[13] outlined the steps to follow in claiming executive privilege. Foremost of these are: (1) it must be clearly asserted, which petitioner did, and by the Government to which the privilege belongs; (2) there must be a formal claim of privilege, lodged by the head of the department having control over the matter; and 3) the statement of the claim must be specific and the claim must state the reasons for withholding the information. Save for some broad statements about the need to protect military, diplomatic, and national security secrets, all the requirements respecting the proper manner of making the claim have satisfactorily been met. As we explained in *Ermita*, the Senate cannot require the executive to state the reasons for the claim with such particularity as to veritably compel disclosure of the information which the privilege is designed to protect in the first place.

It may be stated at this juncture that respondents committees have certain obligations to comply with before they can exact faithful compliance from a summoned official claiming executive privilege over the matter subject of inquiry. Again, *Ermita* has laid out the requirements to be met under that given scenario. They are, to me, not mere suggestions but mandatory prescriptions envisaged as they are to protect the rights of persons appearing or affected by the congressional inquiries. These requirements are: *First*, the invitation or subpoena shall indicate the possible questions to be asked; *second*, such invitation or subpoena shall state the proposed statute which prompted the need for the inquiry; and *third*, that the official concerned must be given reasonable time to apprise the President or the Executive Secretary of the possible need for invoking executive privilege. For the purpose of the first requirement, it would be sufficient if the person invited or subpoenaed is, at least, reasonably apprised and guided by the particular topics to be covered as to enable him to properly prepare. The questions need not be couched in precise details or listed down to exclude all others.

Annex "B" of the Petition, or the subpoena *ad testificandum* dated November 13, 2007 addressed to the petitioner literally

[13] *U.S. v. Reynolds*, 345 U.S 1, 73 S. Ct. 528.

makes no reference to any intended legislation. It did not also accord him with a fair notice of the questions likely to be asked. As it were, the subpoena contained nothing more than a command for the petitioner to appear before the Blue Ribbon Committee at a stated date, then and there to "testify on what [he] know[s] relative to the subject matter under inquiry." And lest it be overlooked, it is not clear from Annex "B" what matters relating to a proposed bill, if there be any, cannot be addressed without information as to the specifics of the conversation between the President and the petitioner.

In net effect, the subpoena thus issued is legally defective, issued as it were in breach of what to me are mandatory requirements. Accordingly, the non-compliance with the subpoena is, under the premises, justifiable. Similarly, respondent committees are precluded from imposing sanctions against the person, petitioner in this instance, thus subpoenaed should the latter opt not to comply with the subpoena.

Grave Abuse of Discretion tainted the issuance of the Order of Arrest

The perceived obstructive defiance of the subpoena (Annex "*B*", Petition) triggered the issuance of the assailed contempt and arrest order. It behooves the Court to now strike the said order down, not only because its existence is the by-product of or traceable to, a legally infirm subpoena, but also because the *Senate Rules of Procedure Governing Inquiries in Aid of Legislation* does not authorize the arrest of unwilling or reluctant witness not **before** it. Surely, respondents cannot look to Sec. 18 of the rules of procedure governing legislative inquiries as the arrest-enabling provision since it only speaks of contempt in the first place. Sec. 18 reads:

Sec. 18. Contempt. The Committee, by a **majority vote** of all its members, may punish for **contempt** any witness **before it** who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members xxx Such witness may be ordered by the Committee to be detained in such place at it may designate under the custody of the Sergeant-at-Arms

until he agrees to produce the required documents or to be sworn or to testify, or otherwise purge himself of that contempt.

I may even go further. Internal rules of procedure cannot plausibly be the source of the power to issue an arrest order and, as has been the practice, for the security unit of the Senate to enforce the order. There must, I submit, be a law for the purpose and where the security unit is given the enforcing authority. The power to issue an order of arrest power is such an awesome, overreaching prerogative that the Constitution, no less, even sets strict conditions before a warrant of arrest will issue against a suspected criminal.[14]

The Court is very much aware that Sec. 3(c) of the *Rules of the Senate* empowers the Senate President to "sign x x x orders of arrest." It cannot be overemphasized, however, that the order for the petitioner's arrest was a joint committee action which naturally ought to be governed by the *Rules of Procedure Governing Inquiries in Aid of Legislation*, not the *Rules of the Senate*. It would be a sad commentary if Senate committees can choose to ignore or apply their very own rules when convenient, given that violation of these rules would be an offense against due process.[15]

But conceding for the nonce the authority of the respondents to order an arrest, as an incident to its contempt power, to be effected by their own organic security complement, the assailed order would still be invalid, the same not having been approved by the required majority vote of the respective members of each of the three investigating committees. Respondents veritably admitted the deficiency in votes when they failed to document or otherwise prove—despite a commitment to do so during the oral arguments—the due approval of the order of citation and arrest. And unable to comply with a promised undertaking, they

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[14] Art. III, Sec. 2 of the Constitution provides that no search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched or the persons and things to be seized.

[15] Bernas, *The 1987 Constitution of the Philippines: A Commentary* (2003), p. 740

offer the lame excuse that the matter of approval of the citation and arrest order is a non-issue.

Philippine jurisprudence remains unclear on what Congress may do should a witness refuse to obey a subpoena. Fr. Bernas has stated the observation, however, that there is American jurisprudence which recognizes the power of Congress to punish for contempt one who refuses to comply with a subpoena issued by a congressional investigating body, albeit the practice seems to be that the Congress asks a court to directly order compliance with a subpoena.[16]

Conclusion

In sum, petitioner had not acted in a manner to warrant contempt, arrest and detention. Far from it. He appeared before respondents committees in the hearing of September 26, 2007 which, to repeat, lasted for 11 hours where he answered all the questions not requiring, in response, divulging confidential matters. Proper procedures were followed in claiming executive privilege, as outlined in *Ermita*. In due time, he replied to the show-cause order the respondents issued.

Considering the circumstances, as discussed, under which it was issued, the assailed January 30, 2008 order should be struck down as having been issued in grave abuse of discretion.

I, therefore, vote to grant the petition.

SEPARATE CONCURRING OPINION

NACHURA, *J.*:

I concur in the comprehensive and well-reasoned *ponencia* of Justice Leonardo-De Castro.

However, I wish to add a few thoughts on the matter of executive privilege, specifically on the area of the presumptive privilege of confidentiality enjoyed by the President relative to

[16] J.G. Bernas, "*Sounding Board: Shielding the President*." *Philippine Daily Inquirer*, February 11, 2008.

Presidential conversations and correspondences necessary for shaping policies and decision-making.

I

U.S. v. Nixon,[1] the leading case on executive privilege in the United States, acknowledges a constitutionally-recognized "presumptive privilege" on the confidentiality of presidential communications. The rationale for such privilege is expressed in the following disquisition:

> The expectation of a President to the confidentiality of his conversations and correspondences, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens, and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping polices and making decisions and to do so in a way many would be unwilling to express except privately. These are the consideration justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution.[2]

However, it is simply a generalized privilege of confidentiality and does not enjoy the same degree of unqualified acceptance as the governmental privilege against public disclosure of state secrets regarding military, diplomatic and other national security matters. Further, it must be formally claimed or asserted by the appropriate executive official. As held in *U.S. v. Reynolds:*[3]

> The privilege belongs to the government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal claim of privilege, lodged by the head of the department which has control over the

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[1] 418 U.S. 683; 41 L. Ed. 2d 1039 (1973).

[2] *U.S. v. Nixon*, *supra*., cited in *Almonte v. Vasquez*, 314 Phil. 150 (1995).

[3] 345 U.S. 1, 73 S. Ct. 528 (1953).

matter, after actual personal consideration by the officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.

In the Philippines, we ruled in *Senate v. Ermita*,[4] that it is only the President, or the Executive Secretary "by order of the President," who may invoke executive privilege.

Because the foundation of the privilege is the protection of the public interest, any demand for disclosure of information or materials over which the privilege has been invoked must, likewise, be anchored on the public interest. Accordingly, judicial recognition of the validity of the claimed privilege depends upon "a weighing of the public interest protected by the privilege against the public interest that would be served by disclosure in a particular case.[5] While a "demonstrated specific need" for material may prevail over a generalized assertion of privilege, whoever seeks the disclosure must make "a showing of necessity sufficient to outweigh the adverse effects the production would engender."[6]

It is in light of these principles that, in the case at bench, we are called upon to strike a balance between two clashing public interests: the one espoused by the Executive Department, and the other asserted by the respondents Senate Committees.

More specifically, the controversy on this particular issue has boiled down to whether this presumptive (executive) privilege may be validly invoked – and whether the invocation was procedurally proper – over the following questions which the petitioner refused to answer when he appeared at the hearing conducted by the respondents:

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[4] *Supra*.

[5] *Black v. Sheraton Corporation of America,* 564 f. 2D 531, 184 U.S. App. D.C. 46, 23 Fed. R. Serv. 2d 1490, citing *Nixon v. Sirica,* 159 U.S. APP. D.C., at 74, 487 F. 2d, at 716.

[6] *Black v. Sheraton Corporation of America*, *supra*.

1. Whether the President followed-up the NBN project?
2. Were you dictated (by the President) to prioritize the ZTE (proposal)?
3. Whether the President said to go ahead and approve the project after being told about the alleged bribe (offer)?[7]

Executive Secretary Ermita articulated the position taken by the executive department in this wise:

> Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision-making process. The expectation of a President to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for the protection of the public interest in candid, objective, and even blunt harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.
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> The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, [the petitioner] cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.[8]

On the other hand, the respondents contended that in the exercise of their power to conduct inquiries in aid of legislation under Section 21, Article VI of the Constitution, they are entitled

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[7] Letter dated November 15, 2007, of Executive Secretary Eduardo R. Ermita to Senate Blue Ribbon Committee Chairman Alan Peter Cayetano; Annex "C", Petition. Parenthetically, events occurring after the start of the legislative inquiry, such as the cancellation of the NBN contract and the Presidential directive for the Ombudsman to conduct its own investigation into the possible criminal liability of persons concerned, for non-issues in this case.

[8] *Id*.

to the disclosure of the information sought from the petitioner. In opposition to the claim of executive privilege, they also raised the general constitutional principles of full public disclosure of all transactions involving public interest,[9] the right of the people to information on matters of public concern,[10] public office is a public trust,[11] the President's duty to faithfully execute the laws,[12] and the due process clause.[13] Finally, they cited the postulate that executive privilege cannot be resorted to in order to shield criminal activity or wrongdoing.

A survey of relevant jurisprudence is useful. *Almonte v. Vasquez*,[14] *Chavez v. PCGG*,[15] and *Chavez v. Public Estates Authority*[16] acknowledged the right of government to withhold certain types of information from the public. In the *Chavez* cases, there was already recognition of "privileged information" arising from "separation of powers," commonly understood to include Presidential conversations, correspondences and discussions in closed-door Cabinet meetings. But it was in *Senate v. Ermita* that the matter of the President's presumptive privilege was explicitly discussed.

However, foreign jurisprudence, notably American decisions from which this Court had repeatedly drawn its conclusions, still appear to be the more insightful. For the case at bench, they should provide this Court the proper perspective to deal with the problem at hand.

First, in *U.S. v. Nixon*, it is abundantly clear that when the general privilege of confidentiality of Presidential communications

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[9] Philippine Constitution, Art. II, Sec. 26.

[10] Philippine Constitution, Art. III, Sec. 7.

[11] Philippine Constitution, Art. XI, Sec. 1.

[12] Philippine Constitution, Art. VII, Sec. 17.

[13] Philippine Constitution, Art. III, Sec. 1.

[14] 314 Phil. 150 (1995).

[15] 360 Phil. 133 (1998).

[16] 433 Phil. 506 (2002).

notably made in the performance of the President's duties and responsibilities is ranged against the requirements in the fair administration of criminal justice, executive privilege must yield. According to the U.S. Supreme Court, the right to the production of evidence at a criminal trial has constitutional dimensions. The high tribunal declared:

> The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of criminal prosecution.
>
> On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal case.[17]

However, in almost the same breath, the U.S. Court aired the caveat that this ruling is "not concerned with the balance between the President's generalized interest in confidentiality and **the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information, nor with the President's interest in preserving state secrets."**[18]

Indeed, with respect to civil cases, this admonition was reiterated and clarified in a subsequent decision involving the Vice-President of the United States.

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[17] *U.S. v. Nixon*, *supra*.

[18] Underscoring supplied.

In *Cheney v. U.S. District Court for the District of Columbia*,[19] where the United States District Court for the District of Columbia entered orders permitting discovery against Vice-President Cheney, other federal officials and members of the National Energy Policy Development Group (NEPDG) on the basis of the allegation of a public interest organization and environmental group that NEPDG was subject to procedural and disclosure requirements of the Federal Advisory Committee Act (FACA), the U.S. Supreme Court stressed the disparity between criminal and civil judicial proceedings in so far as the need for invocation of executive privilege with sufficient specificity is concerned. In reversing the Court of Appeals, the U.S. Supreme Court declared:

> The Court of Appeals dismissed these separation of powers concerns. Relying on *United States v. Nixon*, it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice-President and his former colleagues on the NEPDG "shall bear the burden" of invoking privilege with narrow specificity and objecting to the discovery requests with "detailed precision." In its view, this result was required by *Nixon's* rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." x x x
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> The analysis, however, overlooks fundamental differences in the two cases. *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communication and the "constitutional need for production of relevant evidence in a criminal proceeding." The Court's decision was explicit that it was "not … concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation … We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials."
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> The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. x x x In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from

[19] 542 U.S. 367, 124 S. Ct. 2576 (2004).

a grand jury proceeding or a criminal trial are not to be "expansively construed, for they are in derogation of the search for truth." The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to the production of relevant evidence in civil proceedings does not have the same "constitutional dimensions."[20]

As to the conflict between the confidentiality interest invoked by the President and congressional demands for information in a legislative investigation, there is a close parallel between the instant case and *Senate Select Committee on Presidential Campaign Activities v. Nixon*.[21]

In that case, the Senate Committee was created by resolution of the Senate to investigate "illegal, improper or unethical activities" occurring in connection with the presidential campaign and election of 1972, and "to determine … the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." In testimony before the Committee, Alexander Butterfield, a former Deputy Assistant to the President, stated that certain presidential conversations, presumably including those which Mr. Dean and others had previously testified to, had been recorded on electronic tapes. The Committee thereupon attempted informally to obtain certain tapes and other materials from the President. When these efforts proved unsuccessful, the Committee issued the subpoena subject of the case.[22]

Refusing to apply *Nixon v. Sirica*,[23] the U.S. appellate court's ratiocination is instructive:

We concluded that presidential conversations are presumptively privileged, even from the limited intrusion represented by in camera examination of the conversations by a court. The presumption can

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[20] *Id*.

[21] 498 F. 2d 725, 162 U.S. Appl. D.C. 183.

[22] *Senate Select Committee v. Nixon*, *supra*.

[23] 159 U.S. App. D.C. 58, 487 F. 2d 700.

be overcome only by an appropriate showing of public need by the party seeking access to the conversations. In *Nixon v. Sirica*, such a showing was made by the Special Prosecutor: we think that this presumption of privilege premised on the public interest in confidentiality must fall in the face of the uniquely powerful showing by the Special Prosecutor. x x x As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function – **evidence for which no effective substitute is available**. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of this authority.[24]

The Court then denied the prayer of the Select Committee in this wise:

We find that the Select Committee has failed to make the requisite showing. In its papers below and in its initial briefs to this Court, the Committee stated that it seeks the materials in question in order to resolve particular conflicts in the voluminous testimony it has heard, conflicts relating to "the extent of malfeasance in the executive branch," and, most importantly, the possible involvement of the President himself. The Committee has argued that the testimony before it makes out "a *prima facie* case that the President and his closest associates have been involved in criminal conduct," that the "materials bear on that involvement," and that these facts alone must defeat any presumption of privilege that might otherwise prevail.

It is true, of course, that the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigation by the proper governmental institutions into possible criminal wrongdoing. x x x But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and

[24] Senate Select Committee, *supra*.

the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.

x x x x x x x x x

The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or an institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings. In contrast, the responsibility of the grand jury turns entirely on its ability to determine whether there is probable cause to believe that certain named individuals did or did not commit specific crimes. If, for example, as in *Nixon v. Sirica*, one of those crimes is perjury concerning the content of certain conversations, the grand jury's need for the most precise evidence, the exact text of oral statements recorded in their original form, is undeniable. We see no comparable need in the legislative process, at least, not in the circumstances of this case.[25]

Applying the foregoing decisions to the case at bench, it is my view that the respondents' need for disclosure of the information sought from the petitioner does not at all approximate the "constitutional dimensions" involved in criminal proceedings. While it is true that the Senate Committees, when engaged in inquiries in aid of legislation, derive their power from the Constitution, this is not a situation analogous to that in *Nixon*, where the court's ability to fulfill its constitutional mandate to resolve a case or controversy within its jurisdiction hinged on the availability of certain indispensable information. Rather,

[25] *Id*.

as in *Senate Select Committee*, this is a situation where Senate Committees insist on obtaining information from the petitioner, without at all any convincing showing how and why the desired information "is demonstrably critical to the responsible fulfillment of the Committees' functions." Indeed, respondents have not adequately explained how petitioner's answers to the three questions are crucial to the task of crafting the intended legislation given the inescapable fact that numerous other persons, from the ranks of government and the private sector, had been called to and had already testified at the respondent's hearings.

My own legislative experience echoes the perceptive observation of *Senate Select Committee*:

> While fact-finding by a legislative committee is undeniably a part of its task, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events; Congress frequently legislates on the basis of conflicting information provided in its hearings.

It is not uncommon for some legislative measures to be fashioned on the strength of certain assumptions that may have no solid factual precedents. In any event, the respondents have not demonstrated that the information sought is unqualifiedly necessary for a legitimate legislative purpose, or that the intended legislation would be stillborn without petitioner's responses to the three questions. The respondents have likewise failed to show that the information needed for legislation cannot be obtained from sources other than the petitioner. In fine, the presumption was not successfully rebutted.

II

On the procedure for the invocation of the privilege, it is the respondents' position that when the President decides to claim this presumptive privilege, there arises the concomitant duty on her part to express the reason/s therefor with specificity. From the vantage point of respondents, it appears that the burden of showing the propriety of the claim of privilege devolves upon whoever invokes it, even if the corresponding obligation on the

part of whoever demands disclosure to prove necessity of access to the information desired has not been met.

My own view of the process is quite the opposite. When the President invokes the privilege, announcing the reasons therefor – in this case, the possible rupture of diplomatic and economic relations with the People's Republic of China, and the chilling effect that disclosure of confidential information will have on the President's policy- and decision-making responsibilities[26] — then the presumptive privilege attaches. At this point, the burden to overcome the presumption rests on the shoulders of whoever demands disclosure – in this case, the Senate Committees – and to discharge this burden requires a showing that the public interest will be better served by the revelation of the information.

In *Nixon*, the criminal subpoenas were required to comply with the exacting standards of **relevancy, admissibility and specificity**. As declared by the U.S. Supreme Court:

> Upon invocation of the claim of privilege by the President to whom subpoena duces tecum had been directed, it was the duty of the district court to treat the subpoenaed material as presumptively privileged and to require the special prosecutor to demonstrate that the presidential material was essential to justice of the pending criminal case.[27]

Thus, the Court addressed the issue of executive privilege only after it was satisfied that the special prosecutor had adequately met these demanding requirements.

In *Nixon v. Sirica*, the Court found that the Special Prosecutor had made a uniquely powerful showing that the subpoenaed tapes contain evidence peculiarly necessary to carrying out the vital functions of the grand jury – evidence for which no effective substitute was available. In that light, the presumptive privilege had to yield.

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[26] See letter of Executive Secretary Ermita, Annex "C", Petition.

[27] *U.S. v. Nixon*, *supra*.

In the present controversy, no such standards were set, and none was observed.

In lieu of a showing of a specific necessity for disclosure, the respondent Committees continue to insist on the primacy of its power of legislative inquiry, upon a claim that to uphold the presumptive privilege is an impermissible infringement of the legislative power, and to permit the withholding of the desired information will result in the emasculation of the Senate as a legislative body. Of course, this is accompanied by the invocation of the general constitutional principles of transparency, right to information, due process, public office is a public trust, among others, and the unbending adherence to the pronouncement in *Senate v. Ermita* that: "A claim of privilege, being a claim of exemption from an obligation to disclose information, must, therefore, be clearly asserted."

But if *U.S. v. Nixon* is to be our anchor, then we must concede that the requirements of necessity and specificity are demanded not only of he who claims the presumptive privilege, but also of the one who desires disclosure. And to our mind, the respondents have fallen short of these requirements.

Then, there is the undeniable imperative that executive privilege cannot be used to shield criminal activity or wrongdoing. Again, we must draw reason from extant jurisprudence. *Senate Select Committee* explicates the point which the respondents are missing:

> But under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment. Here also our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity. On the contrary, we think the sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions.

It is the function of the respondents to investigate criminal activity; this is a responsibility of other agencies, such as the Office of the Ombudsman. This Court may even take judicial notice of the fact that the Ombudsman, upon a request of the President, has already commenced a criminal investigation into the subject of the legislative inquiry, the NBN deal. Presumably, the Ombudsman has already summoned the petitioner to give testimony therein, and by analogy with *Nixon v. Sirica*, petitioner cannot withhold information in that investigation by invoking executive privilege.

Finally, it should not escape this Court that on oral argument, the respondents were asked if they had complied with the following guidelines suggested in *Senate v. Ermita*, as a way of avoiding the pitfalls in *Bengzon v. Senate Blue Ribbon Committee*:[28]

> One possible way for Congress to avoid such a result as occurred in *Bengzon* is to indicate in its invitations to the public officials concerned or to any person for that matter, the possible needed statute which prompted the need for the inquiry. Given such statements in its invitations, along with the usual indication of the subject of the inquiry and the questions relative to and in furtherance thereof, there would be less room for speculation on the part of the person invited on whether the inquiry is in aid of legislation.

In reply, the respondents admitted that they did not. This admission has cast a shadow on the regularity of the inquiry such that even the main argument of respondents could fall.

In light of the foregoing, I vote to *GRANT* the petition.

SEPARATE CONCURRING OPINION

BRION, *J.*:

I vote to grant the petition from the prism of two striking features of this case.

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[28] G.R. No. 89914, November 20, 1991, 203 SCRA 767.

First, this case involves a frontal clash between the two great branches of government - the Executive and the Legislature. Caught in between, although identified with the Executive, is the petitioner Romulo L. Neri ("Neri" or "petitioner"). I point this out because in this frontal clash the law expressly recognizes the man in the middle – Neri - as an individual whose rights have to be respected and who should therefore be given sufficient focus as an individual in this Court's consideration of the issues.

The second point relates to the breadth of the issues raised. Because of the frontal clash, the question of the proper parameters for the use of "executive privilege" has been raised by the parties. The factual situation, however, only involves the petitioner's three (3) cited (and the possibly related follow up) questions and puts into issue only the privileged status of conversations and correspondence between the President and Neri in the exercise of executive and policy decision making. At least two (2) Justices[1] strongly implied that the Court can provide a more comprehensive ruling on the executive privilege issue if the petitioner would be allowed to appear at the Senate to answer questions, subject to his right to invoke executive privilege in answering further questions and to the Court's ruling on all the questions claimed to be covered by executive privilege. Unfortunately, the Senate did not positively respond to these suggestions; hence, the narrow issues confronting Us in this case.

Tension between the Executive and the Senate, without doubt, has been building up since the issuance of Executive Order 464 which this Court struck down in part in Our decision in *Senate v. Ermita*.[2] Our decision, however, did not totally ease the tension and was evidently still there when petitioner Neri was invited to the Senate in September 2007, leading to a series of events (more fully described below) that culminated in the Senate Committees' issuance of a citation for contempt and an arrest order for Neri.

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[1] Chief Justice Reynato S. Puno (at pages 431-436) and Justice Antonio T. Carpio (at pages 441-448), TSN, March 4, 2008.

[2] G.R. No. 169777, April 20, 2006.

Under the terms of the present petition, the direct issue raised is whether the Senate acted with grave abuse of discretion in ordering the arrest of Neri considering the *processes* that led to the order of arrest and the *substantive conclusion* that no valid claim to executive privilege had been made.

On the *processes* aspect, I conclude that the Senate processes were attended by fatal infirmities that should invalidate the contempt citation and the order of arrest. Even allowing for the attendant tension, the inter-branch lack of cooperation, and Neri's admitted absences, the Senate Committees' arrest order was a misplaced move from the strictly legal point of view and one that was out of proportion to the attendant circumstances under the standards of common human experience.

This view proceeds from no less than the 1987 Constitution that expressly provides that *"The rights of persons appearing in or affected by such inquiries shall be respected."*[3] Interestingly, this Section as a whole seeks to strengthen the hand of the Legislature in the exercise of inquiries in aid of legislation. In so doing, however, it makes the above reservation for the individual who may be at the receiving end of legislative might. What these "rights" are the Section does not expressly say, but these rights are recognized by jurisprudence and cannot be other than those provided under the Bill of Rights – the constitutional provisions that level the individual's playing field as against the government and its inherent and express powers.[4]

Thus, Neri cannot be deprived of his liberty without due process of law, as provided under Article III Section 1 of the Bill of Rights. Short of actual denial of liberty, Neri should – as a matter of constitutional right – likewise be protected from the humiliation that he so feared in a congressional investigation.[5] All these rights should be guaranteed to him without need of

[3] Article VIII, Section 21, Philippine Constitution.

[4] See: *Bengzon, et al., vs. The Senate Blue Ribbon Committee*, G.R. No. 89914, Nov. 20, 1991.

[5] TSN, March 4, 2008, at pages 188-190.

distinguishing and hairsplitting between coercive and punitive contempt.

The petitioner's travails started when he was summoned to appear before the Senate Committees in relation with the inquiry into the ZTE-NBN Project for the supply of telecommunication equipment and services. He did not appear at the first hearing on September 18, 2007 and on October 25, 2007, but he showed up and testified at the hearing of September 26, 2007. This hearing took all of eleven (11) hours and ended in an executive session that was cut short because of Neri's deteriorated physical condition.

For the hearing of November 20, 2007, the Senate Committees issued Neri a *subpoena ad testificandum* to formally compel his attendance. In response, Neri referred the matter to the President who ordered him to invoke executive privilege. Executive Secretary Ermita implemented the presidential directive by writing the Senate a letter claiming *executive privilege for the President and asking that the presence of Neri be dispensed with* since he had been examined extensively in the hearing of September 26, 2007.[6]

The Senate did not formally reply to the Ermita letter and instead sent its "show cause" order of November 22, 2007 for Neri to explain why he should not be cited for contempt *for his absence on November 20, 2007.*[7] Neri himself and his counsel replied to the "show cause" order, *further explaining his non-attendance and offering to attend for examination on other non-privileged matters.*[8] On top of this reply, he came to this Court on December 7, 2007 *via* the present petition for a definitive judicial ruling.

The Senate Committees chose to disregard these explanations and the claim of executive privilege, and instead issued the currently disputed Order (dated January 30, 2008) citing Neri

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[6] Annex "C" to the Petition dated December 7, 2007.

[7] Annex "A" to the Petition.

[8] Annexes "D" and "D-1" to the Petition.

"in contempt of this *(sic)* Committees". . .(f)or failure to appear and testify in the Committees's *(sic)* hearings on *Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007. . .*".[9]

Even from a strictly layman's perspective, I cannot see how arrest and imprisonment can be justified for one who has complied with the most essential Senate requirements, *i.e.*, to testify and to explain his failure to attend. *Neri did comply with the Senate's orders to attend and testify; underwent hours of grilling before the Senate Committees; did submit explanations for the times when he could not comply; and committed to attend future hearings on matters that are not privileged.* To further ensure that he is properly guided, Neri sought judicial intervention by recourse to this Court through the present petition.

Under these circumstances, his arrest cannot but be highly unfair. This is particularly true if, as suggested during the oral arguments, there were middle ground moves that would have avoided an arrest order had there been more inter-branch cooperation between the contending great branches of government – a condition that is largely out of Neri's control and capacity to bring about.

From a legal perspective, I see no indication from the given facts of this case, of the defiance that merited the condemnation of Congress and the support of this Court for the congressional arrest order in *Arnault v. Nazareno*.[10] I also do not see how Neri could validly be cited for contempt and ordered arrested for *all* his absences[11] after having been formally asked *to explain only one* absence, namely, that of November 20, 2007.[12] I

[9] Annex "A" of the Supplemental Petition for *Certiorari* dated January 30, 2008.

[10] G.R. No. L-3828, July 18, 1950.

[11] *Supra*, at Note 7.

[12] *Supra*, at Note 9.

likewise cannot help but note that the arrest order strongly suggests a lack of inter-branch courtesy, this time by the Senate as against this Court whose formal intervention Neri has sought. I note too that the arrest order runs counter to the respondents' open manifestation on oral arguments that the Senate itself wanted the issue of Neri's attendance resolved through the petition that Senator MAR Roxas himself brought before this Court.[13]

That the Senate committees engaged in shortcuts in ordering the arrest of Neri is evident from the record of the arrest order. The interpellations by Justices Tinga and Velasco of Senators Rodolfo G. Biazon (Chair of the Committee on National Defense and Security) and Francis N. Pangilinan (Senate Majority Leader) yielded the information that none of the participating Committees (National Defense and Security, Blue Ribbon, and Trade and Commerce) registered enough votes to approve the citation of contempt and the arrest order.[14] An examination of the Order dated 30 January 2008[15] shows that only Senators Alan Peter Cayetano, Aquino III, Legarda, Honasan and Lacson (of 17 regular members) signed for the Blue Ribbon Committee; only Senators Roxas, Pia Cayetano, Escudero and Madrigal for the Trade and Commerce Committee (that has 9 regular members); and only Senators Biazon, and Pimentel signed for the National Defense and Security Committee (that has 19 regular members). Senate President Manny Villar, Senator Aquilino Pimentel as Minority Floor Leader, Senator Francis Pangilinan as Majority Floor Leader, and Senator Jinggoy Ejercito Estrada as President Pro Tempore, all signed as *ex-officio* members of the Senate standing committees but their votes, according to Senator Biazon's testimony, do not count in the approval of committee action.

Asked about these numbers, Senator Pangilinan as Majority Floor Leader could only state that any defect in the committee voting had been cured because the sixteen (16) senators who

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[13] TSN, March 4, 2007, at page 334.

[14] TSN, March 4, 2008, at pages 490-519.

[15] *Supra*, at Note 9.

voted, or two-thirds of the Senate, effectively signed for the Senate in plenary session.[16] The Order of arrest, however, was issued in the names of the three participating committees, and was signed by the sixteen (16) senators as committee members, either regular or *ex-officio*, and not as senators acting in plenary. Furthermore, Section 18 of the Rules Governing Inquiries in Aid of Legislation, does not authorize the committees to issue a warrant of arrest against a witness who fails to obey a *subpoena ad testificandum*. This power is vested solely by Rule III Section 3 of the Rules of the Senate on the Senate President. While Senate President Manny Villar did sign the arrest order together with the members of the three (3) participating committees, there still appeared no valid basis for his action for lack of effective and valid supporting committee action authorizing the order of arrest; the signatures of the sixteen (16) senators were mere unintended results of their respective participation in the investigating committees, and did not reflect their intent to sign as senators in plenary session. The contempt citation and order of arrest therefore do not have any basis in effective committee and Senate actions and cannot thus stand as valid.

Thus, in more ways than one, the rights of petitioner Neri – the individual – were grossly violated by Senate action in contravention of the constitutional guarantee for respect of individual rights in inquiries in aid of legislation. *If only for these proven violations, We should grant Neri's petition.*

The Senate Committees' apparent conclusion that the questions – both the expressly cited and the related follow-ups – are not covered by executive privilege appears to miss the point of the letter of Secretary Ermita when he claimed the privilege for *conversations and correspondence of the President in the exercise of her executive and policy decision making*. Although Secretary Ermita stated that the information might impair diplomatic as well as economic relations with the People's Republic of China, the thrust of the claimed privilege is not so

[16] TSN, March 4, 2008, at pages 529-530.

much the "content" of the conversation or correspondence, but the fact of conversation in the course of executive and policy decision making. In other words, it is not necessary for the conversation or correspondence to contain diplomatic, trade or military secret as these matters are covered by their own reasons for confidential treatment. What is material or critical is *the fact of conversation or correspondence in the course of official policy or decision making*; privilege is recognized to afford the President and her executives the widest latitude in terms of freedom from present and future embarrassment in their discussions of policies and decisions. This narrow exception to the rule on disclosure and transparency ultimately redounds to the public interest in terms of the quality and timeliness of executive policies and decisions and, in this sense, is not anathema to other constitutional guarantees relating to the people's right to know and public accountability. Like police and other inherent powers of government, it may seemingly give the government a strong hand but in the end is best for the common good.

Significantly, this type of privilege is not for the Executive to enjoy alone. All the great branches of government are entitled to this treatment for their own decision and policy making conversations and correspondence. It is unthinkable that the disclosure of internal debates and deliberations of the Supreme Court or the executive sessions of either Houses of Congress can be compelled *at will* by outside parties. We need not cite foreign authorities for this proposition as We have so ruled in *Chavez vs. Public Estates Authority*.[17]

Thus, these types of Presidential conversations are presumed privileged once it is established that they refer to official policy or decision making.[18] The operative words for the presumption to arise are *"official policy or decision making."* To be sure, *the presumption is not absolute* as the purpose is not to shield the President from any and all types of inquiries. Where a higher purpose requiring disclosure is present and cited in the proper

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[17] *Chavez v. Public Estates Authority*, G.R. No. 133250, July 9, 2008.

[18] See: *U.S. v. Nixon*, 418 U.S. 683 (1974).

proceeding, then the privilege must fall and disclosure can be compelled. As the oral arguments on the case showed, all parties are agreed that the privilege cannot be used to shield crime as disclosure will then serve the higher purpose of bringing injustice to light.

Concretely applied to the case of Neri, the privilege presumptively applied after Neri claimed, with the authority of the President, that his phone conversation with her related to the handling of "delicate and sensitive national security and diplomatic matters relating to the impact of bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines." The key word in this statement is "impact" in the economic policy sense (as Neri was then the head of NEDA), not the fact of bribery which, as a crime, the President must discuss with the police, law enforcers and prosecutors, not with her economic team members.

Unless and until it can therefore be shown *in the proper proceeding* that the Presidential conversation related to her involvement in, knowledge of or complicity in a crime, or where the inquiry occurs in the setting of official law enforcement or prosecution, then the mantle of privilege must remain so that disclosure cannot be compelled. This conclusion is dictated by the requirement of order in the delineation of boundaries and allocation of governmental responsibilities. The "proper" proceeding is not necessarily in an inquiry in aid of legislation since the purpose of bringing crime to light is served in proceedings before the proper police, prosecutory or judicial body, not in the halls of congress in the course of investigating the effects of or the need for current or future legislation.

In these lights, I reiterate my vote to grant the petition.

DISSENTING AND CONCURRING OPINION

CARPIO, *J.*:

The Case

This Petition,[1] with supplemental petition[2] for *certiorari* with application for a temporary restraining order, assails the letter dated 22 November 2007 and the Order dated 30 January 2008 issued by respondents Senate Committees on Accountability of Public Officers and Investigation (Blue Ribbon),[3] Trade and Commerce,[4] and National Defense and Security[5] (collectively respondents or Committees).

The 22 November 2007 letter required petitioner Commission on Higher Education Chairman and former National Economic Development Authority (NEDA) Director General Romulo L. Neri (petitioner) "to show cause why [he] should not be cited in contempt" for his failure to attend the Blue Ribbon Committee hearing on 20 November 2007, while the Order issued on 30 January 2008 cited petitioner in contempt and directed his arrest and detention in the Office of the Senate Sergeant-At-Arms.

The Antecedent Facts

On 21 April 2007, with President Gloria Macapagal-Arroyo as witness, the Department of Transportation and Communications, represented by Secretary Leandro R. Mendoza, and Zhong Xing Telecommunications Equipment Company Limited (ZTE), represented by its Vice President Yu Yong, signed in Boao, China, a "Contract for the Supply of Equipment and Services for the National Broadband Network Project" (NBN Project) worth US$329,481,290. The People's Republic

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[1] *Rollo*, pp. 3-10. Under Rule 65 of the Rules of Court.

[2] *Id*. at 26-32.

[3] Headed by Senator Alan Peter S. Cayetano as Chair.

[4] Headed by Senator Mar Roxas as Chair.

[5] Headed by Senator Rodolfo G. Biazon as Chair.

of China, through its Export and Import Bank, agreed to extend a loan to the Philippines to finance the NBN Project.[6] The NBN Project was supposed to provide landline, cellular and Internet services in all government offices nationwide.

After the signing of the agreement, controversies hounded the NBN Project. There were various reports of alleged bribery, "overpricing" of US$130 million, payment of "advances" or "kickback commissions" involving high-ranking government officials, and other anomalies which included the loss of the contract, collusion among executive officials, and political pressures against the participants in the NBN Project.[7]

Considering the serious questions surrounding the NBN Project, respondents called an investigation, in aid of legislation, on the NBN Project based on resolutions introduced by Senators Aquilino Q. Pimentel, Sr., Panfilo M. Lacson, Miriam Defensor Santiago, and Mar Roxas. Several hearings were conducted, one of which was held on 26 September 2007 where petitioner testified before respondents.

During this particular hearing, petitioner testified that then Commission on Elections Chairman Benjamin Abalos, Sr. (Abalos), the alleged broker in the NBN Project, offered petitioner ₱200 million in exchange for NEDA's approval of the NBN Project. Petitioner further testified that he told President Arroyo of the bribe attempt by Abalos and that the President instructed him not to accept the bribe offer.

However, when respondents asked petitioner what he and President Arroyo discussed thereafter, petitioner refused to answer, invoking executive privilege. Petitioner claimed executive privilege when he was asked the following questions:

I.

SEN. PANGILINAN: You mentioned earlier that you mentioned this to the President. Did the President after that

[6] Respondents' Comment dated 14 February 2008.

[7] *Id*.

discussion over the phone, was this ever raised again, the issue of the 200 *ka rito*?

MR. NERI: We did not discuss it again, Your Honor.

SEN. PANGILINAN: With the President? But the issue, of course, the NBN deal, was raised again? After that, between you and the President. *Pinalow* up (followed up) *ba niya?*

MR. NERI: May I claim the executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature.

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II.

SEN. LEGARDA: Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI as you've previously done...

MR. NERI: As I said, Your Honor...

SEN. LEGARDA: ...but to prefer or prioritize the ZTE?

MR. NERI: Yeah. As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA: I'm sorry. Can you say that again?

MR. NERI: As I said, I would like to invoke Sec. 2(a) of EO 464.

x x x x x x x x x

III.

MR. NERI: She said, "Don't accept it," Your Honor.

SEN. CAYETANO, (P): And there was something attached to that like... "But pursued with a project or go ahead and approve," something like that?

MR. NERI: As I said, I claim the right of executive privilege no further discussions on the...

SEN. CAYETANO, (P): Ah, so that's the part where you invoke your executive privilege, is that the same thing or is this new, this invocation of executive privilege?

My question is, after you had mentioned the 200 million and she said "Don't accept," was there any other statement from her as to what to do with the project?

MR. NERI: As I said, it was part of a longer conversation, Your Honor, so...

SEN. CAYETANO, (P): A longer conversation in that same— part of that conversation on an ongoing day-to-day, week-to-week conversation?

MR. NERI: She calls me regularly, Your Honor, to discuss various matters.

SEN. CAYETANO, (P): But in connection with, *"Ma'am, na-offer-an ako ng 200."* — "Ah, don't accept, next topic," *ganoon ba yon?* Or was there like, *" Alam mo, magandang project sana ' yan, eh bakit naman ganyan."*

MR. NERI: As I said, Your Honor, beyond that I would not want to go any further, Your Honor.

SEN. CAYETANO, (P): I just can't hear you.

MR. NERI: Beyond what I said, Your Honor, I'd like to invoke the right of executive privilege.

On 13 November 2007, the Blue Ribbon Committee issued a subpoena *ad testificandum*[8] requiring petitioner to appear again before it and testify further on 20 November 2007.

On 15 November 2007, Executive Secretary Eduardo Ermita (Executive Secretary Ermita) addressed a letter (Ermita Letter) to respondent Blue Ribbon Committee Chair Alan Peter S. Cayetano requesting that petitioner's testimony on 20 November 2007 be dispensed with because he was invoking executive privilege "By Order of the President." Executive Secretary Ermita explained:

> Specifically, Sec. Neri sought guidance on the possible invocation of executive privilege on the following questions, to wit:
>
> a) Whether the President followed up the (NBN) project?
>
> b) Were you dictated to prioritize the ZTE?
>
> c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?

Following the ruling in *Senate vs. Ermita*, the foregoing questions fall under **conversations** and correspondence **between the President and public officials which are considered executive privilege** (*Almonte v. Vasquez,* G.R. No. 95367, 23 May 1995; *Chavez v. PEA*, G.R. No. 133250, July 9, 2002). Maintaining the confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision making process. The expectation of a President to the **confidentiality of her conversations** and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, is she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed

[8] *Rollo*, pp. 15-16.

to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as defined in *Senate vs. Ermita*, and has advised Secretary Neri accordingly.[9]

Consequently, petitioner did not appear before respondents on 20 November 2007. Petitioner assumed that the only matters on which respondents would question him were exclusively related to his further discussions with the President relating to the NBN Project.

On 22 November 2007, respondents issued the letter requiring petitioner to show cause why he should not be cited in contempt for his failure to appear at the 20 November 2007 hearing.[10]

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[9] *Id*. at 17-18.

[10] *Id*. at 12-13. The show cause letter reads:

> Dear Mr. Neri:
>
> A *Subpoena Ad Testificandum* has been issued and was duly received and signed by a member of your staff on 15 November 2007.
>
> You were required to appear before the Senate Blue Ribbon hearing at 10:00 a.m. on 20 November 2007 to testify on the Matter of:
>
> P.S. RES. NO. 127 BY SENATOR AQUILINO PIMENTEL, JR. (Resolution Directing The Blue Ribbon Committee and the Committee On Trade And Industry To Investigate, In Aid Of Legislation, The Circumstances Leading To The Approval of the Broadband Contract With The ZTE and The Role Played By The Officials Concerned In Getting It Consummated, and To Make Recommendations To Hale To The Courts of Law, The Persons Responsible For Any Anomaly In Connection Therewith and To Plug Loopholes, If Any, In The BOT Law and Other Pertinent Legislations); P.S. RES. NO. 129 BY SENATOR PANFILO M. LACSON (Resolution Directing The Committee On National Defense And Security To Conduct An Inquiry In Aid Of Legislation Into The National Security Implications Of Awarding The National Broadband Network Contract To The Chinese Firm Zhong Xing Telecommunications Equipment Company Limited [ZTE Corporation], With The End In View Of Providing Remedial

In a letter dated 29 November 2007, petitioner personally replied to respondents, requesting to be furnished in advance new matters, if any, which respondents would like to ask him other than the three questions for which Executive Secretary Ermita had already claimed executive privilege.[11]

On 7 December 2007, petitioner filed the initial Petition for *certiorari* with a prayer for the issuance of a temporary restraining order to enjoin respondents from citing him in contempt.

On 30 January 2008, respondents issued an order for the arrest of petitioner for his failure to appear at the hearings of the Senate Committees on 18 September 2007, 20 September 2007, 25 October 2007, and 20 November 2007.[12] On the same day, petitioner wrote

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> Legislation That Will Further Protect Our National Sovereignty And Territorial Integrity); PRIVILEGE SPEECH OF SENATOR PANFILO M. LACSON entitled "LEGACY OF CORRUPTION" delivered on 11 September 2007; P.S. RES. NO. 136 BY SENATOR MIRIAM DEFENSOR SANTIAGO (Resolution Directing The Proper Senate Committee To Conduct An Inquiry, In Aid Of Legislation, On the Legal and Economic Justification Of The National Broadband Network [NBN] Project Of The Government); PRIVILEGE SPEECH OF SENATOR MIRIAM DEFENSOR SANTIAGO entitled "INTERNATIONAL AGREEMENTS IN CONSTITUTIONAL LAW: THE SUSPENDED RP-CHINA (ZTE) LOAN AGREEMENT" delivered on 24 September 2007; P.S. RES NO. 144 BY SENATOR MAR ROXAS (Resolution Urging President Gloria Macapagal Arroyo to direct the Cancellation of the ZTE Contract).
>
> Since you have failed to appear in the said hearing, the Committees on Accountability of Public Officers and Investigations (Blue Ribbon), Trade and Commerce and National Defense and Security require you to show cause why you should not be cited in contempt under Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).
>
> The Senate expects your explanation on or before 2 December 2007.

[11] *Id.* at 19.

[12] The arrest order reads:

> ORDER
>
> For failure to appear and testify in the Committees's hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007,

respondents and Senate President Manny Villar seeking a reconsideration of the issuance of the arrest order.

On 1 February 2008, petitioner filed with this Court a supplemental petition for *certiorari* with an urgent application for a temporary restraining order or preliminary injunction seeking to nullify the arrest order and to enjoin respondents from implementing such order.

On 5 February 2008, the Court issued a resolution requiring respondents to Comment on the Petition and supplemental petition and to observe the status quo prevailing prior to respondents' Order of 30 January 2008. The Court further resolved to set the Petition for hearing on the merits and on the Status Quo Ante Order on 4 March 2008.

The Court heard the parties in oral arguments on 4 March 2008, on the following issues:

1. What communications between the President and petitioner Neri are covered by the principle of 'executive privilege'?

    1.a Did Executive Secretary Ermita correctly invoke the principle of executive privilege, by order of the President, to cover (i) conversations of the President in the exercise of her executive and policy decision-making and (ii) information, which might impair our diplomatic as well as economic relations with the People's Republic of China?

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despite personal notice and a Subpoena[s] Ad Testificandum sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007, herein attached) ***ROMULO L. NERI*** is hereby cited in contempt of th[ese] Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.

The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.

SO ORDERED.

1.b Did petitioner Neri correctly invoke executive privilege to avoid testifying on his conversations with the President on the NBN contract on his assertions that the said conversations "dealt with delicate and sensitive national security and diplomatic matters relating to the impact of bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines" xxx, within the principles laid down in *Senate v. Ermita* (488 SCRA 1 [2006])?

1.c Will the claim of executive privilege in this case violate the following provisions of the Constitution:

Sec. 28, Art II	(Full public disclosure of all transactions involving public interest)
Sec. 7, Art. III	(The right of the people to information on matters of public concern)
Sec. 1, Art. XI	(Public office is a public trust)
Sec. 17, Art. VII	(The President shall ensure that the laws be faithfully executed)

and the due process clause and the principle of separation of powers?

2. What is the proper procedure to be followed in invoking executive privilege?

3. Did the Senate Committees grave[ly] abuse their discretion in ordering the arrest of petitioner for non-compliance with the subpoena?

After the oral arguments, the Office of the Solicitor General (OSG) filed on 17 March 2008 a Motion for Leave to Intervene and to Admit Attached Memorandum. The OSG argues that

petitioner's discussions with the President are covered by executive privilege. The OSG assails the validity of the Senate's *Rules of Procedure Governing Inquiries in Aid of Legislation* on the ground of lack of publication. On 18 March 2008, the Court granted the OSG's motion to intervene.

In his Petition, petitioner alleges that the invocation of executive privilege is well founded. Petitioner claims that his candid discussions with the President were meant to explore options in crafting policy decisions. Petitioner further argues that the invocation of executive privilege was "timely, upon authority of the President, and within the parameters laid down in *Senate v. Ermita* and *United States v. Reynolds*." Petitioner also maintains that his non-appearance at the 20 November 2007 hearing was due to the order of the President herself, invoking executive privilege. Therefore, petitioner asserts that the show cause order was issued with grave abuse of discretion, hence void.

In his supplemental petition, petitioner argues, among others, that the issuance of the arrest order was another grave abuse of discretion because he did not commit any contumacious act. Petitioner contends that Executive Secretary Ermita correctly invoked executive privilege in response to the subpoena issued by respondents for petitioner to testify at the 20 November 2007 hearing. Petitioner also impugns the validity of the Senate's *Rules of Procedure Governing Inquiries in Aid of Legislation* for lack of publication for the 14th Congress.

Petitioner also alleges that respondents' order of arrest preempted this Court's action on his initial Petition. Petitioner claims that "this order of arrest elides, and side-steps, the President's invocation of executive privilege in behalf of petitioner."

In their Comment, respondents counter that there is no justification for petitioner's invocation of executive privilege. Respondents assert that petitioner's sweeping claim of executive privilege does not authorize his absolute refusal to appear and testify before them. Respondents argue that petitioner failed

to overcome the presumption against executive secrecy and in favor of disclosure, as required in *Senate v. Ermita*.[13]

Respondents also claim that petitioner's justification violates the constitutional and statutory standards for public officers. Respondents further maintain that the grounds invoked by petitioner are mere speculations and presumptions. Likewise, respondents insist that the testimony of petitioner is material and pertinent in aid of legislation. Respondents point out that several bills relating to the inquiry have already been filed in aid of legislation. Respondents also stress that even assuming that petitioner timely invoked executive privilege, this privilege does not extend to criminal activities.

The Issues

The issues raised in this petition may be summarized as follows:

1. Whether Executive Secretary Ermita correctly invoked executive privilege on the three questions mentioned in his 15 November 2007 letter to the Senate Blue Ribbon Committee;
2. Whether the Senate's *Rules of Procedure Governing Inquiries in Aid of Legislation* were duly published; and
3. Whether the Senate's Order of 30 January 2008 citing petitioner in contempt and directing his arrest is valid.

Discussion

1. Overview of Executive Privilege

Executive privilege is the implied constitutional power of the President to withhold information requested by other branches of the government. The Constitution does not expressly grant this power to the President but courts have long recognized implied Presidential powers if "necessary and proper"[14] in carrying

[13] 433 Phil. 506 (2002).

[14] *Marcos v. Manglapus*, G.R. No. 88211, 15 September 1989, 177 SCRA 668, and 27 October 1989, 178 SCRA 760. In resolving the motion for reconsideration, the Court cited *Myers v. United States* (272 U.S. 52

out powers and functions expressly granted to the Executive under the Constitution.

In the United States, executive privilege was first recognized as an implied constitutional power of the President in the 1973 case of *United States v. Nixon*.[15] U.S. Presidents, however, have asserted executive privilege since the time of the first President, George Washington.[16] In this jurisdiction, several decisions have recognized executive privilege starting with the 1995 case of *Almonte v. Vasquez*,[17] and the most recent being the 2002 case of *Chavez v. Public Estates Authority*[18] and the 2006 case of *Senate v. Ermita*.[19]

As Commander-in-Chief of the Armed Forces[20] and as Chief Executive,[21] the President is ultimately responsible for military and national security matters affecting the nation. In the discharge of this responsibility, the President may find it necessary to withhold sensitive military and national security secrets from the Legislature or the public.

As the official in control of the nation's foreign service by virtue of the President's control of all executive departments,

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[1926]) where Chief Justice William H. Taft (a former U.S. President and Governor-General of the Philippines), writing for the majority, ruled: "The true view of the Executive function is x x x that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power **or justly implied and included within such express grant as necessary and proper for its exercise**." The principle that power can be implied if "**necessary and proper**" to carry out a power expressly granted in the Constitution is now a well-settled doctrine.

[15] 418 U.S. 683 (1974).

[16] Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW*, Vol. 1, p. 784 (3rd Edition).

[17] *Supra* note 13.

[18] 433 Phil. 506 (2002).

[19] *Supra* note 13.

[20] Section 18, Article VII, Constitution.

[21] Section 1, Article VII, Constitution.

bureaus and offices,[22] the President is the chief implementer of the foreign policy relations of the State. The President's role as chief implementer of the State's foreign policy is reinforced by the President's constitutional power to negotiate and enter into treaties and international agreements.[23] In the discharge of this responsibility, the President may find it necessary to refuse disclosure of sensitive diplomatic secrets to the Legislature or the public. Traditionally, states have conducted diplomacy with considerable secrecy. There is every expectation that a state will not imprudently reveal secrets that its allies have shared with it.

There is also the need to protect the confidentiality of the internal deliberations of the President with his Cabinet and advisers. To encourage candid discussions and thorough exchange of views, the President's communications with his Cabinet and advisers need to be shielded from the glare of publicity. Otherwise, the Cabinet and other presidential advisers may be reluctant to discuss freely with the President policy issues and executive matters knowing that their discussions will be publicly disclosed, thus depriving the President of candid advice.

Executive privilege, however, is not absolute. The interest of protecting military, national security and diplomatic secrets, as well as Presidential communications, must be weighed against other constitutionally recognized interests. There is the declared state policy of full public disclosure of all transactions involving public interest,[24] the right of the people to information on matters of public concern,[25] the accountability of public officers,[26] the power of legislative inquiry,[27] and the judicial power to secure testimonial and documentary evidence in deciding cases.[28]

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[22] Section 17, Article VII, Constitution.

[23] Section 21, Article VII, Constitution.

[24] Section 28, Article II, Constitution.

[25] Section 7, Article III, Constitution.

[26] Section 1, Article XI, Constitution.

[27] Section 21, Article VI, Constitution.

[28] Sections 1 and 5, Article VIII, Constitution. *See* also *United States v. Nixon*, *supra* note 15.

The balancing of interests – between executive privilege on one hand and the other competing constitutionally recognized interests on the other hand - is a function of the courts. The courts will have to decide the issue based on the factual circumstances of each case. This is how conflicts on executive privilege between the Executive and the Legislature,[29] and between the Executive and the Judiciary,[30] have been decided by the courts.

The Judiciary, however, will consider executive privilege only if the issues cannot be resolved on some other legal grounds.[31] In conflicts between the Executive and the Legislature involving executive privilege, the Judiciary encourages negotiation between the Executive and Legislature as the preferred route of conflict resolution.[32] Only if judicial resolution is unavoidable will courts resolve such disputes between the Executive and Legislature.[33]

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[29] *Senate v. Ermita*, *supra* note 13.

[30] *United States v. Nixon*, *supra* note 15; *Clinton v. Jones*, 520 U.S. 681 (1997).

[31] *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004).

[32] *United States v. AT&T*, 551 F.2d 384, 394 (D.C. Cir. 1976). The Court stated: "Before moving on to a decision of such nerve-center constitutional questions, we pause to allow for further efforts at a settlement. x x x This dispute between the legislative and executive branches has at least some elements of the political-question doctrine. A court decision selects a victor, and tends thereafter to tilt the scales. A compromise worked out between the branches is most likely to meet their essential needs and the country's constitutional balance." *See* also *United States v. AT&T*, 567 F.2d 121, 127 (D.C. Cir. 1977). The Court stated: "The framers, rather than attempting to define and allocate all governmental power in minute detail, relied, we believe, on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of constitutional scheme avoids the mischief of polarization of disputes x x x."

[33] Section 1, Article VIII, Constitution.

Information covered by executive privilege remains confidential even after the expiry of the terms of office of the President, Cabinet members and presidential advisers. Thus, a former President can assert executive privilege.[34] The character of executive privilege attaches to the information and not to the person. Executive privilege is for the benefit of the State and not for the benefit of the office holder. Even death does not extinguish the confidentiality of information covered by executive privilege.

Executive privilege must be exercised by the President in pursuance of **official** powers and functions. Executive privilege cannot be invoked to hide a crime because the President is neither empowered nor tasked to conceal a crime.[35] On the contrary, the President has the constitutional duty to enforce criminal laws and cause the prosecution of crimes.[36]

Executive privilege cannot also be used to hide private matters, like private financial transactions of the President. Private matters are those not undertaken pursuant to the lawful powers and official functions of the Executive. However, like all citizens, the President has a constitutional right to privacy.[37] In conducting inquiries, the Legislature must respect the right to privacy of citizens, including the President's.

Executive privilege is rooted in the separation of powers.[38] Executive privilege is an implied constitutional power because it is necessary and proper to carry out the express constitutional powers and functions of the Executive free from the encroachment of the other co-equal and co-ordinate branches

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[34] *Nixon v. Administrator of General Services Administration*, 433 U.S. 425 (1977).

[35] *McGrain v. Daugherty*, 273 U.S. 135, 179-180 (1927). The U.S. Supreme Court declared: "Nor do we think it a valid objection to the investigation that it might possibly disclose crime or wrongdoing x x x."

[36] Section 17, Article VII, Constitution.

[37] *Nixon v. Administrator of General Services*, *supra.*

[38] *United States v. Nixon*, *supra* note 15.

of government. Executive privilege springs from the supremacy of each branch within its own assigned area of constitutional powers and functions.[39]

Executive privilege can be invoked only by the President who is the sole Executive in whom is vested **all** executive power under the Constitution.[40] However, the Executive Secretary can invoke executive privilege "By Order of the President," which means the President personally instructed the Executive Secretary to invoke executive privilege in a particular circumstance.[41]

Executive privilege must be invoked with **specificity** sufficient to inform the Legislature and the Judiciary that the matter claimed as privileged refers to military, national security or diplomatic secrets, or to confidential Presidential communications.[42] A claim of executive privilege accompanied by sufficient specificity gives rise to a presumptive executive privilege. A generalized assertion of executive privilege, without external evidence or circumstances indicating that the matter refers to any of the recognized categories of executive privilege, will not give rise to presumptive executive privilege.

If there is doubt whether presumptive privilege exists, the court may require *in camera* inspection of so much of the evidence as may be necessary to determine whether the claim of executive

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[39] *Id*.

[40] Section 1, Article VII, Constitution.

[41] *Senate v. Ermita*, *supra* note 13.

[42] *Id*. In *Senate v. Ermita*, the Court quoted *Smith v. Federal Trade Commission* (403 F. Supp. 1000 [1975]), thus: "[T]he lack of specificity renders an assessment of the potential harm resulting from disclosure impossible, thereby preventing the Court from balancing such harm against plaintiffs' need to determine whether to override any claims of privilege." The Court also quoted *U.S. v. Article of Drug* (43 F.R.D. 181, 190 [1976]), thus: "Privilege cannot be set up by an unsupported claim. The facts upon which the privilege is based must be established."

privilege is justified.[43] Once presumptive executive privilege is established, the court will then weigh the need for such executive privilege against the need for other constitutionally recognized interests.

Executive privilege must be invoked **after** the question is asked by the legislative committee, not before. A witness cannot raise hypothetical questions that the committee may ask, claim executive privilege on such questions, and on that basis refuse to appear before the legislative committee. If the legislative committee furnished in advance the questions to the witness, the witness must bring with him the letter of the President or Executive Secretary invoking executive privilege and stating the reasons for such claim.

If the legislative committee did not furnish in advance the questions, the witness must first appear before the legislative committee, wait for the question to be asked, and then raise executive privilege. The legislative committee must then give the witness sufficient time to consult the President or Executive Secretary whether the President will claim executive privilege. At the next hearing, the witness can bring with him the letter of the President or Executive Secretary, and if he fails to bring such letter, the witness must answer the question.

There are other categories of government information which are considered confidential but are not strictly of the same status as those falling under the President's executive privilege. An example of such confidential information is the identity of an informer which is made confidential by contract between the government and the informer.[44] The privilege character of the information is contractual in nature. There are also laws that classify the identity of an informer as confidential.[45] The

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[43] *United States v. Nixon*, *supra* note 15. Professor Lawrence H. Tribe summarizes that "documents defended only by broad claim of confidentiality must be turned over to district court for *in camera* inspection to assess relevance." *Supra* note 16, footnote 35 at 775.

[44] *Toten v. United States*, 92 U.S. 105 (1876).

[45] Republic Act No. 2338. Section 282 of the present Tax Code is now silent on the confidentiality of the identity of the informer.

privilege character of the information is conferred by the Legislature and not by the Executive's implied power of executive privilege under the Constitution.

There is also the category of government information that is confidential while the deliberative process of agency executives is on-going, but becomes public information once an agency decision or action is taken. Thus, a committee that evaluates bids of government contracts has a right to keep its deliberations and written communications confidential. The purpose of the deliberative process privilege is to give agency executives freedom to discuss competing bids in private without outside pressure. However, once they take a definite action, like deciding the best bid, their deliberations and written communications form part of government records accessible by the public.[46]

Confidential information under the deliberative process privilege is different from the President's executive privilege. Military, national security, and diplomatic secrets, as well as Presidential communications, remain confidential without time limit. The confidentiality of matters falling under the President's executive privilege remains as long as the need to keep them confidential outweighs the need for public disclosure.

Then there is the category of government information that must be kept temporarily confidential because to disclose them immediately would frustrate the enforcement of laws. In an entrapment operation of drug pushers, the identity of the undercover police agents, informers and drug suspects may not be disclosed publicly until after the operation is concluded. However, during the trial, the identity of the undercover police

[46] Section 7, Article III, Constitution; *Chavez v. Public Estates Authority*, 433 Phil. 506, 531-532 (2002). The Court stated: "Information, however, on on-going evaluation or review of bids or proposals being undertaken by the bidding or review committee is not immediately accessible under the right to information. While the evaluation or review is still on-going, there are no "official acts, transactions, or decisions" on the bids or proposals. However, once the committee makes its official recommendation, there arises a "definite proposition" on the part of the government. From this moment, the public's right to information attaches, and any citizen can access all the non-proprietary information leading to such definite proposition."

agents and informers must be disclosed if their testimony is introduced in evidence.

2. Overview of Legislative Power of Inquiry

The Legislature's fundamental function is to enact laws and oversee the implementation of existing laws. The Legislature must exercise this fundamental function consistent with the people's right to information on the need for the enactment of laws and the status of their implementation. The principal tool used by the Legislature in exercising this fundamental function is the power of inquiry which is inherent in every legislative body.[47] Without the power of inquiry, the Legislature cannot discharge its fundamental function and thus becomes inutile.

The Constitution expressly grants to the "Senate, the House of Representatives or any of its respective committees" the power to "conduct inquiries in aid of legislation."[48] This power of legislative inquiry is so searching and extensive in scope

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[47] *McGrain v. Daugherty*, *supra* note 35 at 174-175. The U.S. Supreme Court stated: "We are of opinion that the power of inquiry - with process to enforce it - is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. x x x

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed."

[48] Section 21, Article VI, Constitution which provides: "The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected."

that the inquiry need not result in any potential legislation,[49] and may even end without any predictable legislation.[50] The phrase "inquiries in aid of legislation" refers to inquiries to aid the enactment of laws, inquiries to aid in overseeing the implementation of laws, and even inquiries to expose corruption, inefficiency or waste in executive departments.[51]

Thus, the Legislature can conduct inquiries not specifically to enact laws, but specifically to oversee the implementation of laws. This is the mandate of various legislative oversight committees which admittedly can conduct inquiries on the status of the implementation of laws. In the exercise of the legislative

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[49] *McGrain v. Daugherty*, *supra* note 35 at 177. The U.S. Supreme Court stated: "It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice - whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year."

[50] *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509 (1975). The U.S. Supreme Court declared: "To be a valid legislative inquiry there need be no predictable end result."

[51] *Watkins v. United States*, 354 U.S. 178, 187 (1957). The U.S. Supreme Court declared: "[T]he power of Congress to conduct investigations is inherent in the legislative process. That power is broad. **It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste**." (Emphasis supplied)

oversight function, there is always the potential, even if not expressed or predicted, that the oversight committees may discover the need to improve the laws they oversee and thus recommend amendment of the laws. This is sufficient reason for the valid exercise of the power of legislative inquiry. Indeed, the oversight function of the Legislature may at times be as important as its law-making function.[52]

Aside from the purpose of the inquiry, the Constitution imposes two other limitations on the power of legislative inquiry.[53] *One*, the rules of procedure for the inquiry must be duly published. Publication of the rules of the inquiry is an **essential** requirement of due process. *Two*, the rights of persons appearing before the investigating committees, or affected by such inquiries, must be respected. These rights include the right against self-incrimination,[54] as well as the right to privacy of communications and correspondence of a private nature.[55] The power of legislative inquiry does not reach into the private affairs of citizens.[56]

Also protected is the right to due process, which means that a witness must be given "fair notice" of the subject of the legislative inquiry. Fair notice is important because the witness may be cited in contempt, and even detained, if he refuses or fails to answer.[57] Moreover, false testimony before a legislative

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[52] *Supra* note 16 at 790-791. Professor Tribe comments thus: "xxx it is important to note an implicit or ancillary power belonging to Congress that is at times every bit as important as the power to which it is supposedly appurtenant. That, of course, is the power of investigation, typically and most dramatically exemplified by hearings, some of them in executive session but most of them in the glare of klieg lights and with the whole nation watching. Such investigations have served an important role in ventilating issues of profound national concern;" Louis Fisher & David Gray Adler, *AMERICAN CONSTITUTIONAL LAW*, p. 227 (7th Edition). Fisher and Adler write: "Oversight is not subordinate to legislation."

[53] Section 21, Article VI, Constitution.

[54] Section 17, Article III, Constitution.

[55] Section 3(1), Article III, Constitution.

[56] *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

[57] *Watkins v. United States*, 354 U.S. 178 (1957).

body is a crime.[58] Thus, the witness must be sufficiently informed of the nature of the inquiry so the witness can reasonably prepare for possible questions of the legislative committee. To avoid doubts on whether there is fair notice, the witness must be given in advance the questions pertaining to the basic nature of the inquiry.[59] From these advance questions, the witness can infer other follow-up or relevant questions that the legislative committee may ask in the course of the inquiry.

The Legislature has the inherent power to enforce by compulsion its power of inquiry.[60] The Legislature can enforce its power of inquiry through its own sergeant-at-arms without the aid of law enforcement officers of the Executive[61] or resort to the courts.[62] The two principal means of enforcing the power of inquiry are for the Legislature to order the arrest of a witness who refuses to appear,[63] and to detain a witness who refuses to answer.[64] A law that makes a crime the refusal to appear

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[58] Article 183, Revised Penal Code.

[59] *Watkins v. United States*, *supra* note 57.

[60] *Arnault v. Nazareno,* 87 Phil. 29 (1950).

[61] *McGrain v. Daugherty*, *supra* note 35. *See* also *Negros Oriental II Electric Cooperative, Inc. v. Sangguniang Panlungsod of Dumaguete*, G.R. No. 72492, 5 November 1987, 155 SCRA 421, which ruled that local government legislative councils have no inherent power to enforce by compulsion their power of inquiry in aid of ordinance-making.

[62] *Arnault v. Balagtas*, 97 Phil. 358, 370 (1955). The Court stated: "When the framers of the Constitution adopted the principle of separation of powers, making each branch supreme within the realm of its respective authority, it must have intended each department's authority to be full and complete, independently of the other's authority or power. And how could the authority and power become complete if for every act of refusal, every act of defiance, every act of contumacy against it, the legislative body must resort to the judicial department for the appropriate remedy, because it is impotent by itself to punish or deal therewith, with the affronts committed against its authority or dignity."

[63] *Lopez v. De los Reyes,* 55 Phil. 170 (1930).

[64] *Arnault v. Nazareno*, *supra* note 60.

before the Legislature does not divest the Legislature of its inherent power to arrest a recalcitrant witness.[65]

The inherent power of the Legislature to arrest a recalcitrant witness remains despite the constitutional provision that "no warrant of arrest shall issue except upon probable cause to be determined personally by the judge."[66] The power being inherent in the Legislature, **essential for self-preservation**,[67] and not expressly withdrawn in the Constitution, the power forms part of the "legislative power x x x vested in the Congress."[68] The Legislature asserts this power independently of the Judiciary.[69] A grant of legislative power in the Constitution is a grant of all legislative powers, including inherent powers.[70]

The Legislature can cite in contempt and order the arrest of a witness who fails to appear pursuant to a subpoena *ad testificandum*. There is no distinction between direct and indirect contempt of the Legislature because both can be punished *motu proprio* by the Legislature upon failure of the witness to appear

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[65] *McGrain v. Daugherty*, *supra* note 35 at 172. The U.S. Supreme Court quoted *In re Chapman* (166 U.S. 661), thus: "We grant that Congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended; x x x."; *Lopez v. De los Reyes*, *supra* note 63. The Court stated that "the Philippine Legislature could not divest either of its Houses of the inherent power to punish for contempt."

[66] Section 2, Article III, Constitution.

[67] *Lopez v. De los Reyes*, *supra* note 63 at 179-180. The Court declared that the Legislature's "power to punish for contempt rests solely upon the right of self-preservation"; *Negros Oriental II Electric Cooperative v. Sangguniang Panlungsod of Dumaguete*, *supra* note 61 at 430. The Court stated: "The exercise by the legislature of the contempt power is a matter of self-preservation as that branch of the government vested with the legislative power, independently of the judicial branch, asserts its authority and punishes contempts thereof."

[68] Section 1, Article VI, Constitution.

[69] *Lopez v. De los Reyes*, *supra* note 63.

[70] *Marcos v. Manglapus*, *supra* note 14.

or answer. Contempt of the Legislature is different from contempt of court.[71]

3. Whether Executive Privilege Was Correctly Invoked In this Case

The Ermita Letter invokes two grounds in claiming executive privilege. *First*, the answers to the three questions involve confidential conversations of the President with petitioner. *Second*, the information sought to be disclosed might impair "diplomatic as well as economic" relations with the People's Republic of China.

However, in his present Petition, which he verified under oath, petitioner declared:

7.03. Petitioner's discussions with the President were candid discussions mean[t] to explore options in making policy decisions

[71] *Lopez v. De los Reyes*, *supra* note 63 at 178. The Court declared: "x x x In the second place, the same act could be made the basis for contempt proceedings and for a criminal prosecution. It has been held that a conviction and sentence of a person, not a member, by the House of Representatives of the United States Congress, for an assault and battery upon a member, is not a bar to a subsequent criminal prosecution by indictment for the offense. (*U.S. vs. Houston* [1832], 26 Fed. Cas., 379.) In the third place, and most important of all, the argument fails to take cognizance of the purpose of punishment for contempt, and of the distinction between punishment for contempt and punishment for crime. Let us reflect on this last statement for a moment. The implied power to punish for contempt is coercive in nature. The power to punish crimes is punitive in nature. The first is a vindication by the House of its own privileges. The second is a proceeding brought by the State before the courts to punish offenders. The two are distinct, the one from the other."; *Arnault v. Balagtas*, *supra* note 62 at 370. The Court declared: "The process by which a contumacious witness is dealt with by the legislature in order to enable it to exercise its legislative power or authority must be distinguished from the judicial process by which offenders are brought to the courts of justice for the meting of the punishment which the criminal law imposes upon them. The former falls exclusively within the legislative authority, the latter within the domain of the courts; because the former is a necessary concomitant of the legislative power or process, while the latter has to do with the enforcement and application of the criminal law."

(see *Almonte v. Vasquez*, 244 SCRA 286 [1995]). **These discussions dwelt on the impact of the bribery scandal involving high Government officials on the country's diplomatic relations and economic and military affairs, and the possible loss of confidence of foreign investors and lenders in the Philippines.** (Emphasis supplied)

Petitioner categorically admits that his discussions with the President "**dwelt on the impact of bribery scandal involving high Government officials**."Petitioner's discussions with the President dealt not on simple bribery, but on **scandalous bribery involving high Government officials** of the Philippines.

In a letter dated 29 November 2007 to the Chairs of the Committees, petitioner's counsel declared:

4. His conversations with the President dealt with delicate and sensitive national security and diplomatic matters relating to the impact of **bribery scandal involving high Government officials** and the possible loss of confidence of foreign investors and lenders in the Philippines. x x x (Emphasis supplied)

Petitioner admits, and there can be no dispute about this admission, that his discussions with the President dwelt on a bribery scandal involving high Government officials of the Philippines.

Executive privilege can never be used to hide a crime or wrongdoing, even if committed by high government officials. Executive privilege applies only to protect **official** acts and functions of the President, never to conceal illegal acts by anyone, not even those of the President.[72] During the oral arguments on 4 March 2008, **counsel for petitioner admitted that executive privilege cannot be invoked to hide a crime**. Counsel for petitioner also **admitted** that petitioner and the President discussed a scandal, and that the "**scandal was about bribery**." Thus:

JUSTICE CARPIO: Counsel, in your petition, paragraph 7.03, x x x – you are referring to the discussions between Secretary Neri and the President and you state: - ["]This

[72] *United States v. Nixon*, *supra* note 15.

discussion dwelt on the impact of the bribery scandal involving high government officials on the countries diplomatic relations and economic and military affairs and the possible loss of confidence of foreign investors and lenders in the Philippines.["] You stated the same claim also in your letter of 29 November 2007 to the Senate, is that correct?

ATTY. BAUTISTA: That is true, Your Honor.

JUSTICE CARPIO: **Now, can Executive Privilege be invoked to hide a crime or a wrongdoing on the part of government officials?**

ATTY. BAUTISTA: **Definitely not, Your Honor.**

JUSTICE CARPIO: x x x Now, you are saying that the discussions between the President and Secretary Neri that you claim[x] to be privilege[ed] refer to bribery scandal involving government officials. So, you are admitting that there is a crime here?

ATTY. BAUTISTA: Only the scandal, Your Honor, not the crime.

JUSTICE CARPIO: But you are saying bribery, bribery is a crime, correct?

ATTY. BAUTISTA: That is true, Your Honor.

JUSTICE CARPIO: **So, they discuss[ed] about a bribery involving government officials, correct?**

ATTY. BAUTISTA: **The scandal, Your Honor.**

JUSTICE CARPIO: **No, [it] says bribery.**

ATTY. BAUTISTA: **Well, bribery, the scandal was about bribery.**

x x x. (Emphasis supplied)

Petitioner admits in his Petition, and through his counsel in the 15 November 2007 letter to the Senate Blue Ribbon Committee and during the oral arguments, that he discussed with the President a "**bribery scandal involving high government officials**." This particular discussion of petitioner with the President is not covered by executive privilege. The invocation of executive privilege on the three questions dwelling on a bribery scandal is clearly unjustified and void. Public office is a public trust[73] and not a shield to cover up wrongdoing. Petitioner must answer the three questions asked by the Senate Committees.

The Ermita Letter merely raises a generalized assertion of executive privilege on diplomatic matters. The bare claim that disclosure "might impair" diplomatic relations with China, without specification of external evidence and circumstances justifying such claim, is insufficent to give rise to any presumptive executive privilege.[74] A claim of executive privilege is presumptively valid if there is specificity in the claim. The claim of impairment of economic relations with China is invalid because impairment of economic relations, involving "foreign investors and lenders in the Philippines," is not a recognized ground for invoking executive privilege.

The Ermita Letter does not claim impairment of military or national security secrets as grounds for executive privilege. **The Ermita Letter only invokes confidential Presidential conversations and impairment of diplomatic and economic relations.** However, in his Petition, petitioner declared that his discussions with the President referred to a bribery scandal affecting "diplomatic relations and economic and military affairs." Likewise, in his 29 November 2007 letter to the Senate Committees, counsel for petitioner stated that petitioner's discussions with the President referred to "sensitive national security and diplomatic matters."

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[73] Section 1, Article XI, Constitution.

[74] *Senate v. Ermita*, *supra* note 13.

Apparently, petitioner has expanded the grounds on which Executive Secretary Ermita invoked executive privilege on behalf of the President. Petitioner also confuses military secrets with national security secrets. Petitioner's claim of executive privilege not only lacks specificity, it is also imprecise and confusing. In any event, what prevails is the invocation of Executive Secretary Ermita since he is the only one authorized to invoke executive privilege "By Order of the President."[75]

Thus, the bases for the claim of executive privilege are what the Ermita Letter states, namely, confidential Presidential conversations and impairment of diplomatic and economic relations. However, impairment of economic relations is not even a recognized ground. In short, this Court can only consider confidential Presidential conversations and impairment of diplomatic relations as grounds for the invocation of executive privilege in this petition.

During the oral arguments, counsel for petitioner failed to correct or remedy the lack of specificity in the invocation of executive privilege by Executive Secretary Ermita. Thus:

JUSTICE CARPIO: Okay, was the DFA involved in the negotiation[s] for the NBN contract?

ATTY. BAUTISTA:[76] I do not know, Your Honor.

x x x x x x x x x

CHIEF JUSTICE PUNO: Do [you] also know whether there is any aspect of the contract relating to diplomatic relations which was referred to the Department of Foreign Affairs for its comment and study?

ATTY. LANTEJAS: As far as I know, Your Honors, there was no referral to the Department of Foreign Affairs, Your Honor.

While claiming that petitioner's discussions with the President on the NBN Project involved sensitive diplomatic matters,

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[75] *Senate v. Ermita*, *supra* note 13.

[76] Atty. Antonio R. Bautista.

petitioner does not even know if the Department of Foreign Affairs (DFA) was involved in the NBN negotiations. This is incredulous considering that under the Revised Administrative Code, the DFA "shall be the **lead agency** that shall advise and assist the President in planning, organizing, directing, coordinating and evaluating the total national effort in the field of foreign relations."[77]

The three questions that Executive Secretary Ermita claims are covered by executive privilege, if answered by petitioner, will not disclose confidential Presidential communications. Neither will answering the questions disclose diplomatic secrets. Counsel for petitioner **admitted** this during the oral arguments in the following exchange:

ASSOCIATE JUSTICE CARPIO: Going to the first question x x x whether the President followed up the NBN project, is there anything wrong if the President follows up with NEDA the status of projects in government x x x, is there anything morally or legally wrong with that?

ATTY. LANTEJAS:[78] There is nothing wrong, Your Honor, because (interrupted)

ASSOCIATE JUSTICE CARPIO: That's normal.

ATTY. LANTEJAS: That's normal, because the President is the Chairman of the NEDA Board, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes, so there is nothing wrong. So why is Mr. Neri afraid to be asked this question?

ATTY. LANTEJAS: I just cannot (interrupted)

ASSOCIATE JUSTICE CARPIO: You cannot fathom?

ATTY. LANTEJAS: Yes, Your Honor.

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[77] Section 2, Chapter 1, Title 1, Book IV, Revised Administrative Code of 1987.

[78] Atty. Paul Lantejas.

ASSOCIATE JUSTICE CARPIO: You cannot fathom. The second question, were you dictated to prioritize the ZTE [contract], is it the function of NEDA to prioritize specific contract[s] with private parties? No, yes?

ATTY. LANTEJAS: The prioritization, Your Honor, is in the (interrupted).

ASSOCIATE JUSTICE CARPIO: Project?

ATTY. LANTEJAS: In the procurement of financing from abroad, Your Honor.

ASSOCIATE JUSTICE CARPIO: Yes. The NEDA will prioritize a project, housing project, NBN project, the Dam project, but never a specific contract, correct?

ATTY. LANTEJAS: Not a contract, Your Honor.

ASSOCIATE JUSTICE CARPIO: This question that Secretary Neri is afraid to be asked by the Senate, he can easily answer this, that NEDA does not prioritize contract[s], is that correct?

ATTY. LANTEJAS: It is the project, Your Honor.

ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question?

ATTY. LANTEJAS: I cannot, I cannot fathom. Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: But is there anything wrong if the President will tell the NEDA Director General, you prioritize this project, is there anything legally or morally wrong with that?

ATTY. LANTEJAS: There is nothing wrong with that, Your Honor.

ASSOCIATE JUSTICE CARPIO: There is nothing [wrong]. It happens all the time?

ATTY. LANTEJAS: The NEDA Board, the Chairman of the NEDA Board, yes, she can.

ASSOCIATE JUSTICE CARPIO: [S]he can always tell that?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. Let's go to the third question, whether the President said, to go ahead and approve the project after being told about the alleged bribe. Now, x x x it is not the NEDA Director General that approves the project, correct?

ATTY. LANTEJAS: No, no, Your Honor.

ASSOCIATE JUSTICE CARPIO: It is the (interrupted)

ATTY. LANTEJAS: It is the NEDA Board, Your Honor.

ASSOCIATE JUSTICE CARPIO: The NEDA Board headed by the President.

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: So this question, is not correct also, x x x whether the President said to Secretary Neri to go ahead and approve the project? Secretary Neri does not approve the project, correct?

ATTY. LANTEJAS: He's just the Vice Chairman, Your Honor.

ASSOCIATE JUSTICE CARPIO: So why is he afraid to be asked this question?

ATTY. LANTEJAS: I cannot tell you, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also?

ATTY. LANTEJAS: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: You cannot fathom also.

ATTY. LANTEJAS: Yes, Your Honor.

Petitioner's counsel admits that he "cannot fathom" why petitioner refuses to answer the three questions. Petitioner's counsel admits that the three questions, even if answered by petitioner, will not disclose confidential Presidential discussions or diplomatic secrets. The invocation of executive privilege is thus unjustified.

Of course, it is possible that the follow-up questions to the three questions may call for disclosure of confidential presidential discussions or diplomatic secrets. However, executive privilege cannot be invoked on possible questions that have not been asked by the legislative committee. Executive privilege can only be invoked after the question is asked, not before, because the legislative committee may after all not ask the question. But even if the follow-up questions call for the disclosure of confidential Presidential discussions or diplomatic secrets, still executive privilege cannot be used to cover up a crime.

4. Whether the Senate's Rules of Procedure on Inquiries Have Been Published

The Constitution requires that the Legislature publish its rules of procedure on the conduct of legislative inquiries in aid of legislation.[79] There is no dispute that the last publication of the *Rules of Procedure of the Senate Governing the Inquiries in Aid of Legislation* was on 1 December 2006 in the *Philippine Star* and *Philippine Daily Inquirer* during the 13th Congress. There is also no dispute that the *Rules of Procedure* have not been published in newspapers of general circulation during the current 14th Congress. However, the *Rules of Procedure* have been published continuously in the website of the Senate since at least the 13th Congress. In addition, the Senate makes the *Rules of Procedure* available to the public in pamphlet form.

[79] Section 22, Article VI, Constitution.

Petitioner assails the validity of the *Rules of Procedure* because they have not been duly published for the 14th Congress.[80] Respondents counter that the Senate is a continuing legislative body. Respondents argue that as a continuing body, the Senate does not have to republish the *Rules of Procedure* because publication of the *Rules of Procedure* in the 13th Congress dispenses with republication of the *Rules of Procedure* in subsequent Congresses. The issue then turns on whether the Senate under the 1987 Constitution is a continuing body.

In *Arnault v. Nazareno*,[81] decided under the 1935 Constitution, this Court ruled that "the Senate of the Philippines is a continuing body whose members are elected for a term of six years and so divided that the seats of only one-third become vacant every two years, **two-thirds always continuing into the next Congress** save as vacancies may occur thru death or resignation." To act as a legislative body, the Senate must have a quorum, which is a majority of its membership.[82] Since the Senate under the 1935 Constitution always had two-thirds of its membership filled up except for vacancies arising from death or resignation, the Senate always maintained a quorum to act as a legislative body. Thus, the Senate under the 1935 Constitution continued to act as a legislative body even after the expiry of the term of one-third of its members. This is the rationale in holding that the Senate under the 1935 Constitution was a continuing legislative body.[83]

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[80] Petitioner's Supplemental Petition dated 1 February 2008 and Petitioner's Memorandum dated 14 March 2008.

[81] *Supra* note 60.

[82] Section 10(2), Article VI, 1935 Constitution; Section 16(2), Article VI, 1987 Constitution. Both the 1935 and 1987 Constitutions provide that "[A] majority of each House shall constitute a quorum to do business."

[83] *See* also *Attorney General Ex. Rel. Werts v. Rogers, et al.*, 56 N.J.L. 480, 652 (1844). The Supreme Court of New Jersey declared: "[T]he vitality of the body depends upon the existence of a quorum capable of doing business. That quorum constitutes a senate. Its action is the expression of the will of the senate, and no authority can be found which states any other conclusion. All difficulty and confusion in constitutional construction

The present Senate under the 1987 Constitution is no longer a continuing legislative body. The present Senate has twenty-four members, twelve of whom are elected every three years for a term of six years each. Thus, the term of twelve Senators expires every three years, leaving **less than a majority of Senators to continue into the next Congress**. The 1987 Constitution, like the 1935 Constitution, requires a majority of Senators to "constitute a quorum to do business."[84] Applying the same reasoning in *Arnault v. Nazareno*, the Senate under the 1987 Constitution is not a continuing body because less than majority of the Senators continue into the next Congress. The consequence is that the *Rules of Procedure* must be republished by the Senate after every expiry of the term of twelve Senators.

The publication of the *Rules of Procedure* in the website of the Senate, or in pamphlet form available at the Senate, is not sufficient under the *Tañada v. Tuvera*[85] ruling which requires publication either in the Official Gazette or in a newspaper of general circulation. The *Rules of Procedure* even provide that the rules "shall take effect seven (7) days after publication in two (2) newspapers of general circulation,"[86] precluding any other form of publication. Publication in accordance with *Tañada* is mandatory to comply with the due process requirement because the *Rules of Procedure* put a person's liberty at risk. A person

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is avoided by applying the rule x x x that the continuity of the body depends upon the fact that in the senate a majority constitutes a quorum, and, as there is always more than a quorum of qualified senators holding seats in that body, its organic existence is necessarily continuous. x x x The senate of the United States remains a continuous body because two-thirds of its members are always, in contemplation of the constitution, in existence."

[84] Section 16(2), Article VI, Constitution.

[85] 230 Phil. 528 (1986), ***reiterated*** in *National Electrification Administration, v. Gonzaga*, G.R. No. 158761, 4 December 2007; *NASECORE v. Energy Regulatory Commission*, G.R. No. 163935, 2 February 2006, 481 SCRA 480; *Dadole v. Commission on Audit*, 441 Phil. 532 (2002).

[86] Section 24, *Rules of Procedure Governing Inquiries in Aid of Legislation*.

who violates the *Rules of Procedure* could be arrested and detained by the Senate.

Due process requires that "fair notice" be given to citizens before rules that put their liberty at risk take effect. The failure of the Senate to publish its *Rules of Procedure* as required in Section 22, Article VI of the Constitution renders the *Rules of Procedure* void. Thus, the Senate cannot enforce its *Rules of Procedure*.

5. Whether the Senate Committees Validly Ordered the Arrest of Petitioner

The Senate and its investigating committees have the implied power to cite in contempt and order the arrest of a witness who refuses to appear despite the issuance of a subpoena. The Senate can enforce the power of arrest through its own Sergeant-at-Arms. In the present case, based on the Minutes of Meetings and other documents submitted by respondents, the majority of the regular members of each of the respondent Committees voted to cite petitioner in contempt and order his arrest. However, the Senate's Order of 30 January 2008 citing petitioner in contempt and ordering his arrest is void due to the non-publication of the *Rules of Procedure*.[87]

The arrest of a citizen is a deprivation of liberty. The Constitution prohibits deprivation of liberty without due process of law. The Senate or its investigating committees can exercise the implied power to arrest only in accordance with due process which requires publication of the Senate's *Rules of Procedure*.

[87] Section 18, on Contempt, of the *Rules of Procedure* provides: "The Committee, by a vote of a majority of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively.

A contempt of the Committee shall be deemed a contempt of the Senate. Such witness may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt."

This Court has required judges to comply strictly with the due process requirements in exercising their **express** constitutional power to issue warrants of arrest.[88] This Court has voided warrants of arrest issued by judges who failed to comply with due process. This Court can do no less for arrest orders issued by the Senate or its committees in violation of due process.

6. Conclusion

In summary, the issues raised in this petition should be resolved as follows:

a. Executive Secretary Ermita's invocation of executive privilege in his letter of 15 November 2007 to the Senate Committees is void because (1) executive privilege cannot be used to hide a crime; (2) the invocation of executive privilege lacks specificity; and (3) the three questions for which executive privilege is claimed can be answered without disclosing confidential Presidential communications or diplomatic secrets.

b. The Senate's *Rules of Procedure* are void for lack of publication; and

c. The Senate Committees' Order of 30 January 2008 citing petitioner in contempt and directing his arrest is void for lack of published rules governing the conduct of inquiries in aid of legislation.

Accordingly, I *DISSENT* from the majority opinion's ruling that the three questions are covered by executive privilege. However, I *CONCUR* with the majority opinion's ruling that the Rules of Procedure are void. Hence, I vote to *GRANT* the petition in part by (i) declaring void the assailed Order of respondents dated 30 January 2008 citing petitioner Secretary Romulo L. Neri in contempt and directing his arrest, and (ii) ordering respondents to desist from citing in contempt or arresting petitioner until the Senate's *Rules of Procedure Governing*

[88] *Allado v. Diokno*, G.R. No. 113630, 5 May 1994, 232 SCRA 192; *Abdula v. Guiani*, 382 Phil. 757 (2000).

Inquiries in Aid of Legislation are duly published and have become effective.

DISSENTING OPINION

PUNO, *C.J.*:

The giant question on the scope and use of executive privilege has cast a long shadow on the ongoing Senate inquiry regarding the alleged and attempted bribery of high government officials in the consummation of the National Broadband Network (NBN) Contract of the Philippine government. With the expanse and opaqueness of the constitutional doctrine of executive privilege, we need to open a window to enable enough light to enter and illuminate the shadow it has cast on the case at bar. The task is not easy, as the nature of executive privilege is not static, but dynamic. Nonetheless, if there is a North Star in this quest, it is that the end all of executive privilege is to promote public interest and no other.

First, let us unfurl the facts of the case.

On April 21, 2007, the Department of Transportation and Communications (DOTC), through Secretary Leandro Mendoza, and Zhing Xing Telecommunications Equipment (ZTE), through its Vice President Yu Yong, executed in Boao, China, a "Contract for the Supply of Equipment and Services for the National Broadband Network Project" ("NBN-ZTE Contract") worth US$ 329,481,290.00 or approximately PhP 16 billion.[1] ZTE is a corporation owned by the Government of the People's Republic of China.[2] The NBN-ZTE Contract was to be financed through a loan that would be extended by the People's Republic of China. President Gloria Macapagal-Arroyo allegedly witnessed the signing of the contract.[3]

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[1] Comment, pp. 3-4.

[2] Petition, p. 3.

[3] Comment, p. 4.

The NBN-ZTE Contract became the subject of investigations by the Joint Committees of the Senate, consisting of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon), Committee on Trade and Commerce and Committee on National Defense and Security after the filing of the following resolutions and delivery of the following privilege speeches:

1. **P.S. Res. (Philippine Senate Resolution) No. 127**, introduced by **Senator Aquilino Q. Pimentel, Jr.,** entitled:

Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting It Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations.[4]

2. **P.S. Res. No. 129**, introduced by **Senator Panfilo M. Lacson**, entitled:

Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity.[5]

3. **P.S. Res. No. 136**, introduced by **Senator Miriam Defensor Santiago**, entitled:

Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government.[6]

4. **P.S. Res. No. 144**, introduced by **Senator Manuel Roxas III**, entitled:

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[4] *Id*. at 4-5.

[5] *Id*. at 5.

[6] *Id*. at 5-6.

Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract.[7]

5. **Privilege Speech of Senator Panfilo M. Lacson**, delivered on September 11, 2007, entitled "Legacy of Corruption."[8]

6. **Privilege Speech of Senator Miriam Defensor Santiago,** delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement."[9]

There are also **three (3) pending bills** in the Senate related to the investigations, namely:

1. **Senate Bill No. 1793**, introduced by **Senator Manuel Roxas III**, entitled:

An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes.[10]

2. **Senate Bill No. 1794**, introduced by **Senator Manuel Roxas III**, entitled:

An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes.[11]

3. **Senate Bill No. 1317**, introduced by **Senator Miriam Defensor Santiago**, entitled:

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[7] *Id*. at 6.

[8] *Id*. at 5.

[9] *Id*. at 6.

[10] *Id*. at 6-7; Annex A.

[11] *Id*. at 7; Annex B.

An Act Mandating Concurrence to International Agreements and Executive Agreements.[12]

The hearings **in aid of legislation** started in September 2007[13] and have yet to be concluded.

On September 26, 2007, petitioner Romulo L. Neri, upon invitation by the respondent Senate Committees, attended the hearing and testified for eleven (11) hours.[14] Petitioner was the Director General of the National Economic and Development Authority (NEDA) during the negotiation and signing of the NBN-ZTE Contract.[15] He testified that President Macapagal-Arroyo had initially given instructions that there would be no loan and no guarantee for the NBN Project, and that it was to be undertaken on an unsolicited Build-Operate-Transfer (BOT) arrangement, so that the government would not expend funds for the project.[16] Eventually, however, the NBN

[12] *Ibid*.; Annex C.

[13] *Id*. at 8.

[14] Petition, p. 3.

[15] Petitioner is the current Chairman of the Commission on Higher Education (CHED) and was Director General of the National Economic and Development Authority (NEDA) from December 17, 2002 to July 17, 2006, and February 16, 2006 to August 15, 2007; Petition, p. 2.

[16] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **MR. NERI.** And at that time, I expressed to the Chinese, to the ZTE representatives the President's instructions that they want it to be…she wants it as a BOT project, probably unsolicited because I think she can read from the minutes of the previous NEDA meetings – no loan, no guarantee; performance undertaking but not take or pay. Meaning that if we don't use it, we don't pay. So I made that very clear to the ZTE people that these are the wishes of the President. (p. 66)
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> x x x x x x x x x
>
> **MR. NERI.** Your Honor, it was originally conceived as a BOT project.
>
> **THE CHAIRMAN (SEN. ROXAS).** Ah, originally conceived as a BOT project. I*yon, iyon ang puntos natin dito. Kasi kung*

Project was awarded to ZTE with a government-to-government loan.[17]

In the course of his testimony, petitioner declared that then Commission on Elections Chairperson Benjamin Abalos, the alleged broker of the NBN-ZTE Contract, offered him Php 200 million in relation to the NBN-ZTE Contract.[18] He further

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BOT Project *ito, hindi uutang ang gobyerno nito, hindi ho ba?*

MR. NERI. That's right, Your Honor. (p. 351)

[17] Comment, p. 8; TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **THE CHAIRMAN (SEN. ROXAS).** Okay. So in this instance, the President's policy direction is something that I can fully support, 'no. Because it is BOT, it is user pay, it doesn't use national government guarantees and we don't take out a loan, *hindi tayo uutang dito. Iyan ang policy directive ng Pangulo*. So *ang tanong ko is*, what happened between November and March n*a lahat itong mga reservations na ito ay naiba*? In fact, it is now a government undertaken contract. It requires a loan, it is a loan that is tied to a supplier that doesn't go through our procurement process, that doesn't go through the price challenge, as you say, and what happened, what was (sic) the considerations that got us to where we are today?
>
> **MR. NERI.** I am no longer familiar with those changes, Your Honor. We've left it to the line agency to determine the best possible procurement process, Your Honor. (p. 360)

[18] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **MR. NERI.** But we had a nice golf game. The Chairman (Abalos) was very charming, you know, and – but there was something that he said that surprised me and he said that, "Sec, may 200 ka dito." I believe we were in a golf cart. He was driving, I was seated beside him so medyo nabigla ako but since he was our host, I chose to ignore it.
>
> x x x x x x x x x
>
> **MR. NERI.** As I said I guess I was too shocked to say anything, but I informed my NEDA staff that perhaps they should be careful in assessing this project viability and maybe be careful with the costings because I told them what happened, I mean, what he said to me.

stated that he informed President Macapagal-Arroyo of the bribe attempt by Chairperson Abalos, and that the President

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SEN. LACSON. *Ano ho ang pinag-uusapan ninyo? Paano pumasok iyong 200 na* – was it mentioned to you in the vernacular, "may 200 ka rito" or in English?

MR. NERI. I think, as I remember, Mr. Chair, Your Honors, the words as I can remember is, "Sec, may 200 ka dito."

SEN. LACSON. May 200 ka rito. Ano ang context noong "may 200 ka rito?" *Ano ang pinag-uusapan ninyo? Saan nanggaling iyon - iyong proposal*?

MR. NERI. I guess the topic we were discussing, you know…

SEN. LACSON. NBN.

THE SENATE PRESIDENT. *Naisip mo ba kung para saan iyong 200 na iyon?*

x x x x x x x x x

THE SENATE PRESIDENT. Two hundred lang, walang ano iyon, wala namang million or pesos…

MR. NERI. I guess we were discussing the ZTE projects… (pp. 33-34)

x x x x x x x x x

SEN. LACSON. *Pumunta ho tayo dun sa* context *ng usapan kung saan pumasok iyong 200* as you mentioned. *Pinag-uusapan ninyo ba* golf balls*?*

MR. NERI. I don't think so, Your Honor.

MR. NERI. Basically was NBN.

SEN. LACSON. So, how did it occur to you, *ano ang dating sa inyo noong naguusap kayo ng* NBN project, *may ibubulong sa inyo iyong chairman (Abalos) na kalaro ninyo ng* golf, "*Sec, may 200 ka rito*." A*nong pumasok sa isip ninyo noon*?

MR. NERI. I was surprised.

SEN. LACSON. You were shocked, you said.

MR. NERI. Yeah, I guess, I guess.

SEN. LACSON. *Bakit kayo na-shock*?

MR. NERI. Well, I was not used to being offered.

SEN. LACSON. Bribed?

MR. NERI. Yeah. Second is, *medyo malaki.*

SEN. LACSON. In other words, at that point it was clear to you that you were being offered bribe money in the amount of 200 million, *kasi malaki, sabi ninyo*?

told him not to accept the bribe.[19] When Senator Francis N. Pangilinan asked petitioner whether the President had followed up on the NBN Contract, he refused to answer. He invoked executive privilege which covers conversations between the President and a public official.[20] Senator Loren B. Legarda

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MR. NERI. I said no amount was put, but I guess given the magnitude of the project, siguro naman hindi ₱200 or ₱200,000, so…

SEN. LACSON. Dahil cabinet official kayo, eh.

MR. NERI. I guess. But I – you know. (pp. 42-44)

[19] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

SEN. LACSON. Did you report this attempted bribe offer to the President?

MR. NERI. I mentioned it to the President, Your Honor.

SEN. LACSON. What did she tell you?

MR. NERI. She told me, "Don't accept it."

SEN. LACSON. And then, that's it?

MR. NERI. Yeah, because we had other things to discuss during that time.

SEN. LACSON. And then after the President told you, "Do not accept it," what did she do? How did you report it to the President? In the same context it was offered to you?

MR. NERI. I remember it was over the phone, Your Honor. (pp. 43-44)

[20] *Id*. It reads in relevant part, *viz*:

SEN. PANGILINAN. You mentioned earlier that you mentioned this to the President. Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 ka rito?

MR. NERI. We did not discuss it again, Your Honor.

SEN. PANGILINAN. With the President? But the issue, of course, the NBN deal, was raised again? After that, between you and the President. *Pinalow* up (followed up) *ba niya*?

MR. NERI. May I claim the executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature. (pp. 91-92)

x x x x x x x x x

asked petitioner if there was any government official higher than he who had dictated that the ZTE be prioritized over Amsterdam Holdings, Inc. (AHI), another company applying to undertake the NBN Project on a BOT arrangement.[21] Petitioner again invoked executive privilege, as he claimed that the question may involve a conversation between him and the President.[22] Senator Pia S. Cayetano also asked petitioner whether the President told him what to do with the project - after he had told her of the PhP 200 million attempted bribe and she told him not to accept it – but petitioner again invoked

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> **MR. NERI.** …Under EO 464, Your Honor, the scope is, number one, state secrets; number two, informants privilege; number three, intra-governmental documents reflecting advisory opinions, recommendations and deliberations. And under **Section 2(A) of EO 464, it includes all confidential or classified information between the President and public officers covered by the EO, such as conversations, correspondence between the President and the public official** and discussions in closed-door Cabinet meetings.
>
> Section 2(A) was held valid in *Senate versus Ermita*. (*emphasis supplied*) (p. 105)

[21] *Id*. It reads in relevant part, *viz:*

> **MR. NERI.** I think, Mr. Chair, Your Honors, that thing has been thoroughly discussed already because if we were to do a BOT the one - the pending BOT application was the application of AHI. (p. 263)

[22] *Id*. It reads in relevant part, *viz*:

> **SEN. LEGARDA.** Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI (Amsterdam Holdings, Inc.) as you've previously done…
>
> **MR. NERI.** As I said, Your Honor…
>
> **SEN. LEGARDA. …but to prefer or prioritize the ZTE?**
>
> **MR. NERI. Yeah. As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.**
>
> **SEN. LEGARDA.** I'm sorry. Can you say that again?
>
> **MR. NERI.** As I said, I would like to invoke Sec. 2(a) of EO 464. (*emphasis supplied*) (pp. 114-115)

executive privilege.[23] At this juncture, Senator Rodolfo G. Biazon, Chairperson of the Committee on National Defense and Security, sought clarification from petitioner on his source of authority for invoking executive privilege. Petitioner replied that he had been instructed by Executive Secretary Eduardo R. Ermita to invoke executive privilege on behalf of the President, and that a written order to that effect would be submitted to the respondent Senate Committees.[24]

Several Senators urged petitioner to inform the respondent Senate Committees of the basis for his invocation of executive privilege as well as the nature and circumstances of his communications with the President — whether there were military secrets or diplomatic and national security matters involved. Petitioner did not accede and instead cited the coverage of

[23] *Id*. It reads in relevant part, *viz*:

> **SEN. CAYETANO, (P).** …I was told that you testified, that you had mentioned to her that there was ₱200 something offer. I guess it wasn't clear how many zeroes were attached to the 200. And I don't know if you were asked or if you had indicated her response to this. I know there was something like "Don't accept." And can you just for my information, repeat.
>
> **MR. NERI. She said "Don't accept it," Your Honor.**
>
> **SEN. CAYETANO, (P). And was there something attached to that like… "But pursue with a project or go ahead and approve," something like that?**
>
> **MR. NERI**. As I said, I claim the right of executive privilege on further discussions on the… (*emphasis supplied*) (pp. 275-276)

[24] *Id*. It reads in relevant part, *viz*:

> **THE CHAIRMAN (SEN. BIAZON).** Are you invoking it for you as a member of the Cabinet or are you invoking it in behalf of the President?
>
> **MR. NERI.** I guess the law says it can be invoked in behalf of the President, and I've been instructed.
>
> **THE CHAIRMAN (SEN. BIAZON).** In behalf of the President.
>
> **MR. NERI.** And I've been instructed to invoke it, Your Honor.
>
> **THE CHAIRMAN (SEN. BIAZON).** And we assume a written order will follow and be submitted to the committees?
>
> **MR. NERI.** Yes, Your Honor, it's being prepared now. (p. 278)

executive privilege under Section 2(a) of Executive Order 464,[25] which includes "all confidential or classified information between the President and public officers covered by the Executive Order, such as conversations, correspondence between the President and public official." As respondent Senate Committees needed to know the basis for petitioner's invocation of executive privilege in order to decide whether to accept it or not, the petitioner was invited to an executive session to discuss the matter.[26] During the executive session, however,

[25] Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation Under the Constitution, and For Other Purposes."

[26] TSN, Senate Hearing on the NBN-ZTE Contract, September 26, 2007. It reads in relevant part, *viz*:

> **THE CHAIRMAN (SEN. BIAZON).** … In your judgment, therefore, Mr. Secretary, which of the three instances would allow the invoking of executive privilege? First instance is, if the answerwill involve military secrets. That's one. Second, if it will involve diplomatic issues; and Number 3, if it has something to do with national security.
>
> **We don't have to hear about the details, 'no. Which of these three, Mr. Secretary, instances – military secret, diplomatic issue and national security, which of these three will be affected by your answer to that specific question? We don't have to hear the details at this point.**
>
> **MR. NERI.** I am not a lawyer, Your Honor, but based on the notes of my lawyers here, it says: **Section 2(A) of EO 464 includes "all confidential or classified information between the President and public officers covered by the Executive Order, such as conversations, correspondence between the President and public official** and discussions in closed-door cabinet meetings.
>
> **THE CHAIRMAN (SEN. BIAZON). …**But even then, we still have – **the Committee will still have to listen or in closed door, in executive session, your justification of invoking executive privilege and for the Committees to grant you the privilege**… (*emphasis supplied*) (pp. 473-474)
>
> x x x x x x x x x
>
> **SEN. PIMENTEL. …I'm willing to have this matter settled in a caucus where we will hear him so that we hear in the**

petitioner felt ill and was allowed to go home with the undertaking that he would return.[27]

On November 13, 2007, a subpoena *ad testificandum* was issued to petitioner, requiring him to appear before the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).[28] The subpoena was signed by Senator Alan Peter S.

> **confidence of our conference room the reason why he is invoking executive privilege**. But we certainly cannot allow him to do just that on his mere say so without demeaning the institution that's what I'm worried about, Mr. Chairman.
>
> **THE CHAIRMAN (SEN. CAYETANO, A.).** …We cannot ask you questions about the nature that would eventually lead you to telling us what the communication is. But as to the **nature of the communication that would allow us to determine whether or not to grant your claim for executive privilege, that may be asked.** So, with the indulgence of the senators, anyway, the members of this Committee we have agreed to deal with it in caucus…(*emphasis supplied*) (p. 478)
>
> x x x x x x x x x
>
> **THE CHAIRMAN (SEN. CAYETANO, A.)**…The three committees are now going on **executive session**. And again, to repeat, **Secretary Neri, please join us**, you can bring your lawyer… (*emphasis supplied*) (p. 519)

[27] TSN, Oral Argument, March 4, 2008. It reads in relevant part, *viz*:

> **SENATOR CAYETANO**. Yes, Your Honor, let me clarify this factual basis, Your Honor. We went into an Executive Session precisely because Secretary Neri said that if I tell you the nature of our conversation, I will be exposed – I will be telling it to the public. So we agreed to go into Executive Session. Allow me not to talk about what happened there. But at the end, all the Senators with Secretary Neri agreed that he will go home because he is having chills and coughing and he's sick. And number 2, we will tell everyone that he promised to be back. The warrant of arrest was issued, Your Honor, after we explained in open hearing, Your Honor, that he should attend and claim the privilege or claim any right not to answer in session. So, Your Honor, the Committees have not made a decision whether or not to consider to agree with him that the questions we want him to have answered will constitute executive privilege. We have not reached that point, Your Honor. (pp. 430-431)

[28] Petition, Annex B. The subpoena reads, *viz*:

Cayetano, Chairperson of the Senate Blue Ribbon Committee; Senator Manual A. Roxas III, Chairperson of the Committee

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In the Matter of **P.S. Res. No. 127 (**Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations); **P.S. Res. No. 129** (The National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation); **Privilege Speech of Senator Panfilo M. Lacson**, delivered on September 11, 2007, entitled "Legacy of Corruption"; **P.S. Res. No. 136 (**The Legal and Economic Justification of the National Broadband Network [NBN] Project of the Government); **Privilege Speech of Senator Miriam Defensor Santiago** delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement"; **P.S. Res. No. 144** (A Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract).

SUBPOENA AD TESTIFICANDUM

TO: Mr. ROMULO L. NERI
Chairman
Commission on Higher Education
5th Floor, DAP Bldg, San Miguel Ave.,
Ortigas Center, Pasig City

By authority of Section 17, Rules of Procedure Governing Inquiries in Aid of Legislation of the Senate, Republic of the Philippines, you are hereby commanded and required to appear before the Committee on Accountability of Public Officers and Investigations (Blue Ribbon) of the Senate, then and there to testify under oath on what you know relative to the subject matter under inquiry by the said Committee, on the day, date, time and place hereunder indicated:

Day, Date & Time: Tuesday, November 20, 2007
10:00 a.m.
Place: Senator Ambrosio Padilla Room
2nd Floor, Senate of the Philippines
GSIS Bldg., Roxas Blvd.
Pasay City

on Trade and Commerce; and Senator Rodolfo G. Biazon, Chairperson of the Committee on National Defense and Security; and it was approved and signed by Senate President Manuel B. Villar.

On November 15, 2007, Executive Secretary Eduardo Ermita wrote to respondent Senate Blue Ribbon Committee Chairperson Alan Peter Cayetano. He communicated the **request** of the Office of the President to dispense with the petitioner's testimony on November 20, 2007, "(c)onsidering that Sec. Neri has been lengthily interrogated on the subject in an unprecedented 11-hour hearing, wherein he answered all questions propounded to him **except** the foregoing questions involving executive privilege." The three (3) questions for which executive privilege was invoked "by Order of the President" were the following:

"a) Whether the President followed up the (NBN) project?

b) Were you dictated to prioritize the ZTE?

WITNESS MY HAND and the Seal of the Senate of the Republic of the Philippines, at Pasay City, this 13th day of November, 2007.

(Signed)
ALAN PETER S. CAYETANO
Chairman
Committee on Accountability of Public Officers & Investigations (Blue Ribbon)

(Signed)
MAR ROXAS
Chairman
Committee on Trade and Commerce

(Signed)
RODOLFO G. BIAZON
Chairman
Committee on National Defense & Security

Approved:

(Signed)
MANNY VILLAR
Senate President

c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?"[29]

The letter of Executive Secretary Ermita offered the following justification for the invocation of executive privilege on these three questions, *viz*:

"Following the ruling in ***Senate v. Ermita***, the foregoing questions fall under conversations and correspondence between the President and public officials which are considered executive privilege (*Almonte v. Vasquez*, G.R. No. 95367, 23 May 1995; *Chavez v. PEA,* G.R. No. 133250, July 9, 2002). Maintaining the **confidentiality of conversations of the President is necessary in the exercise of her executive and policy decision-making process.** The expectation of a President [as] to the confidentiality of her conversations and correspondences, like the value which we accord deference for the privacy of all citizens, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. Disclosure of conversations of the President will have a chilling effect on the President, and will hamper her in the effective discharge of her duties and responsibilities, if she is not protected by the confidentiality of her conversations.

The context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President, he cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.

In light of the above considerations, this Office is constrained to invoke the settled doctrine of executive privilege as refined in *Senate v. Ermita*, and has advised Secretary Neri accordingly." (*emphasis supplied*)[30]

Petitioner did not appear before the respondent Senate Committees on November 20, 2007. Consequently, on November

[29] Letter of Executive Secretary Eduardo R. Ermita to Senator Alan Peter Cayetano as Chairman of the Committee on Accountability of Public Officers and Investigations dated November 15, 2007; Petition, Annex C.

[30] *Ibid*.

22, 2007, the committees wrote to petitioner requiring him to show cause why he should not be cited for contempt **for failing to attend the hearing on November 20, 2007,** pursuant to Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon). The letter was signed by the Chairpersons of the Senate Blue Ribbon Committee, the Committee on Trade and Commerce and the Committee on National Defense and Security and was approved and signed by the Senate President.[31]

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[31] Petition, Annex A. The letter reads, *viz*:

22 November 2007

MR. ROMULO L. NERI
Chairman
Commission on Higher Education
5th Floor, DAP Building, San Miguel Ave.
Ortigas Center, Pasig City

Dear Mr. Neri:

A *Subpoena Ad Testificandum* has been issued and was duly received and signed by a member of your staff on 15 November 2007.

You were required to appear before the Senate Blue Ribbon hearing at 10:00 a.m. on 20 November 2007 to testify on the Matter of:

P.S. RES. NO. 127, introduced by SENATOR AQUILINO Q. PIMENTEL, JR. (Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations); P.S. RES. NO. 129, introduced by SENATOR PANFILO M. LACSON (Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity; PRIVILEGE SPEECH OF SENATOR PANFILO M. LACSON, entitled "LEGACY OF CORRUPTION," delivered on September 11, 2007; P.S. RES. NO. 136, introduced by SENATOR

On November 29, 2007, petitioner wrote to Senator Alan Peter Cayetano as Chairperson of the Committee on Accountability of Public Officers and Investigations. Petitioner

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MIRIAM DEFENSOR SANTIAGO (Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government); PRIVILEGE SPEECH OF SENATOR MIRIAM DEFENSOR SANTIAGO, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement" delivered on November 24, 2007; P.S. RES. NO. 144, introduced by SENATOR MANUEL ROXAS III (Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract).

Since you have failed to appear in the said hearing, the Committees on Accountability of Public Officers and Investigations (Blue Ribbon), Trade and Commerce and the National Defense and Security require you to show cause why you should not be cited in contempt under Section 6, Article 6 of the Rules of the Committee on Accountability of Public Officers and Investigations (Blue Ribbon).

The Senate expects your explanation on or before 2 December 2007.

For the Senate:

(Signed)
ALAN PETER S. CAYETANO
Chairman
Committee on Accountability of Public Officers & Investigations (Blue Ribbon)

(Signed)
MAR ROXAS
Chairman
Committee on Trade and Commerce

(Signed)
RODOLFO G. BIAZON
Chairman
Committee on National Defense & Security

Approved:

(Signed)
MANNY VILLAR
Senate President

stated that after his exhaustive testimony, he "thought that what remained were only the three questions, where the Executive Secretary claimed executive privilege"; hence, in his November 15, 2007 letter to Senator Alan Peter Cayetano, Executive Secretary Ermita requested that petitioner's presence be dispensed with in the November 20, 2007 hearing. Petitioner then requested that if there were matters not taken up in the September 26, 2007 hearing that would be taken up in the future, he be informed in advance, so he could adequately prepare for the hearing.[32]

Attached to petitioner's letter was the letter of his lawyer, Atty. Antonio Bautista, explaining that petitioner's "non-appearance last 20 November 2007 was upon the order of the President invoking executive privilege, as embodied in Sec. Eduardo R. Ermita's letter dated 18 (sic) November 2007," and that "Secretary Neri honestly believes that he has exhaustively and thoroughly answered all questions asked of him on the ZTE/NBN contract except those relating to his conversations with the President."[33] Atty. Bautista's letter further stated that petitioner's **"conversations with the President dealt with delicate and sensitive national security and diplomatic matters relating to the impact of the bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines.** Secretary Neri believes, upon our advice, that, given the sensitive and confidential nature of his discussions with the President, he can, within the principles laid down in *Senate v. Ermita*…and *U.S. v. Reynolds*…justifiably decline to disclose these matters on the claim of executive privilege."[34] Atty. Bautista also requested that he be notified in advance if there were new matters for petitioner to testify on, so that the latter could prepare for the hearing.[35]

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[32] Petition, Annex D.

[33] *Id*., Annex D-1.

[34] *Ibid*.

[35] *Ibid*.

On December 6, 2007, petitioner filed the Petition at bar. He contends that he properly invoked executive privilege to justify his non-appearance at the November 20, 2007 hearing and prays that the Show Cause Order dated November 22, 2007 be declared null and void.

On January 30, 2008, an Order citing petitioner for contempt was issued by respondent Senate Committees, which reads, *viz*:

COMMITTEES ON ACCOUNTABILITY OF PUBLIC OFFICERS AND INVESTIGATIONS (BLUE RIBBON), TRADE & COMMERCE, AND NATIONAL DEFENSE AND SECURITY

IN RE: P.S. Res. Nos. 127, 129, 136 & 144; and Privilege Speeches of Senators Lacson and Santiago (all on the ZTE-NBN Project)

x————————————————————x

ORDER

For failure to appear and testify in the Committees' hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007, despite personal notice and a *Subpoena Ad Testificandum* sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007, herein attached) **ROMULO L. NERI** is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.

The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.

SO ORDERED.

Issued this 30th day of January, 2008 at the City of Pasay.

(Signed)
ALAN PETER S. CAYETANO
Chairman
Committee on Accountability of Public Officers & Investigations (Blue Ribbon)

(Signed)
MAR ROXAS
Chairman
Committee on Trade and Commerce

(Signed)
RODOLFO G. BIAZON
Chairman
Committee on National Defense & Security

(Signed)
PIA S. CAYETANO**

MIRIAM DEFENSORSANTIAGO*

(Signed)
JUAN PONCE ENRILE**

(Signed)
FRANCIS G. ESCUDERO**

(Signed)
RICHARD J. GORDON**

(Signed)
GREGORIO B. HONASAN*

JUAN MIGUEL F. ZUBIRI*

JOKER P. ARROYO*

RAMON B. REVILLA, JR.**

MANUEL M. LAPID**

(Signed)
BENIGNO C. AQUINO III*

(Signed)
PANFILO M. LACSON*

(Signed)
LOREN B. LEGARDA*

(Signed)
M. A. MADRIGAL**

ANTONIO F. TRILLANES*

EDGARDO J. ANGARA***

(Signed)
AQUILINO Q. PIMENTEL, JR.***

Approved:

(Signed)
MANNY VILLAR
Senate President

* Member, Committees on Accountability of Public Officers & Investigations (Blue Ribbon) and National Defense & Security

** Member, Committees on Accountability of Public Officers & Investigations (Blue Ribbon), Trade & Commerce and National Defense & Security

*** Member, Committee on National Defense & Security

Ex Officio

(Signed)
AQUILINO Q. PIMENTEL, JR.
Minority Leader

(Signed)
FRANCIS "Kiko" N. PANGILINAN
Majority Leader

(Signed)
JINGGOY EJERCITO ESTRADA
President *Pro Temporare*[36]

On January 30, 2008, petitioner wrote to Senate President Manuel Villar, Senator Alan Peter S. Cayetano, Chairperson of the Committee on Accountability of Public Officers & Investigations (Blue Ribbon); Senator Manuel Roxas, Chairperson of the Committee on Trade & Commerce; and Senator Rodolfo G. Biazon, Chairperson of the Committee on National Defense and Security, seeking reconsideration of the Order of arrest. He explained that as stated in his November 29, 2007 letter, he had not intended to snub the November 20, 2007 hearing and had in fact cooperated with the Senate in its almost eleven hours of hearing on September 26, 2007. He further explained that he thought in good faith that the only remaining questions were the three for which he had invoked executive privilege. He also reiterated that in his November 29, 2007 letter, he requested to be furnished questions in advance if there were new matters to be taken up to allow him to prepare for the hearing, but that he had not been furnished these questions.[37]

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[36] Supplemental Petition, Annex A.

[37] *Id*., Annex B.

On February 5, 2008, petitioner filed a Supplemental Petition for *Certiorari*, praying that the Court issue a Temporary Restraining Order or Writ of Preliminary Injunction enjoining respondent Senate Committees from enforcing the Order for his arrest, and that the Order of arrest be annulled. Petitioner contends that his non-appearance in the November 20, 2007 hearing was justified by the invocation of executive privilege, as explained by Executive Secretary Ermita in his November 15, 2007 letter to respondent Senate Blue Ribbon Committee Chairperson Alan Peter Cayetano and by his (petitioner's) letter dated November 29, 2007 to Senator Alan Peter Cayetano as Chairperson of the Committee on Accountability of Public Officers and Investigations.[38] On February 5, 2008, the Court issued a Status Quo Ante Order and scheduled the case for Oral Argument on March 4, 2008.

Respondent Senate Committees filed their comment, arguing that: (1) there is no valid justification for petitioner to claim executive privilege;[39] (2) his testimony is material and pertinent to the Senate inquiry in aid of legislation; [40] (3) the respondent Senate Committees did not abuse their authority in issuing the Order of arrest of petitioner;[41] and (4) petitioner did not come to Court with clean hands.[42]

On March 4, 2008, the Oral Argument was held. Thereafter, the Court ordered the parties to submit their memoranda. Both parties submitted their Memoranda on March 17, 2008. On the same day, the Office of the Solicitor General filed a Motion for Leave to Intervene and to Admit Attached Memorandum.

In the Oral Argument held on March 4, 2008, the Court delineated the following **issues to be resolved**, *viz*:

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[38] *Id*., p. 3.

[39] Comment, p. 10.

[40] *Id*. at 23.

[41] Id. at 29.

[42] *Id*. at 35.

1. What communications between the President and petitioner Neri are covered by the principle of executive privilege?[43]
2. What is the proper procedure to be followed in invoking executive privilege?
3. Did the Senate Committees gravely abuse their discretion in ordering the arrest of petitioner for noncompliance with the subpoena?

A holistic view of the doctrine of executive privilege will serve as a hermeneutic scalpel to excise the fat of information that does not fall within the ambit of the privilege and to preserve only the confidentiality of the lean meat of information it protects in the particular setting of the case at bar.

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[43] These are the sub-issues:

1.a. Did Executive Secretary Ermita correctly invoke the principle of executive privilege, by order of the President, to cover (i) conversations of the President in the exercise of her executive and policy decision-making and (ii) information, which might impair our diplomatic as well as economic relations with the People's Republic of China?

1.b. Did petitioner Neri correctly invoke executive privilege to avoid testifying on his conversations with the President on the NBN contract on his assertions that the said conversations "dealt with delicate and sensitive national security and diplomatic matters relating to the impact of the bribery scandal involving high government officials and the possible loss of confidence of foreign investors and lenders in the Philippines" xxx, within the principles laid down in ***Senate v. Ermita*** (488 SCRA 1 [2006])?

1.c. Will the claim of executive privilege in this case violate the following provisions of the Constitution:

Sec. 28, Art. II (Full public disclosure of all transactions involving public interest)

Sec. 7, Art. III (The right of the people to information on matters of public concern)

Sec. 1, Art. XI (Public office is a public trust)

Sec. 17, Art. VII (The President shall ensure that the laws be faithfully executed)

and the due process clause and the principle of separation of powers?

I. General Policy Considerations on Disclosure and Secrecy in a Democracy: United States and Philippine Constitutions

The doctrine of executive privilege is tension between disclosure and secrecy in a democracy. Its doctrinal recognition in the Philippines finds its origin in the U.S. political and legal system and literature. At the outset, it is worth noting that the provisions of the U.S. Constitution say little about government secrecy or public access.[44] In contrast, the 1987 Philippine Constitution is replete with provisions on government transparency, accountability and disclosure of information. This is a reaction to our years under martial rule when the workings of government were veiled in secrecy.

The 1987 Constitution provides for the right to information in Article III, Sec. 7, *viz*:

> The **right of the people to information** on matters of public concern shall be recognized. Access to official records, and to documents, and papers pertaining to official acts, transactions, or decisions, as well as to government research data used as basis for policy development, shall be afforded the citizen, subject to such limitations as may be provided by law. (*emphasis supplied*)

Symmetrical to this right, the 1987 Constitution enshrines the policy of the State on information and disclosure in its opening Declaration of Principles and Policies in Article II, *viz*:

> Sec. 24. The State recognizes the **vital** role of communication and **information in nation-building**. (*emphasis supplied*).
>
> Sec. 28. Subject to reasonable conditions prescribed by law, the State adopts and implements a **policy of full public disclosure of all its transactions involving public interest**. (*emphasis supplied*)

A complementary provision is Section 1 of Article XI on the Accountability of Public Officers, which states, *viz*:

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[44] Samaha, A., "*Government Secrets, Constitutional Law, and Platforms for Judicial Intervention,*" UCLA Law Review, April 2006, 909, 916.

Sec.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. (*emphasis supplied*)

A more specific provision on availability of information is found in Section 21 of Article XI, National Economy and Patrimony, which states, *viz*:

Sec. 21. Foreign loans may be incurred in accordance with law and the regulation of the monetary authority. **Information on foreign laws obtained or guaranteed by the Government shall be made available to the public**. (*emphasis supplied*)

In the concluding articles of the 1987 Constitution, information is again given importance in Article XVI, General Provisions, which states, *viz*:

Sec. 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. (*emphasis supplied*)

A government's democratic legitimacy rests on the people's information on government plans and progress on its initiatives, revenue and spending, among others, for that will allow the people to vote, speak, and organize around political causes meaningfully.[45] As Thomas Jefferson said, "if a nation expects to be ignorant and free in a state of civilization, it expects what never was and will never be."[46]

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[45] Samaha, *supra* at 918.

[46] Levinson, J., "*An Informed Electorate: Requiring Broadcasters to Provide Free Airtime to Candidates for Public Office," 72 Boston University Law Review* (January 1992), p. 143, citing Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), in 10 The Writings of Thomas Jefferson 4 (Paul L. Ford ed., 1899), cited in Library of Congress, Respectfully Quoted 97 (Suzy Platt ed., 1989).

II. Our Government Operates under the Principle of Separation of Powers

The 1987 Constitution separates governmental power among the legislative, executive and judicial branches to avert tyranny by "safeguard(ding) against the encroachment or aggrandizement of one branch at the expense of the other."[47] However, the principle of separation of powers recognized that a "hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively"; hence, the separation of powers between the branches is not absolute.[48]

Our Constitution contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, and autonomy but reciprocity. [49] Well said, the boundaries established by the Constitution delineating the powers of the three branches must be fashioned "according to common sense and the . . .

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[47] Iraola, R. "*Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*," Iowa Law Review, vol. 87, no. 5, August 2002, pp. 1559, 1565. The separation of powers was fashioned to avert tyranny as explained by James Madison in *The Federalist No. 47*:

> The reasons on which Montesquieu grounds his maxim [that the legislative, executive and judicial departments should be separate and distinct] are a further demonstration of his meaning. "When the legislative and executive powers are united in the same person or body," says he, "there can be no liberty, because apprehension may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner." Again: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor." (The Federalist No. 47, at 315 (James Madison) (Modern Library 1937).

[48] *Ibid*.

[49] *Id*. at 1565-1566, citing *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, *J.*, concurring).

necessities of governmental co-ordination."[50] This constitutional design requires an internal balancing mechanism by which government powers cannot be abused.[51] We married all these ideas when we decided the 1936 case ***Angara v. Electoral Commission*,**[52] *viz*:

> Each department of the government has exclusive cognizance of the matters within its jurisdiction, and is **supreme within its own sphere.** But it does not follow from the fact that the three powers are to be kept separate and distinct that the Constitution intended them to be absolutely restrained and independent of each other. **The Constitution has provided for an elaborate system of checks and balances to secure coordination in the workings of the various departments of the government.**[53] (*emphasis supplied*)

A. A Look at the Power of Legislative Investigation and Contempt of Witness

Patterned after the U.S. Constitution, the Philippine Constitution structures the government in a manner whereby its three separate branches — executive, legislative and judicial — are able to provide a system of checks and balances. The responsibility to govern is vested in the executive, but the legislature has a long-established power to inquire into administrative conduct and the exercise of administrative discretion under the acts of the legislature, and to ascertain compliance with legislative intent.[54]

This power of congressional oversight embraces all activities undertaken by Congress to enhance its understanding of and

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[50] *Id*. at 1559, citing *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 406 (1928).

[51] Doherty, M., "*Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques,*" 19 Northern Illinois University Law Review (Summer 1999) 801, 808.

[52] 63 Phil. 139 (1936).

[53] *Id*. at 156.

[54] Keefe, W., Ogul, M., *The American Legislative Process: Congress and the States*, 4th ed. (1977), p. 20. *See also* Gross, The Legislative Struggle (1953), pp. 136-137.

influence over implementation of legislation it has enacted. Oversight may be undertaken through review or investigation of executive branch action.[55] One device of the legislature to review, influence and direct administration by the executive is legislation and the corollary power of investigation.[56] The standard justification for an investigation is the presumed need for new or remedial legislation; hence, investigations ought to be made in aid of legislation.[57]

The legislative power of investigation was recognized under the 1935 Constitution, although it did not explicitly provide for it. This power had its maiden appearance in the 1973 Constitution[58] and was carried into the 1987 Constitution in Article VI, Section 21, *viz*:

> Sec. 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

Included in the legislative power of investigation is the power of contempt or process to enforce. Although the power of contempt is not explicitly mentioned in the provision, this power has long been recognized. In the 1950 landmark case ***Arnault v. Nazareno*,**[59] the Court held, *viz*:

> Although there is no provision in the Constitution, expressly investing either House of Congress with power to make investigations and exact testimony to the end that it may exercise its legislative

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[55] Javits, J., Klein, G., "*Congressional Oversight and the Legislative Veto: A Constitutional Analysis,*" New York University Law Review, vol. 52, No. 3, June 1977, p. 460.

[56] Keefe, W., Ogul, M., *supra* at 20-23.

[57] *Id*. at 25.

[58] Article VIII, Section 12 of the 1973 Constitution provides in relevant part, *viz*:

> x x x x x x x x x
>
> (2) The National Assembly or any of its committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in such inquiries shall be respected.

[59] 87 Phil. 29 (1950).

functions advisedly and effectively, such power is so far incidental to the legislative function as to be implied. In other words, **the power of inquiry -with process to enforce it- is an essential and appropriate auxiliary to the legislative function. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -which is not infrequently true- recourse must be had to others who do possess it.** Experience has shown that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete; so **some means of compulsion is essential to obtain what is needed.** (*McGrain vs. Daugherty*, 273 U.S. 135; 71 L.ed, 580; 50 A.L.R., 1) **The fact that the Constitution expressly gives to Congress the power to punish its Members for disorderly behaviour, does not by necessary implication exclude the power to punish for contempt any other person.** (*Anderson vs. Dunn*, 6 Wheaton, 204; 5 L. ed., 242)[60] *(emphasis supplied)*

There are **two requirements** for the valid exercise of the legislative power of investigation and contempt of witness for contumacy: **first, the existence of a legislative purpose,** *i.e.*, the inquiry must be in aid of legislation, and **second, the pertinency of the question propounded**.

First, the legislative purpose. In the 1957 case **Watkins v. United States**,[61] the U.S. Supreme Court held that the **power to investigate encompasses everything** that concerns the administration of existing laws, as well as proposed or possibly needed statutes.[62] It further held that the **improper motives of members** of congressional investigating committees **will not vitiate** an investigation instituted by a House of Congress, if that assembly's legislative purpose is being served by the work of the committee.[63] Two years later, the U.S. High Court

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[60] *Id*. at 45.

[61] 354 U.S. 178 (1957), pp. 194-195.

[62] *Id*. at 187.

[63] *Id*. at 178.

held in ***Barenblatt v. United*** **States**[64] that the **power is not unlimited**, as Congress may only investigate those areas in which it may potentially legislate or appropriate. It cannot inquire into matters that are within the **exclusive** province of one of the other branches of government. The U.S. High Court ruled that the **judiciary has no authority to intervene on the basis of motives** that spurred the exercise of that power, even if it was exercised purely for the purpose of exposure, so long as Congress acts in pursuance of its constitutional power of investigation.

In the seminal case of **Arnault,** this Court held that the subject inquiry had a legislative purpose. In that case, the Senate passed Resolution No. 8, creating a special committee to investigate the Buenavista and the Tambobong Estates Deal in which the government was allegedly defrauded of Php 5 million. Jean Arnault was among the witnesses examined by the committee. Arnault refused to answer a question, which he claimed was "self-incriminatory," prompting the Senate to cite him for contempt. He was committed to the custody of the Sergeant-at-Arms and imprisoned. He sought redress before this Court on a petition for *habeas corpus*, contending that the Senate had no power to punish him for contempt; the information sought to be obtained by the Senate was not pertinent to the investigation and would not serve any intended legislation, and the answer required of him was incriminatory.

The Court upheld the jurisdiction of the Senate to investigate the Buenavista and Tambobong Estates Deal through the Special Committee it created under Senate Resolution No. 8. The Resolution read in relevant part, *viz*:

RESOLUTION CREATING A SPECIAL COMMITTEE TO INVESTIGATE THE BUENAVISTA AND THE TAMBOBONG ESTATES DEAL.

xxx xxx xxx

[64] 360 U.S. 109 (1959).

RESOLVED, That a Special Committee, be, as it hereby is, created, composed of five members to be appointed by the President of the Senate to investigate the Buenavista and Tambobong Estates deal. **It shall be the duty of the said Committee to determine whether the said purchase was honest, valid, and proper and whether the price involved in the deal was fair and just, the parties responsible therefor, and any other facts the Committee may deem proper in the premises…**(*emphasis supplied*)

The subject matter to be investigated was clearly stated in the Resolution, and the Court "entertain(ed) no doubt as to the Senate's authority to do so and as to the validity of Resolution No. 8"[65] for the following reasons, *viz*:

…The transaction involved a questionable and allegedly **unnecessary and irregular expenditure of no less than ₱5,000,000 of public funds**, of which **Congress is the constitutional guardian**. It also **involved government agencies created by Congress and officers whose positions it is within the power of Congress to regulate or even abolish**. As a result of the yet uncompleted investigation, the **investigating committee has recommended and the Senate has approved three bills** (1) prohibiting the Secretary of Justice or any other department head from discharging functions and exercising powers other than those attached to his own office, without previous congressional authorization; (2) prohibiting brothers and near relatives of any President of the Philippines from intervening directly or indirectly and in whatever capacity in transactions in which the Government is a party, more particularly where the decision lies in the hands of executive or administrative officers who are appointees of the President; and (3) providing that purchases of the Rural Progress Administration of big landed estates at a price of ₱100,000.00 or more, and loans guaranteed by the Government involving ₱100,000.00 or more, shall not become effective without previous congressional confirmation.[66] (*emphasis supplied*)

There is, thus, legislative purpose when the **subject matter of the inquiry is one over which the legislature can legislate,** such as the appropriation of public funds; and the creation, regulation and abolition of government agencies and positions.

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[65] *Arnault v. Nazareno*, 87 Phil. 29 (1950), p. 46.

[66] *Id*. at 46-47.

It is **presumed that the facts are sought by inquiry, because the "legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change**."[67] (*emphasis supplied*) The Court noted that the investigation gave rise to several bills recommended by the Special Committee and approved by the Senate.

In sum, under the first requirement for validity of a legislative investigation and contempt of witness therein, the dual requirements of authority are that the power exercised by the committee must be both within the authority delegated to it and within the competence of Congress to confer upon the committee.[68]

Second, the pertinency of the question propounded. The test of pertinency is whether a question itself is in the ultimate area of investigation; a question is pertinent also if it is "a usual and necessary stone in the arch of a bridge over which an investigation must go."[69] In determining pertinency, the court looks to the history of the inquiry as disclosed by the record.[70] **Arnault** states the **rule on pertinency**, *viz*:

> Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, we think the **investigating committee has the power to require a witness to answer any question pertinent to that inquiry**, subject of course to his constitutional right against self-incrimination. The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and **every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject matter of the inquiry or investigation.** So a witness may not be coerced to answer a question

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[67] *Id*. at 45, citing *McGrain vs. Daugherty*, 273 U.S. 135.

[68] Annotation: Contempt of Congress, 3 L ed 2d 1649, footnotes omitted.

[69] *Wollam v. United States* (1957, CA9 Or) 244 F2d 212.

[70] *Sacher v. United States* (1957) 99 App DC 360, 240 F2d 46.

that obviously has no relation to the subject of the inquiry. But from this **it does not follow that every question that may be propounded to a witness be material to any proposed or possible legislation**. In other words, **the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.**[71] *(emphasis supplied)*

The Court found that the question propounded to Arnault was not immaterial to the investigation or self-incriminatory; thus, the petition for *habeas corpus* was dismissed.

B. A Look at Executive privilege
1. Definition and judicial use of the term

"**Executive privilege**" has been **defined** as the right of the President and high-level executive branch officials to withhold information from Congress, the courts, and the public.[72] Executive privilege is a direct descendant of the constitutionally designed separation of powers among the legislative, executive and judicial branches of government.

The U.S. Constitution (and the Philippine Constitution) **does not directly mention** "executive privilege," but commentators theorized that the privilege of confidentiality is **constitutionally based**, as it relates to the President's effective discharge of executive powers.[73] The Founders of the American nation acknowledged an **implied** constitutional prerogative of

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[71] 87 Phil. 29 (1950), p. 48.

[72] Rozell, M., "*Executive Privilege and the Modern Presidents: In Nixon's Shadow*," *Symposium on United States v. Nixon*: *Presidential Power and Executive Privilege Twenty-Five Years Later*, 83 Minnesota Law Review (May 1999) 1069.

[73] Doherty, M., "*Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques*," 19 Northern Illinois University Law Review 801, 810 (Summer 1999) (footnotes omitted).

Presidential secrecy, a power they believed was at times necessary and proper.

The term "executive privilege" is but half a century old, having **first appeared** in the 1958 case ***Kaiser Aluminum & Chemical Co. v. United States,***[74] in which Justice Reed, sitting on the U.S. Court of Claims, wrote: "The power must lie in the courts to determine **Executive Privilege** in litigation.... (T)he privilege for intra-departmental advice would very rarely have the importance of diplomacy or security."[75] (*emphasis supplied*)

The **U.S. Supreme Court's recognition of executive privilege is even more recent**, having entered the annals of the High Court only in the 1974 landmark case ***U.S. v. Nixon***.[76]

But as aforestated, executive privilege has been practised since the founding of the American nation. To better grasp the issue presented in the case at bar, we revisit the history of executive privilege in the U.S. political and legal landscape, to which we trace the concept of executive privilege in our jurisdiction. Next, an exposition of the scope, kinds and context for invocation of executive privilege will also be undertaken to delineate the parameters of the executive privilege at issue in the case at bar.

2. History and use

As the first U.S. President, **George Washington** established time-honored principles that have since molded the doctrine of executive privilege. He was well aware of the crucial role he played in setting precedents, as evinced by a letter he wrote on May 5, 1789 to James Madison, *viz*: "As the first of every thing *in our situation* will serve to establish a precedent, it is

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[74] 157 F. Supp. 939 (Ct. Cl. 1958).

[75] McNeely-Johnson, K.A., "*United States v. Nixon, Twenty Years After: The Good, the Bad and the Ugly –An Exploration of Executive Privilege*," 14 Northern Illinois University Law Review (Fall, 1993) 251, 261-262, citing *Kaiser Aluminum & Chemical Co. v. United States,* 157 F. Supp. 939 (Ct. Cl. 1958), 946.

[76] 418 US 613 (1974).

devoutly wished on my part that these precedents may be fixed on true principles."[77]

Though not yet then denominated "executive privilege," President Washington in 1792 originally claimed authority to withhold information from the Congressional committee investigation of a military expedition headed by General Arthur St. Clair against native Americans. The committee requested papers and records from the executive to assist it in its investigation.[78] After conferring with his cabinet, President Washington decided that **disclosure was in the public interest** but, as Secretary of State Jefferson explained, the President was inclined to **withhold papers that would injure the public**.

In 1794, in response this time to a Senate request, Washington allowed the Senate to examine some parts of, but withheld certain information in relation to correspondence between the French government and the American minister thereto, and between the minister and Secretary of State Randolph, because the **information could prove damaging to the public interest.** The Senate did not challenge his action.[79]

Thus, **Washington established a historical precedent for executive privilege that is firmly rooted in two theories: first, a separation of powers theory that certain presidential communications should be free from compulsion by other branches; and second, a structural**

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[77] Rozell, M., "*Restoring Balance to the Debate Over Executive Privilege: A Response to Berger," Symposium: Executive Privilege and the Clinton Presidency*," 8 William and Mary Bill of Rights Journal (April 2000) 541, 557 citing *Letter from George Washington to James Madison (May 5, 1789), in 30 The Writings of George Washington*, 1745-1799, at 311 (John Fitzpatrick ed., 1931-1944).

[78] Doherty, M., "*Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques,*" 19 Northern Illinois University Law Review 801, 821 (Summer 1999).

[79] Rozell, M., *supra* note 77. See also Boughton, J.R., "*Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*" 21 Whittier Law Review (Summer, 2000) 797, footnotes omitted.

argument that secrecy is important to the President's[80] Washington established that he had the **right to withhold information if disclosure would injure the public, but he had no right to withhold embarrassing or politically damaging information.**[81]

President **Thomas Jefferson** came next. He also staunchly defended executive secrecy. In the **1807** case ***U.S. v. Burr***,[82] Jefferson was ordered by the court to comply with a subpoena *duces tecum* for a letter concerning Vice President Aaron Burr who was on trial for treason arising from a secessionist conspiracy. The court reasoned that what was involved was a capital case involving important rights; that producing the letter advanced the cause of justice, which Jefferson as Chief Executive had a duty to seek; that the letter contained no state secrets; and that even if state secrets were involved, *in camera* review would be undertaken. Thus, as early as 1807, the **Burr case established the doctrine that the President's authority to withhold information is not absolute,** the President is amenable to compulsory process, **and the interests in secrecy must be weighed against the interests in disclosure.**[83]

Despite the **Burr case**, **the mid-nineteenth century U.S. Presidents exercised the power of secrecy without much hesitation**. The trend **grew among chief executives,** following President Washington's lead, **to withhold information** either because a particular request would have **given another branch the authority to exercise a constitutional power reserved solely to the President or because the request would interfere with the President's own exercise of such a power.**[84] **In the early life of the nation, the legislature**

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[80] Boughton, "*Paying Ambition's Debt: Can the Separation of Powers Tame the Impetuous Vortex of Congressional Investigations?*" 21 Whittier Law Review (Summer, 2000) 797, p. 814.

[81] Rozell, M., *supra* note 77 at 582.

[82] 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

[83] Boughton, *supra* at 815.

[84] *Ibid*.

generally accepted the secrecy privilege, as the Framers of the Constitution attempted to put into practice the principles they had created.[85]

The **trend continued among U.S. Presidents of the early to the mid-twentieth century**. Despite Congress' aggressive attempts to assert its own constitutional investigative and oversight prerogatives, the **twentieth century Presidents protected their own prerogatives with almost no interference from the judiciary, often forcing a quick congressional retreat**.[86]

The **latter half of the twentieth century** gave birth to the term "executive privilege" under President **Dwight Eisenhower**. At this time, the **judiciary's efforts to define and delimit the privilege** were more aggressive, and there were less of the **absolute assertions of the privilege that were typical of previous Presidents.**

The administration of President Richard Nixon produced the **most significant developments in executive privilege**. Although his administration initially professed an "open" presidency in which information would flow freely from the executive to Congress to the public, **executive privilege during this period was invoked not for the protection of national security interests, foreign policy decision-making or military secrets as in the past, but rather to keep under wraps politically damaging and personally embarrassing information.**[87] President Nixon's resignation was precipitated by the landmark case on executive privilege, ***U.S. v. Nixon*.**[88] In view of its importance to the case at bar, its depth discussion will be made in the subsequent sections.

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[85] Doherty, *supra* at 801, 822.

[86] Boughton, *supra* at 817.

[87] *Id*. at 826, citing Rozell, Executive Privilege: The Dilemma of Secrecy and Democratic Accountability (1994).

[88] 418 U.S. 683 (1974).

Executive privilege was asserted commonly during the Ford, Carter, Reagan and Bush Administrations, but its use had only a marginal impact on constitutional law.[89] The administration of William or Bill Clinton again catapulted executive privilege to the limelight. As noted by a commentator, "President Clinton's frequent, unprincipled use of the executive privilege for self-protection rather than the protection of constitutional prerogatives of the presidency or governmental process ultimately weakened a power historically viewed with reverence and deference by the judicial and legislative branch."[90] The **latest trend has become for Presidents to assert executive privilege, retreat the claim and agree to disclose information under political pressure.**[91]

The history of executive privilege shows that the **privilege is strongest when used not out of a personal desire to avoid culpability, but based on a legitimate need to protect the President's constitutional mandate to execute the law, to uphold prudential separation of powers, and above all, to promote the public interest.** Under these circumstances, both the Congress and the judiciary have afforded most respect to the President's prerogatives.[92]

3. Scope, kinds and context of executive privilege

With the wealth of literature on government privileges in the U.S., scholars have not reached a consensus on the number of these privileges or the proper nomenclature to apply to them.[93] Governmental privileges are loosely lumped under the heading "executive privilege."[94]

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[89] Boughton, *supra* at 819.

[90] *Ibid*.

[91] Doherty, *supra* at 828.

[92] *Id*. at 820.

[93] Iraola, *supra* at 1571, citing 26A Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5662, at 484-90 (1992) (footnotes omitted).

[94] *Id*. at 1571, citing 26A Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5662, at 490 n.3.

The occasions in which information requests trigger the invocation of executive privilege vary. The request may come from Congress or via a criminal or civil case in court. In a criminal case, the request may come from the accused. The request may also come from a party to a civil case between private parties or to a civil case by or against the government. The proceeding may or may not be for the investigation of alleged wrongdoing in the executive branch.[95]

In the U.S., at least four kinds of **executive privilege can be identified in criminal and civil litigation and the legislative inquiry context**: (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges.[96]

First, military and state secrets. The state secrets privilege "is a common law evidentiary rule" that allows the government to **protect "information from discovery when disclosure would be inimical to national security"**[97] **or result in "impairment of the nation's defense capabilities, disclosure of intelligence-gathering methods or capabilities, and disruption of diplomatic relations with foreign governments.**"[98] To properly invoke the privilege, "(t)here must be a formal claim of privilege, lodged by the head of the department [99] having control over the matter, after actual personal

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[95] Wald, P. and Siegel, J., "*The D.C. Circuit and the Struggle for Control of Presidential Information,*" *Symposium, The Bicentennial Celebration of the Courts of the District of Columbia Circuit, 90 Georgetown Law Journal* (March 2002) 737, 740.

[96] Iraola, *supra* at 1571.

[97] *Id*. at 1559.

[98] *Id*. at 1572, citing *Ellsberg v. Mitchell,* 709 F.2d 51, 57 (D.C. Cir. 1983) (footnotes omitted). It has been aptly noted that "[i]n the hierarchy of executive privilege, the 'protection of national security' constitutes the strongest interest that can be asserted by the President and one to which the courts have traditionally shown the utmost deference." 12 Op. Off. Legal Counsel 171, 176-77 (1988).

[99] *United States v. Reynolds*, 345 U.S. 1; Iraola, *supra* at 1572.

consideration by that officer."[100] A court confronted with an assertion of the state secrets privilege must find "that there is a reasonable danger that disclosure of the particular facts . . . will jeopardize national security."[101]

Second, Presidential communications privilege. The U.S. Supreme Court recognized in ***U.S. v. Nixon*** that there is "a presumptive privilege for Presidential communications" based on the "President's generalized interest in confidentiality." This ruling was made in the context of a criminal case. The Presidential communications privilege was also recognized in a civil proceeding, ***Nixon v. Administrator of General Services.***[102]

Third, deliberative process. Of the various kinds of executive privilege, the deliberative process privilege is the most frequently litigated in the United States. It entered the portals of the federal courts in the 1958 case **Kaiser Aluminum & Chem. Corp**. The privilege "rests most fundamentally on the belief that were agencies forced to operate in a fishbowl, frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer."[103]

Of common law origin, the deliberative process privilege allows the government to withhold documents and other materials that would reveal "advisory opinions, recommendations and deliberations comprising part of a process by which governmental

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[100] *United States v. Reynolds*, 345 U.S. 1, 7-8 (1953); Iraola, *supra* at 1572, citing *Bowles v. United States,* 950 F.2d 154, 156 (4th Cir. 1991); *In re United States*, 872 F.2d 472, 475 (1989).

[101] *United States v. Reynolds*, 345 U.S. 1; Iraola, *supra* at 1572, citing *Zuckerbraun v. Gen. Dynamics Corp*., 935 F.2d 544, 547 (1991).

[102] 433 U.S. 425 (1977).

[103] Iraola, *supra* at 1577, citing *First E. Corp. v. Mainwaring*, 21 F.3d 465, 468 (D.C. Cir. 1994) (quoting *Dudman Communications Corp. v. Dept. of Air Force*, 815 F.2d 1565, 1567 (D.C. Cir. 1987)); see also *Missouri v. United States Army Corps of Eng'rs,* 147 F.3d 708, 710 (8th Cir. 1998) ("The purpose of the deliberative process privilege is to allow agencies freely to explore alternative avenues of action and to engage in internal debates without fear of public scrutiny.")

decisions and policies are formulated."[104] Courts have identified three purposes in support of the privilege: (1) it protects candid discussions within an agency; (2) it prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy; and (3) it protects the integrity of an agency's decision; the public should not judge officials based on information they considered prior to issuing their final decisions.[105] For the privilege to be validly asserted, the material must be pre-decisional and deliberative.[106]

Fourth, law enforcement privilege. The law enforcement privilege protects against the disclosure of confidential sources and law enforcement techniques, safeguards the privacy of those involved in a criminal investigation, and otherwise prevents interference with a criminal investigation.[107]

We now focus on Presidential communications privilege and Philippine jurisprudence.

III. Presidential Communications Privilege and Philippine Jurisprudence

As enunciated in ***Senate v. Ermita***, a claim of executive privilege may be valid or not depending on the **ground invoked** to justify it and the **context** in which it is made. The ground involved in the case at bar, as stated in the letter of Secretary Ermita, is **Presidential communications privilege** on information that "might impair our **diplomatic as well as economic relations** with the People's Republic of China." This particular issue is one of first impression in our jurisdiction.

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[104] *Id*. at 1578 citing *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967); accord *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 151-53 (1975); *EPA v. Mink*, 410 U.S. 73, 86-93 (1973).

[105] *Ibid*, citing *Judicial Watch, Inc. v. Clinton,* 880 F. Supp. 1, 12 (D.D.C. 1995) (citation omitted), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

[106] *Id*. at 1578 (footnotes omitted).

[107] *Id*. at 1579, citing In re: Dep't. of Investigation, 856 F.2d 481, 484 (2d Cir. 1988); *United States v. Winner,* 641 F.2d 825, 831 (10th Cir. 1981); *Black v. Sheraton Corp. of Am.,* 564 F.2d 531, 545 (D.C. Cir. 1977).

Adjudication on executive privilege in the Philippines is still in its infancy stage, with the Court having had only a few occasions to resolve cases that directly deal with the privilege.

The **1995 case *Almonte v. Vasquez***[108] involved an investigation by the Office of the Ombudsman of petitioner Jose T. Almonte, who was the former Commissioner of the Economic Intelligence and Investigation Bureau (EIIB) and Villamor C. Perez, Chief of the EIIB's Budget and Fiscal Management Division. An anonymous letter from a purported employee of the bureau and a concerned citizen, alleging that funds representing savings from unfilled positions in the EIIB had been illegally disbursed, gave rise to the investigation. The Ombudsman required the Bureau to produce all documents relating to Personal Services Funds for the year 1988; and all evidence, such as vouchers (salary) for the whole plantilla of EIIB for 1988. Petitioners refused to comply.

The **Court recognized a government privilege** against disclosure with respect to **state secrets bearing on military, diplomatic and similar matters**. Citing ***U.S. v. Nixon***, the Court acknowledged that the necessity to protect **public interest in candid, objective and even blunt or harsh opinions in Presidential decision-making justified a presumptive privilege of Presidential communications**. It also recognized that the "privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution," as held by the U.S. Supreme Court in ***U.S. v. Nixon***. The Court found, however, that no military or diplomatic secrets would be disclosed by the production of records pertaining to the personnel of the EIIB. Nor was there any law making personnel records of the EIIB classified. Thus, the **Court concluded that the Ombudsman's need for the documents outweighed the claim of confidentiality of petitioners.**

While the Court alluded to ***U.S. v. Nixon*** and made pronouncements with respect to Presidential communications,

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[108] *Almonte, et al. v. Vasquez, et al.*, G.R. No. 95367, May 23, 1995, 244 SCRA 286.

a closer examination of the facts of **Almonte** would reveal that the requested **information did not refer to Presidential communications**, but to alleged confidential government documents. Likewise, ***U.S. v. Nixon*** specifically confined its ruling to criminal proceedings, but **Almonte** was about a prosecutorial investigation involving public interests and constitutional values different from a criminal proceeding.

The **1998 case *Chavez v. PCGG***[109] concerned a **civil litigation**. The question posed before the Court was whether the government, through the Presidential Commission on Good Government (PCGG), could be required to reveal the proposed terms of a compromise agreement with the Marcos heirs as regards their alleged ill-gotten wealth. The petitioner, a concerned citizen and taxpayer, sought to compel respondents to make public all negotiations and agreement, be they ongoing or perfected, and all documents related to the negotiations and agreement between the PCGG and the Marcos heirs.

The Court ruled in favor of petitioner. It acknowledged petitioner's right to information under the Bill of Rights of the 1987 Constitution, but citing **Almonte**, also recognized restrictions on the exercise of this right, *viz*: national security matters; trade secrets and banking transactions; criminal/law enforcement matters; other confidential or classified information officially known to public officials by reason of their office and not made available to the public; diplomatic correspondence; closed-door Cabinet meetings and executive sessions of either house of Congress; as well as the internal deliberations of the Supreme Court.

On the issue whether petitioner could access the settlement documents, the Court ruled that it was incumbent upon the PCGG and its officers, as well as other government representatives, to disclose sufficient public information on any proposed settlement they had decided to take up with the ostensible owners and holders of ill-gotten wealth. Such information, however, must pertain to definite propositions of the government,

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[109] G.R. No. 130716, December 9, 1998, 299 SCRA 744.

not necessarily to intra-agency or inter-agency recommendations or communications during the "exploratory" stage. At the same time, the Court noted the need to observe the same restrictions on disclosure of information in general, such as on matters involving national security, diplomatic or foreign relations, intelligence and other classified information.

Again, it is stressed that the information involved in **Chavez** did not fall under the category of Presidential communications.

More recently, this Court decided the **2006 case *Senate of the Philippines v. Ermita***.[110] At issue in this case was the constitutionality of Executive Order (EO) No. 464, "Ensuring Observance of the Principle of Separation of Powers, Adherence to the Rule on Executive Privilege and Respect for the Rights of Public Officials Appearing in Legislative Inquiries in Aid of Legislation under the Constitution, and for Other Purposes." The presidential issuance was handed down at a time when the Philippine Senate was conducting investigations on the alleged overpricing of the North Rail Project; and the alleged fraud in the 2004 national elections, exposed through the much-publicized taped conversation allegedly between President Gloria Macapagal-Arroyo and Commission on Elections Commissioner Virgilio Garcillano.

EO No. 464 required heads of the executive departments of government and other government officials and officers of the Armed Forces of the Philippines and the Philippine National Police to secure prior consent from the President before appearing in Congressional inquiries. Citing the **Almonte case**, the issuance emphasized that the rule on confidentiality based on executive privilege was necessary for the operation of government and rooted in the separation of powers. Alluding to both the **Almonte** and **Chavez cases**, the issuance enumerated the kinds of information covered by executive privilege, *viz*: (1) conversations and correspondence between the President and the public official covered by the executive order; (2) military, diplomatic and other national security matters which in the interest of national security

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[110] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006).

should not be divulged; (3) information between inter-government agencies prior to the conclusion of treaties and executive agreements; (4) discussion in closed-door Cabinet meetings; and (5) matters affecting national security and public order.

Relying on EO No. 464, various government officials did not appear in the hearings of the Senate on the North Rail Project and the alleged fraud in the 2004 elections, prompting various cause-oriented groups to file suits in the Supreme Court to seek the declaration of the unconstitutionality of EO No. 464.

The Court upheld the doctrine of executive privilege but found the Presidential issuance partly infirm, specifically Sections 2(b) and 3 which required government officials below the heads of executive departments to secure consent from the President before appearing in congressional hearings and investigations. The Court acknowledged that Congress has the right to obtain information from the executive branch whenever it is sought in aid of legislation. Thus, if the executive branch withholds such information because it is privileged, it must so assert it and state the reason therefor and why it must be respected.

In this case, the Court again alluded to ***U.S. v. Nixon*** and also recognized that Presidential communications fall under the mantle of protection of executive privilege in the setting of a legislative inquiry. But since the issue for resolution was the constitutionality of EO No. 464 and not whether an actual Presidential communication was covered by the privilege, the Court did not have occasion to rule on the same.

Prescinding from these premises, we now discuss the **test and procedure to determine the validity of the invocation of executive privilege covering Presidential communications in a legislative inquiry.**

IV. Test and Procedure to Determine the Validity of the Invocation of Executive Privilege Covering Presidential Communications in a Legislative Inquiry

In ***U.S. v. Nixon***, the leading U.S. case on executive privilege, the U.S. Supreme Court emphasized that its ruling addressed

"**only** the conflict between the President's assertion of a **generalized privilege of confidentiality** and the constitutional need for relevant evidence in **criminal trials**"[111] and that the **case was not concerned** with the balance "between the President's generalized interest in confidentiality…and congressional demands for information."[112] Nonetheless, the Court laid down principles and procedures that can serve as torch lights to illumine us on the scope and use of Presidential communication privilege in the case at bar. Hence, it is appropriate to examine at length ***U.S. v. Nixon***.

A. U.S. v. Nixon

1. Background Proceedings

U.S. v. Nixon[113] came about because of a break-in at the Democratic National Committee (DNC) headquarters in the Watergate Hotel. In the early morning of June 17, 1972, about four and a half months before the U.S. Presidential election, police discovered five men inside the DNC offices carrying electronic equipment, cameras, and large sums of cash. These men were operating as part of a larger intelligence gathering plan of the Committee to Re-elect the President, President Richard Nixon's campaign organization for the 1972 election. Their mission was to fix a defective bugging device which had been placed a month before on the telephone of the DNC chairperson. Their orders came from the higher officials of the CRP.[114]

A grand jury[115] was empanelled to **investigate** the incident. On July 23, 1973, Watergate Special Prosecutor Archibald Cox,[116]

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[111] *U.S. v. Nixon,* 418 U.S. 683 (1974), Note 19 at 713.

[112] *Ibid*.

[113] 418 U.S. 683 (1974).

[114] *U.S. v. Haldeman*, 559 F.2d 31 (1976), p. 52.

[115] A grand jury is an investigatory body charged with the duty to determine whether or not a crime has been committed. (*U.S. v. R. Enterprises, Inc., et al*. 498 US 292, 296 [1991]).

[116] *In re: Grand Jury Subpoena Duces Tecum* Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or

acting on behalf of the June 1972 grand jury, caused to be issued a subpoena *duces tecum* to President Nixon in the case **In re Grand Jury Subpoena Duces Tecum Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects**[117] in the District Court of the District of Columbia with Honorable John J. Sirica as District Judge. The **subpoena** required President Nixon to **produce for the grand jury** certain **tape recordings and documents** enumerated in an attached schedule.

President Nixon partially complied with the subpoena, but otherwise declined to follow its directives. In a letter to the Court that issued the subpoena, **the President advised that the tape recordings sought would not be provided, as he asserted that the President is not subject to the compulsory process of the courts**.[118] The Court ordered the President or any appropriate subordinate official to **show cause** "why the documents and objects described in [the subpoena] should not be produced as evidence before the grand jury."

After the filing of briefs and arguments, the Court resolved **two questions**: (1) whether it had jurisdiction to decide the issue of privilege, and (2) whether it had authority to enforce the subpoena *duces tecum* by way of an order requiring production for inspection *in camera*. **The Court answered both questions in the affirmative**.[119]

President Nixon **appealed** the order commanding him to produce documents or objects identified in the subpoena for

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Control of Certain Documents or Objects, 360 F. Supp 1 (1973), Note 1 which states, *viz*: The Special Prosecutor has been designated as the attorney for the Government to conduct proceedings before the grand jury investigating the unauthorized entry into the Democratic National Committee Headquarters and related offenses.

[117] 360 F. Supp 1 (1973).

[118] *In re Grand Jury Subpoena Duces Tecum* Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects (also referred to as In re Subpoena for Nixon), 360 F. Supp 1, 3 (1973).

[119] *Supra* note 116.

the court's *in camera* inspection. This appeal in the Court of Appeals of the District of Columbia Circuit was the subject of ***Nixon v. Sirica***.[120] The central issue addressed by the D.C. Court of Appeals was whether the President may, in his sole discretion, **withhold from a grand jury** evidence in his possession that is relevant to the grand jury's investigations.[121] It overruled the President's invocation of executive privilege covering Presidential communications and upheld the order of the District Court ordering President Nixon to produce the materials for *in camera* inspection subject to the procedure it outlined in the case. **President Nixon did not appeal the Court's ruling**.

As a result of the investigation of the grand jury, a **criminal case** was filed against **John N. Mitchell**, former Attorney General of the U.S. and later head of the Committee to Re-elect the President, and other former government officials and presidential campaign officials in ***U.S. v. Mitchell***[122] in the District Court of the District of Columbia. In that case, the Special Prosecutor filed a motion for a subpoena *duces tecum* for the production **before trial** of certain **tapes and documents** relating to precisely identified **conversations and meetings of President Nixon**. The President, claiming executive privilege, moved to quash the subpoena. The District Court, after treating the subpoenaed material as presumptively privileged, concluded that the Special Prosecutor had made a sufficient showing to rebut the presumption and that the requirements for a subpoena had been satisfied. The Court then issued an **order for an *in camera* examination** of the subpoenaed material. The Special Prosecutor filed in the **U.S. Supreme Court** a petition for a writ of certiorari which upheld the order of the District Court in the well-known case ***U.S. v. Nixon***.[123]

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[120] 487 F. 2d 700.

[121] *Id*. at 704.

[122] 377 F. Supp. 1326 (1974).

[123] 418 U.S. 683 (1974).

2. Rationale of Presidential Communications Privilege

For the **first time** in 1974, the U.S. Supreme Court recognized the **Presidential communications privilege and the qualified presumption in its favor** in ***U.S. v. Nixon*****.** The decision cited two reasons for the **privilege and the qualified presumption**: (1) the "necessity for protection of the **public interest** in **candid**, **objective,** and even **blunt or harsh opinions** in **Presidential decision-making**"[124] and (2) it "… is **fundamental to the operation of Government** and inextricably **rooted in the separation of powers under the Constitution.**"[125]

a. Public Interest in Candor or Candid Opinions in Presidential Decision-making

In support of the first reason, the **Nixon Court** held that "a President and those who assist him must be **free to explore alternatives in the process of shaping policies and making decisions** and to do so in a way many would be unwilling to express except **privately**.[126]

The **Nixon Court** pointed to **two bases** of this need for confidentiality. The **first is common sense and experience.** In the words of the Court, "the importance of this confidentiality is **too plain to require further discussion**. Human experience teaches that those who expect **public dissemination** of their remarks may well **temper candor with a concern for**

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[124] *Id*. at 708.

[125] *Ibid*., explaining in Note 17 that, "Freedom of communication vital to fulfillment of the aims of wholesome relationships is obtained only by removing the specter of compelled disclosure. . . . (G)overnment . . . needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." *Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325 (DC 1966). See *Nixon v. Sirica,* 159 U.S.App.D.C. 58, 71, 487 F.2d 700, 713 (1973); *Kaiser Aluminum & Chem. Corp. v. United States*, 141 Ct.Cl. 38, 157 F.Supp. 939 (1958) (Reed, J.); The Federalist, No. 64 (S. Mittell ed. 1938).

[126] *Id*. at 708.

appearances and for their own interests to the detriment of the decision-making process."[127]

The **second** is the **supremacy of each branch in its own sphere of duties** under the Constitution and the **privileges flowing from these duties.** Explained the Court, *viz*: "Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II (presidential) powers, the **privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.** Certain powers and **privileges flow from the nature of enumerated powers**; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."[128] In this case, the Special Prosecutor seeking access to the tape recordings of conversations of the President argued that the U.S. Constitution does not provide for privilege as to the President's communications corresponding to the privilege of Members of Congress under the Speech and Debate Clause. But the **Nixon Court** disposed of the argument, *viz*: "(T)he silence of the Constitution on this score is not dispositive. 'The rule of constitutional interpretation announced in ***McCulloch v. Maryland***, 4 Wheat. 316, 4 L.Ed. 579, that that which was **reasonably appropriate and relevant to the exercise of a granted power was to be considered as accompanying the grant**, has been so universally applied that it suffices merely to state it.'"[129]

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[127] *Id*. at 705, explaining in Note 15 that, "There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. 1 M. Farrand, The Records of the Federal Convention of 1787, pp. xi-xxv (1911). Moreover, all records of those meetings were sealed for more than 30 years after the Convention. *See* 3 Stat. 475, 15th Cong., 1st Sess., Res. 8 (1818). Most of the Framers acknowledge that without secrecy no constitution of the kind that was developed could have been written. C. Warren, *The Making of the Constitution,* 134-139 (1937).

[128] *Id*. at 708.

[129] *Id*. at 706, Note 16, citing *Marshall v. Gordon,* 243. U.S. 521, 537, 37 S.Ct. 448, 451, 61 L.Ed. 881 (1917).

b. Separation of Powers

The **Nixon Court** used **separation of powers** as the second ground why presidential communications enjoy a privilege and qualified presumption. It explained that while the **Constitution divides power among the three coequal branches of government and affords independence to each branch in its own sphere, it does not intend these powers to be exercised with absolute independence.** It held, *viz*: "In designing the structure of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a **comprehensive system**, but the **separate powers** were **not intended to operate with absolute independence**. 'While the Constitution diffuses power the better to secure liberty, it also contemplates that **practice will integrate the dispersed powers into a workable government.** It enjoins upon its branches **separateness but interdependence, autonomy but reciprocity**.'" (*emphasis supplied*)[130]

Thus, while the **Nixon Court** recognized the Presidential communications privilege based on the independence of the executive branch, **it also considered the effect of the privilege on the effective discharge of the functions of the judiciary**.

3. Scope of the Presidential Communications Privilege

The scope of Presidential communications privilege is clear in ***U.S. v. Nixon***. **It covers communications in the "performance of the President's responsibilities"**[131] **"of**

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[130] *Id*. at 707, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S., at 635, 72 S.Ct., at 870 (Jackson, *J*., concurring).

[131] *Id*. at 711 where the Court held, *viz*:

> In this case we must weigh the importance of the general privilege of **confidentiality of Presidential communications in performance of the President's responsibilities** against the inroads of such a privilege on the fair administration of criminal justice. (*emphasis supplied*)

his office"[132] **and made "in the process of shaping policies and making decisions."**[133] This scope was affirmed three years later in **Nixon v. Administrator of General Services.**[134]

4. Qualified Presumption in Favor of the Presidential Communications Privilege

In ***U.S. v. Nixon*****,** the High Court alluded to ***Nixon v. Sirica*** which held that Presidential communications are "**presumptively privileged**" and noted that this ruling was accepted by both parties in the case before it.[135] In ***Nixon v. Sirica*****,** the D.C. Court of Appeals, without expounding, agreed with the presumptive privilege status afforded to Presidential communications by its precursor case **In re Subpoena for**

[132] *Id*. at 712-713 where the Court held, *viz*:

A President's acknowledged **need for confidentiality in the communications of his office** is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. (*emphasis supplied*)

[133] *Id*. at 708 where the Court held, *viz*:

… A President and those who assist him must be **free to explore alternatives in the process of shaping policies and making decisions** and to do so in a way many would be unwilling to express except **privately**. (*emphasis supplied*)

[134] *Id*. at 449, where the Court held, *viz*:

The appellant may legitimately assert the **Presidential privilege**, of course, **only as to those materials whose contents fall within the scope of the privilege recognized in *United States v. Nixon***, *supra*. In that case the Court held that the **privilege is limited to communications 'in performance of (a President's) responsibilities**,' 418 U.S., at 711, 94 S.Ct., at 3109, '**of his office**,' *id*., at 713, and **made 'in the process of shaping policies and making decisions**,'*id*., at 708, 94 S.Ct., at 3107. (*emphasis supplied*)

[135] *U.S. v. Nixon*, 418 U.S. 613 at 708, where the Court held, *viz*:

… In *Nixon v. Sirica,* 159 U.S.App.D.C. 58, 487 F.2d 700 (1973), the Court of Appeals held that such Presidential communications are 'presumptively privileged,' *id.*, at 75, 487 F.2d, at 717, and this position is accepted by both parties in the present litigation.

Nixon in the D.C. District Court.[136] The latter case ushered the birth of the presumption in the midst of a **general disfavor of government privileges**. In **In re Subpoena for Nixon,** the D.C. District Court began with the observation that "a search of the Constitution and the history of its creation reveal a general disfavor of government privileges…"[137] In deciding whether the Watergate tapes should be covered by a privilege, the Court acknowledged that it must accommodate **two competing policies**: one, "the **need to disfavor** privileges and narrow their application as far as possible"; and two, "the **need to favor** the privacy of Presidential deliberations" and "indulge in a presumption in favor of the President." The Court **tilted the balance** in favor of the latter and held that "respect for the President, the Presidency, and the duties of the office, gives the advantage to this second policy."[138] The **Court explained** that the need to protect Presidential privacy and the presumption in favor of that privacy arises from the "paramount **need for frank expression and discussion among the President and those consulted by him in the making of Presidential decisions**."[139] (*emphasis supplied*)

5. Demonstrable Specific Need for Disclosure Will Overcome the Qualified Presumption

The **Nixon Court** held that to overcome the qualified presumption, there must be "sufficient showing or demonstration of specific need" for the withheld information on the branch of government seeking its disclosure. **Two standards** must be met to show the specific need: one is **evidentiary**; the other is **constitutional**.

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[136] 487 F.2d 700 at 717. The Court held, *viz*:

> We recognize this great public interest, and agree with the District Court that such (Presidential) conversations are **presumptively privileged…** (*emphasis supplied*)

[137] 360 F. Supp. 1, 4.

[138] *Id*. at 10-11.

[139] *Id*. at 5, citing Note 8 quoting Brief in Opposition at 3.

a. Evidentiary Standard of Need

In ***U.S. v. Nixon*****,** the High Court first determined whether the subpoena ordering the disclosure of Presidential communications satisfied the evidentiary requirements of **relevance, admissibility and specificity** under Rule 17(c) of the Federal Rules of Criminal Procedure. Rule 17(c) governs all subpoenas for documents and materials made in criminal proceedings. In the 1997 **In re Sealed Case (Espy)**,[140] the D.C. Court of Appeals held that there must also be a showing that "**evidence is not available with due diligence elsewhere**" or that the **evidence is particularly and apparently useful** as in that case where an **immediate** White House **advisor** was being investigated for criminal behavior. It explained that the information covered by Presidential communication privilege should not be treated as just another specie of information. Presidential communications are treated with confidentiality to strengthen the President in the performance of his duty.

b. Demonstrable Specific Need for Disclosure to be Balanced with the Claim of Privilege using the Function Impairment Test

The claim of executive privilege must then be balanced with the specific need for disclosure of the communications on the part of the other branch of government. The **"function impairment test"** was utilized in making the balance albeit it was not the term used by the Court. By this test, the **Court weighs** how the disclosure of the witheld information would **impair the President's ability to perform his constitutional** duties more than nondisclosure would **impair the other branch's ability to perform its constitutional functions.** It proceeded as follows:

First, **it assessed how significant the adverse effect of disclosure is on the performance of the functions of**

[140] In re Sealed Case (Espy), 121 F3d 729 at 754.

the President. While affording great deference to the President's need for complete candor and objectivity from advisers, the **Nixon Court** found that the **interest in confidentiality of Presidential communications is not significantly diminished by production of the subject tape recordings for *in camera* inspection,** with all the **protection** that a district court will be obliged to provide in **infrequent occasions** of a **criminal proceeding**. It ruled, *viz*:

> … The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends **solely** on the **broad, undifferentiated claim of public interest in the confidentiality of such conversations**, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, **we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.**[141]
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> … The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, **we cannot conclude** that **advisers will be moved to temper the candor** of their remarks by the **infrequent occasions of disclosure** because of the **possibility that such conversations will be called for in the context of a criminal prosecution**. [142] (*emphasis supplied*)

Second, it considered the ill effect of nondisclosure of the withheld information on the performance of functions of the judiciary. The Nixon Court found that an absolute, unqualified privilege would **impair the judiciary's performance of its constitutional duty to do justice in criminal prosecutions.** In balancing the competing interests of the executive and the judiciary using the function impairment test, it held:

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[141] *U.S. v. Nixon*, 418 U.S. 683 at 706.

[142] *Id.* at 712.

The impediment that an absolute, unqualified privilege would place in the way of the **primary constitutional duty of the Judicial Branch to do justice** in criminal prosecutions would plainly conflict with the **function of the courts under Art. III**.

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To read the **Art. II powers of the President** as providing an absolute privilege as against a subpoena essential to **enforcement of criminal statutes** on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would **upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III**.

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Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to **resolve those competing interests in a manner that preserves the essential functions of each branch**.[143]

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… this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that 'the twofold aim (of criminal justice) is that guilt shall not escape or innocence suffer.' *Berger v. United States,* 295 U.S., at 88, 55 S.Ct., at 633. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. **The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available** for the production of evidence needed either by the prosecution or by the defense.[144]

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[143] *Id*. at 707.

[144] *Id*. at 709.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the **right 'to be confronted with the witnesses against him' and 'to have compulsory process** for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also **guarantees that no person shall be deprived of liberty without due process of law**. It is the **manifest duty of the courts to vindicate those guarantees**, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case **we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice**. [145] (*emphasis supplied*)

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… the allowance of the privilege to withhold evidence that is **demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts.** A **President's acknowledged need for confidentiality** in the communications of his office is **general** in nature, whereas the **constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice.** Without access to specific facts a criminal prosecution may be **totally frustrated**. The **President's broad interest in confidentiality of communications** will **not be vitiated** by **disclosure of a limited number of conversations preliminarily shown to have some bearing** on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the **generalized interest in confidentiality**, it **cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice**. The generalized assertion of privilege must yield to the **demonstrated, specific need** for evidence in a pending **criminal trial**.[146] (*emphasis supplied*)

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[145] *Id* at 711-712.

[146] *Id*. at 712-713.

Third, the Court examined the **nature or content of the communication sought to be withheld**. It found that the Presidential communications privilege invoked by President Nixon "depended **solely** on the broad, **undifferentiated** claim of public interest in the confidentiality"[147] of his conversations. He did not claim the need to protect **military, diplomatic, or sensitive national security secrets.**[148] Held the Court, *viz*:

… He (President Nixon) **does not place his claim of privilege on the ground that they are military or diplomatic secrets**. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities…

In ***United States v. Reynolds***, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said: 'It may be possible to **satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect** by insisting upon an examination of the evidence, even by the judge alone, in chambers.' *Id.*, at 10.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.[149] (*emphasis supplied*)

In balancing the competing interests of the executive and judicial branches of government, the **Nixon Court** emphasized that while government privileges are **necessary, they impede the search for truth and must not therefore be lightly created or expansively construed. It held, *viz*:**

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[147] *Id*. at 706.

[148] *Ibid*.

[149] *Id*. at 710-711.

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man 'shall be compelled in any criminal case to be a witness against himself.' And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are **not lightly created nor expansively construed, for they are in derogation of the search for truth**.[150]

6. In Camera Determination of Information to be Disclosed

After determining that the Special Prosecutor had made a sufficient showing of a "demonstrable specific need" **to overcome the qualified presumption** in favor of the Presidential communications privilege, the High Court upheld the order of the D.C. District Court in ***U.S. v. Mitchell*** that an ***in camera*** **examination of the subpoenaed material was warranted**. Its purpose was to determine if there were parts of the subpoenaed material that were not covered by executive privilege and should therefore be disclosed or parts that were covered by executive privilege and must therefore be kept under seal.

The U.S. Supreme Court acknowledged that in the course of the *in camera* inspection, **questions may arise on the need to excise parts of the material that are covered by executive privilege**. It afforded the D.C. District Court the discretion to seek the **aid of the Special Prosecutor and the President's counsel** for *in camera* consideration of the validity

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[150] *Id*. at 709-710, explaining in Note 18 that, "Because of the key role of the testimony of witnesses in the judicial process, courts have historically been cautious about privileges. Mr. Justice Frankfurter, dissenting in ***Elkins v. United States,*** 364 U.S. 206, 234, 80 S.Ct. 1437, 1454,4 L.Ed.2d 1669 (1960), said of this: 'Limitations are properly placed upon the operation of this general principle only to the very limited extent that **permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth**.'" (*emphasis supplied*)

of the particular excisions, whether on the basis of **relevancy** or **admissibility,** or the **content** of the material being in the **nature of military or diplomatic secrets**.[151]

In **excising materials that are not relevant or not admissible or covered by executive privilege because of their nature as military or diplomatic secrets**, the High Court emphasized the heavy responsibility of the D.C. District Court to ensure that these excised parts of the Presidential communications would be accorded that "high degree of respect due the President," considering the "singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article … a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.'"[152] It was "necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice."[153] Thus, the High Court sternly ordered that **until released by the judge to the Special Prosecutor, no *in camera* material be revealed to anyone, and that the excised material be restored to its privileged status and returned under seal to its lawful custodian.**[154]

The procedure enunciated in ***U.S. v. Nixon*** was cited by the Court of Appeals of the District of Columbia Circuit in the 1997 case **In re Sealed Case (Espy)**.[155]

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[151] *Id*. at 714, Note 21, citing *United States v. Reynolds,* 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), or *C. & S. Air Lines v. Waterman S.S. Corp*., 333 U.S. 103, 68 S.Ct. 431, 92 L.Ed. 568 (1948).

[152] *Id*. at 714-715.

[153] *Id*. at 715.

[154] *Ibid*.

[155] 121 F.3d 729, pp. 744-745. The Court held, *viz*:

The *Nixon* cases establish the contours of the presidential communications privilege. The President can invoke the privilege when asked to produce documents or other materials that reflect presidential decision-making and deliberations and that the President believes should remain confidential. If the President does so, the documents become presumptively privileged. However, the privilege is qualified, not absolute, and can be overcome by an adequate

B. Resolving the Case at Bar with the Aid of U.S. v. Nixon and Other Cases

1. Procedure to Follow When Diplomatic, Military and National Security Secrets Privilege is Invoked

In the case at bar, Executive Secretary Ermita's letter categorically invokes the Presidential communications privilege and in addition, raises possible impairment of diplomatic relations with the People's Republic of China. Hence, the letter states, *viz*:

> The **context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China. Given the confidential nature in which these information were conveyed to the President,** he (Secretary Neri) cannot provide the Committee any further details of these conversations, without disclosing the very thing the privilege is designed to protect.[156] (*emphasis supplied*)

As afore-discussed, this Court recognized in ***Almonte v. Vasquez***[157] and ***Chavez v. PCGG***[158] a governmental privilege against public disclosure of **state secrets** covering **military, diplomatic and other national security matters**. In ***U.S. v. Reynolds*,**[159] the U.S. Supreme Court laid down the **procedure**

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showing of need. If a court believes that an adequate showing of need has been demonstrated, it should then proceed to review the documents *in camera* to excise non-relevant material. The remaining relevant material should be released. Further, the President should be given an opportunity to raise more particularized claims of privilege if a court rules that the presidential communications privilege alone is not a sufficient basis on which to withhold the document.

[156] Letter of Executive Secretary Eduardo R. Ermita to Senator Alan Peter Cayetano as Chairman of the Committee on Accountability of Public Officers and Investigations dated November 15, 2007, Annex C of the Petition.

[157] G.R. No. 95367 May 23, 1995, 244 SCRA 286 (1995).

[158] G.R. No. 130716, December 9, 1998, 299 SCRA 744 (1998), citing IV Record of the Constitutional Commission 621-922, 931 (1986) and *Almonte v. Vasquez,* 244 SCRA 286, 295, 297, May 23, 1995.

[159] 345 U.S. 1 (1953).

for invoking and assessing the validity of the invocation of the military secrets privilege, **a privilege based on the nature and content of the information**, which can be analogized to the diplomatic secrets privilege, also a **content-based** privilege. In **Reynolds**, it was held that there must be a **formal claim** of privilege lodged by the head of the department that has control over the matter after actual personal consideration by that officer. The court must thereafter **determine whether the circumstances are appropriate for the claim of privilege, without forcing a disclosure of the very thing the privilege is designed to protect**.[160] It was stressed that "(j)udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers…"[161] It is possible for these officers "to satisfy the court, **from all the circumstances of the case**, that there is a **reasonable danger** that compulsion of the evidence will **expose military matters which, in the interest of national security, should not be divulged.** When this is the case, the **occasion for the privilege is appropriate**, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."[162] It was further held that "(i)n each case, **the showing of necessity which is made will determine how far the court should probe** in satisfying itself that the occasion for invoking the privilege is appropriate."[163]

Thus, the facts in **Reynolds** show that the Secretary of the Air Force filed a formal "Claim of Privilege" and stated his objection to the production of the document "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force."[164] The Judge Advocate General of the U.S. Air Force

[160] *Id*. at 7-8.

[161] *Id*. at 9-10.

[162] *Id*. at 10.

[163] *Id*. at 11.

[164] *Id*. at 4.

also filed an affidavit, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment."[165] On the record before the trial court, it appeared that the accident that spawned the case occurred to a military plane that had gone aloft to test secret electronic equipment.[166] The **Reynolds Court** found that **on the basis of all the circumstances of the case before it**, there was **reasonable danger** that the accident investigation report would contain references to the **secret electronic equipment** that was the primary concern of the mission, which would be exposed if the investigation report for the accident was disclosed.[167]

In the case at bar, we cannot assess the validity of the claim of the Executive Secretary that disclosure of the withheld information may impair our diplomatic relations with the People's Republic of China. There is but a **bare assertion** in the letter of Executive Secretary Ermita that the **"context in which executive privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China."** There is absolutely **no explanation** offered by the Executive Secretary on how diplomatic secrets will be exposed at the expense of our national interest if petitioner answers the three disputed questions propounded by the respondent Senate Committees. In the Oral Argument on March 4, 2008, petitioner Neri similarly failed to explain how diplomatic secrets will be compromised if the three disputed questions are answered by him.[168] Considering this paucity of explanation, the Court cannot

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[165] *Id*. at 4-5.

[166] *Id*. at 10.

[167] *United States v. Reynolds*, 345 U.S. 1 (1953) at 10.

[168] TSN, Oral Argument, March 4, 2008, pp. 35-38. Counsel for petitioner did not provide sufficient basis for claiming diplomatic secrets privilege as supplied by the President or the proper head of agency involved in foreign affairs, *viz*:

determine whether there is reasonable danger that petitioner's answers to the three disputed questions would **reveal privileged diplomatic secrets. The Court cannot engage in guesswork in resolving this important issue.**

Petitioner Neri also invokes executive privilege on the **further ground** that his conversation with the President dealt with **national security matters.** On November 29, 2007, petitioner wrote to Senator Alan Peter S. Cayetano as Chairperson of the Committee on Accountability of Public Officers and Investigations in reply to the respondent Senate Committees' Show Cause Order requiring petitioner to explain why he should

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> **JUSTICE CARPIO:** But where is the diplomatic secret there, my question was – does this refer, do the conversations refer to diplomatic secrets?
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> **ATTY. BAUTISTA:** Well, it refers to our relationship with a friendly foreign power.
>
> **JUSTICE CARPIO:** But that doesn't mean that there are secrets involved with our relationships?
>
> **ATTY. BAUTISTA:** Just the same Your Honors the disclosure will harm our relationship with China as it now appears to have been harmed.
>
> **JUSTICE CARPIO:** But how can it harm when you have not given us any basis for leading to that conclusion, you are just saying it is a commercial contract, they discussed about the broadband contract but where are the secrets there?

Counsel for petitioner also admitted that there was no referral of any aspect of the ZTE Contract to the Department of Foreign Affairs, *viz*:

> **CHIEF JUSTICE PUNO:** Do you also know whether there is any aspect of the contract relating to diplomatic relations which was referred to the Department of Foreign Affairs for its comment and study?
>
> **ATTY. LANTEJAS:** As far as I know, Your Honors, there was no referral to the Department of Foreign Affairs, Your Honor.
>
> **CHIEF JUSTICE PUNO:** And yet you are invoking the doctrine of Executive Privilege, because allegedly, this contract affects national security, and would have serious impact on our diplomatic relations, is that true? (p. 291)

not be cited for contempt for failing to attend the respondent Senate Committees' November 20, 2007 hearing. Petitioner attached to his letter the letter of his lawyer, Atty. Antonio Bautista, also dated November 29, 2007. In this letter, Atty. Bautista **added other reasons to justify** petitioner's failure to attend the Senate hearings. He stated that petitioner's "conversations with the President dealt with delicate and sensitive **national security** and diplomatic matters **relating to the impact of the bribery scandal involving high government officials** and the possible loss of confidence of foreign investors and lenders in the Philippines."[169] In his Petition, Neri did not use the term "national security," but the term "military affairs," *viz*:

> Petitioner's discussions with the President were candid discussions meant to explore options in making policy decisions (see *Almonte v. Vasquez*, 244 SCRA 286 [1995]). These discussions dwelt on the impact of the bribery scandal involving high Government officials on the country's **diplomatic relations and economic and military affairs**, and the possible loss of confidence of foreign investors and lenders in the Philippines.[170]

In ***Senate v. Ermita,*** **we ruled that only the President or the Executive Secretary, by order of the President, can invoke executive privilege.** Thus, **petitioner, himself or through his counsel, cannot expand the grounds** invoked by the President through Executive Secretary Ermita in his November 15, 2007 letter to Senator Alan Peter S. Cayetano. In his letter, **Executive Secretary Ermita invoked only the Presidential communications privilege** and, as earlier explained, suggested a claim of **diplomatic secrets privilege**. But even assuming *arguendo* that petitioner Neri can properly invoke the privilege covering "national security" and "military affairs," still, the records will show that he failed to provide the Court knowledge of the **circumstances** with which the Court can **determine whether there is reasonable danger**

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[169] Petition, Annex D-1.

[170] *Ibid*.

that his answers to the three disputed questions would indeed **divulge secrets** that would compromise our national security.

In the Oral Argument on March 4, 2008, petitioner's counsel argued the basis for invoking executive privilege covering diplomatic, military and national security secrets, but those are arguments of petitioner's counsel and can hardly stand for the "formal claim of privilege lodged by the head of the department which has control over the matter after actual personal consideration by that officer" that **Reynolds** requires.[171]

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[171] TSN, Oral Argument, March 4, 2008, pp. 35-38. Counsel for petitioner did not provide sufficient basis for claiming military and national secrets privilege as supplied by the President or the proper head of agency involved in military and national security, *viz*:

> **JUSTICE CARPIO:** Okay, you mentioned that the nature of the discussion refers to military secrets, are you claiming that?
>
> **ATTY. BAUTISTA:** Yes, Your Honor, military concerns.
>
> **JUSTICE CARPIO:** Yes, was the Armed Forces of the Philippines or the Intelligence Service of the Armed Forces of the Philippines were they ever involved in the negotiation of the NBN contract, were they part of the team that designed the NBN network?
>
> **ATTY. BAUTISTA:** I do not know Your Honor.
>
> **JUSTICE CARPIO:** So, how can you claim that it involves military secret when the army, the military, the navy were not involved?
>
> **ATTY. BAUTISTA:** Because for one thing the Committee on National Defense and Security is investigating it and there was mention that this facility will be accessed and used by our military.
>
> **JUSTICE CARPIO:** So, you are just basing that on what the Senate is doing, conducting an investigation, you are not basing it on what the President is claiming?
>
> **ATTY. BAUTISTA:** Well, we cannot really divulge what it was that the President said on the matter.

Counsel for petitioner also admitted that in offering the justifications for the invocation of executive privilege, he was only representing petitioner and not speaking in behalf of the government, *viz*:

> **JUSTICE TINGA**: You do not in any way speak in behalf of the government or any other government official let alone the Chief Executive, do you?
>
> **ATTY. BAUTISTA:** It is not my job, Your Honor, maybe the Solicitor General. (p. 144)

Needless to state, the diplomatic, military or national security privilege claimed by the petitioner has no leg to stand on.

2. Applicability of the Presidential Communications Privilege

The **Presidential communications privilege attaches to the office of the President**; it is **used** after careful consideration in order to uphold public interest in the confidentiality and **effectiveness of Presidential decision-making to benefit the Office of the President.** It is **not to be used** to personally benefit the person occupying the office. In **In re Subpoena for Nixon**[172] Chief Judge Sirica emphasized, *viz*: "… **[P]rivacy, in and of itself, has no merit**. Its importance and **need of protection arise from 'the paramount need for frank expression and discussion among the President and those consulted by him** in the making of **Presidential decisions**.'"[173] In ***Kaiser Aluminum & Chemical Corp. v. United States***,[174] in which the term "executive privilege" was first used, the U.S. Court of Claims emphasized that executive privilege is granted "**for the benefit of the public, not of executives who may happen to then hold office**."[175] (*emphasis supplied*)

Counsel for petitioner also admitted that the ZTE Contract was not referred to the Department of National Defense, *viz*:

CHIEF JUSTICE PUNO: May I call, again, Atty. Lantejas. In the whole process when this contract was conceptualized, negotiated and concluded, was there any aspect of the contract that involved national security and that was referred to the Department of National Defense for comment?

ATTY. LANTEJAS: As far as I know, Your Honor, I think there was no referral to the National Defense, Your Honor. (pp. 291-292)

[172] *In re Grand Jury Subpoena Duces Tecum* Issued to Richard M. Nixon, or any Subordinate Officer, Official, or Employee with Custody or Control of Certain Documents or Objects, 360 F. Supp 1, August 29, 1973.

[173] *Id*., Note 8, p. 5, citing Brief in Opposition, p. 3.

[174] 157 F.Supp. 939, 944, 141 Ct.Cl. 38 (1958).

[175] 141 Ct. Cl. 38, 157 F.Supp. 939 (1958).

The **rationale** for the Presidential communications privilege is enunciated in ***U.S. v. Nixon***.[176] As aforestated, it is **based** on common sense and on the principle that flows from the enumerated powers of the President and the doctrine of separation of powers under the Constitution. This rationale was recognized in both ***Almonte v. Vasquez*** and ***Senate v. Ermita***.

It is worthy to note that ***U.S. v. Nixon*** involved the executive and the judicial branches of government **in the context of a criminal proceeding**. In **the case at bar**, the branches of government in conflict and the context of the conflict are different: the conflict is between the **executive versus the legislature in the context of a Senate investigation in aid of legislation. Be that as it may, the clash of powers between the executive and the legislature** must be resolved in a manner that will best allow each branch to **perform its designed functions** under the Constitution, using the **"function impairment test."** In accord with this **test**, it is the Court's task to **balance** whether the disclosure of the disputed information **impairs the President's ability to perform her constitutional duty to execute the laws** more than non-disclosure would **impair the respondent Senate Committees' ability to perform their constitutional function to enact laws.**

2. a. Presidential Communications Enjoy a Qualified Presumption in Their Favor

The function impairment test begins with a recognition that Presidential communications are **presumptively privileged.**

In their Comment, respondent Senate Committees contend that petitioner has the burden of overcoming the **presumption against executive privilege**, citing ***Senate v. Ermita***, *viz*:

From the above discussion on the meaning and scope of executive privilege, both in the United States and in this jurisdiction, a clear principle emerges. Executive privilege,

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[176] *Almonte v. Vasquez*, G.R. No. 95367 May 23, 1995, 244 SCRA 286 (1995); *Senate v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006).

whether asserted against Congress, the courts, or the public, is recognized only in relation to certain types of information of a sensitive character. While executive privilege is a constitutional concept, a claim thereof may be valid or not depending on the ground invoked to justify it and the context in which it is made. Noticeably absent is any recognition that executive officials are exempt from the duty to disclose information by the mere fact of being executive officials. Indeed, **the extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure**.[177] (*emphasis supplied*)

A hard look at ***Senate v. Ermita*** ought to yield the conclusion that it bestowed a qualified presumption in favor of the Presidential communications privilege. As shown in the previous discussion, ***U.S. v. Nixon***, as well as the other related Nixon cases **Sirica**[178] and ***Senate Select Committee on Presidential Campaign Activities, et al. v. Nixon***[179] in the D.C. Court of Appeals, as well as subsequent cases,[180] **all recognize** that there is a

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[177] *Senate v. Ermita*, G.R. No. 169777, April 20, 2006, 488 SCRA 1, 51; Comment, pp. 16-17.

[178] 487 F.2d 700, 717. The Court held, *viz*:

We recognize this great public interest, and agree with the District Court that such (Presidential) conversations are **presumptively privileged…** (*emphasis supplied*)

[179] *Id*. at 730. The Court, affirming **Sirica** held, *viz*:

The staged decisional structure established in *Nixon v. Sirica* was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. **So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government-** a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations- **we believed in *Nixon v. Sirica*, and continue to believe**, that the effective functioning of the presidential office will not be impaired. (*emphasis supplied*)

[180] See *U.S. v. Haldeman, et al,* 559 F.2d 31 (1976) and In re Sealed Case (Espy), 121 F.3d 729 (1997).

presumptive privilege in favor of Presidential communications. The **Almonte case**[181] quoted ***U.S. v. Nixon*** and recognized a presumption in favor of confidentiality of Presidential communications.

The statement in ***Senate v. Ermita*** that the "extraordinary character of the exemptions indicates that the presumption inclines heavily against executive secrecy and in favor of disclosure"[182] must therefore be read to mean that there is a general disfavor of government privileges as held in **In Re Subpoena for Nixon,** especially considering the bias of the 1987 Philippine Constitution towards full public disclosure and transparency in government. In fine, ***Senate v. Ermita*** recognized the Presidential communications privilege in ***U.S. v. Nixon*** and the qualified presumptive status that the U.S. High Court gave that privilege. **Thus, respondent Senate Committees' argument that the burden is on petitioner to overcome a presumption against executive privilege cannot be sustained.**

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[181] G.R. No. 95367 May 23, 1995, 244 SCRA 286 (1995). Citing ***U.S. v. Nixon***, the Court held, *viz*:

[182] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006) at 51; Comment, pp. 16-17.

In addition, in the litigation over the Watergate tape subpoena in 1973, the U.S. Supreme Court recognized the right of the President to the confidentiality of his conversations and correspondence, which it likened to "the claim of confidentiality of judicial deliberations." Said the Court in *United States v. Nixon*:

> The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. **A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications.** The privilege is fundamental to the operation of the government and inextricably rooted in the separation of powers under the Constitution. . . . (*emphasis supplied*)

2. b. Next, the Strength of the Qualified Presumption Must be Determined

Given the **qualified presumption** in favor of the confidentiality of Presidential communications, the Court should proceed to determine the **strength of this presumption as it varies in light of various factors**. Assaying the strength of the presumption is important, as it is **crucial** in determining the demonstrable specific need of the respondent Senate Committees in seeking the disclosure of the communication in aid of its duty to legislate. The **stronger the presumption, the greater the demonstrable need required to overcome the presumption; conversely**, **the weaker the presumption, the less the demonstrable need required to overcome the presumption**.

A **primary factor** to consider in determining the strength of the presumption is to look where the Constitution textually committed the power in question. ***U.S. v. Nixon*** stressed that the Presidential communications privilege flows from the enumerated powers of the President. The **more concentrated power is in the President**, the greater the need for confidentiality and the **stronger the presumption**; contrariwise, the more **shared or diffused the power** is with other branches or agencies of government, the **weaker the presumption.** For, indisputably, there is less need for confidentiality considering the likelihood and expectation that the branch or agency of government sharing the power will need the same information to discharge its constitutional duty.

In the case at bar, the subject matter of the respondent Senate Committees' inquiry is a **foreign loan agreement** contracted by the President with the People's Republic of China. The power of the President to contract or guarantee foreign loans is **shared** with the Central Bank. Article VII, Section 20 of the 1987 Constitution, provides, *viz*:

> Sec. 20. The president may contract or guarantee **foreign loans** on behalf of the Republic of the Philippines with the **prior concurrence of the Monetary Board,** and subject to such limitations as may be provided by law. The Monetary Board shall, within thirty days from

the end of every quarter of the calendar year, **submit to the Congress a complete report of its decisions on applications for loans to be contracted or guaranteed by the Government or government-controlled corporations which would have the effect of increasing the foreign debt**, and containing other matters as may be provided by law. (*emphasis supplied*)

In relation to this provision, the Constitution provides in Article XII, Section 20 that majority of the members of the Monetary Board (the Central Bank) shall come from the **private sector** to maintain its independence. Article VII, Section 20 is a revision of the corresponding provision in the 1973 Constitution. The intent of the revision was explained to the 1986 Constitutional Commission by its proponent, Commissioner Sumulong, *viz*:

The next constitutional change that I would like to bring to the body's attention is the **power of the President to contract or guarantee domestic or foreign loans in behalf of the Republic of the Philippines**. We studied this provision as it appears in the 1973 Constitution. In the 1973 Constitution, it is provided that the President may contract or guarantee domestic or foreign loans in behalf of the Republic of the Philippines subject to such limitations as may be provided by law.

In view of the fact that our foreign debt has amounted to $26 billion – it may reach up to $36 billion including interests – we studied this provision in the 1973 Constitution, so that **some limitations may be placed upon this power of the President.** We consulted representatives of the Central Bank and the National Economic Development Authority on this matter. After studying the matter, we decided to provide in Section 18 that **insofar as the power of the President to contract or guarantee foreign loans is concerned, it must receive the prior concurrence of the Monetary Board.**

We placed this **limitation** because, as everyone knows, the Central Bank is the custodian of foreign reserves of our country, and so, it is in the best position to determine whether an application for foreign loan initiated by the President is within the paying capacity of our country or not. That is the reason we require **prior concurrence of the Monetary Board** insofar as **contracting and guaranteeing of foreign loans** are concerned.

We also provided that the **Monetary Board should submit complete quarterly report of the decisions it has rendered on application for loans to be contracted or guaranteed by the Republic of the Philippines so that Congress, after receiving these reports, can study the matter. If it believes that the borrowing is not justified by the amount of foreign reserves that we have, it can make the necessary investigation in aid of legislation, so that if any further legislation is necessary, it can do so.**[183] (*emphasis supplied*)

There are other factors to be considered in determining the strength of the presumption of confidentiality of Presidential communications. They pertain to the **nature of the disclosure** sought, namely: (1) time of disclosure, whether contemporaneous disclosure or open deliberation, which has a greater chilling effect on rendering candid opinions, as opposed to subsequent disclosure; (2) level of detail, whether full texts or whole conversations or summaries; (3) audience, whether the general public or a select few; (4) certainty of disclosure, whether the information is made public as a matter of course or upon request as considered by the U.S. Supreme Court in ***Nixon v. Administrator of General Services*;**[184] (5) frequency of disclosure as considered by the U.S. Supreme Court in ***U.S. v. Nixon*** and ***Cheney v. U.S. District Court for the District of Columbia*;**[185] and (6) form of disclosure, whether live testimony

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[183] II Record of the Constitutional Commission, p. 387.

[184] *See* note 186, infra.

[185] In ***Cheney v. United States District Court for the District of Columbia, et al.,*** the U.S. Supreme Court pointed out the distinction in context between the case before it and ***U.S. v. Nixon***. It cautioned that the observation in ***U.S. v. Nixon*** that production of confidential information in a criminal proceeding would not disrupt the functioning of the Executive Branch could not be applied mechanically to the civil litigation before it. The Court pointed out that in the criminal justice system, there are mechanisms to filter out insubstantial legal claims such as through responsible exercise of prosecutorial discretion to prosecute a criminal case. In contrast, in civil litigation, there is no sufficient mechanism to screen out unmeritorious or vexatious claims against the Executive Branch wherein access to Presidential communications may be sought. **Cheney v. United States District Court for the District of Columbia, *et al.,*** 542 U.S. 367 (2004). *See also* note 186, infra.

or recorded conversation or affidavit. The **type of information** should also be considered, whether involving military, diplomatic or national security secrets.[186]

2. c. Determining Specific Need of Respondent Senate Committees for the Withheld Information to Overcome the Qualified Presumption

1) The first aspect: evidentiary standard of need

We have considered the factors determinative of the strength of the **qualified presumption in favor of the Presidential communications privilege.** We now determine whether the Senate has sufficiently demonstrated its specific need for the information withheld to overcome the presumption in favor of Presidential communications.

In ***U.S. v. Nixon,*** the "demonstration of a specific need" was **preceded by a showing** that the tripartite requirements of Rule 17(c) of the Federal Rules of Criminal Procedure had been satisfied, namely: **relevance, admissibility and specificity**. ***U.S. v. Nixon,*** however, involved a **criminal proceeding**. **The case at bar involves a Senate inquiry**

[186] Lee, G., *The President's Secrets*, 76 George Washington Law Review, February 2008, 197.

Gia B. Lee, professor of the UCLA School of Law and an outside counsel for the General Accounting Office's suit against US Vice President Richard B. Cheney in ***Walker v. Cheney*** (230 F. Supp.2d 51, 53 [D.D.C. 2002]), suggests a "differentiation approach" in assessing the President's need for confidentiality of his communications. She argues that the commonsense or "too plain to require further discussion" assertion in ***U.S. v. Nixon*** overstates the strength of the President's interest in confidentiality. The unexamined presumption fails to take into account the qualified and contingent nature of the President's need for confidentiality. According to her, "(t)he **extent to which the lack of confidentiality will chill presidential deliberations is neither fixed nor always substantial, but turns on a range of factors, including the information under discussion and the specifics of the proposed disclosure**." (Lee, G., *The President's Secrets,* George Washington Law Review, February 2008, 202) Thus, the "differentiation approach" makes a searching review and assesses the likelihood that the proposed disclosure would chill candid deliberations.

not bound by rules equivalent to Rule 17(c) of the Federal Rules of Criminal Procedure. Indeed, the Senate Rules of Procedure Governing Inquiries in Aid of Legislation provides in Section 10 that "technical rules of evidence applicable to judicial proceedings which do not affect substantive rights need not be observed by the Committee."

In legislative investigations, the requirement is that the question seeking the withheld information must be **pertinent.**

In analyzing the Nixon cases, she asserts that the US Supreme Court in ***U.S. v. Nixon*** adopted a slight "differentiation approach" in considering the effect of the **frequency of disclosure** on the candor of advisers and concluding that advisers will not be moved to temper the candor of their remarks by the **infrequent occasions** of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution. Three years later, after Nixon had resigned as President, the Court again employed a "differentiation approach," this time more heavily, in ***Nixon v. Administrator of General Services***. In that case, the Court ruled in favor of disclosure of varied documents and communications of former President Nixon pursuant to the Presidential Recordings and Materials Preservation Act which directed the General Services Administrator to take custody of the Nixon Administration's papers and tape recordings. The Court considered that the alleged infringement on presidential confidentiality was not as great as the President claimed it to be because the statute directed the Administrator to issue regulations that would allow the President to **assert the privilege claims before any eventual public release of the documents**, thus **only the archivists would have access to the materials**; professional archivists had regularly screened similar materials for each of the prior presidential libraries and there had never been any suggestion that such screening interfered with executive confidentiality even if executive officials knew of the practice. Furthermore, the Court held that the limited intrusion was justified in light of the desire of Congress to preserve the materials for "legitimate historical and governmental purposes" and the need in the wake of the Watergate incident "to restore public confidence" in the nation's political processes, and the need to enhance Congress's ability to craft remedial legislation.

The **"differentiation approach" takes a measured approach to invocations of presidential confidentiality.** This approach argues against a constitutional approach that simply assumes the substantiality of a "generalized or undifferentiated interest in confidential presidential communications, and in favor of an approach that demands **differentiating among confidentiality claims, depending on the nature of the disclosures sought and the type of information sought to be disclosed**.

As held in **Arnault,** the following is the **rule on pertinency**, *viz*:

> Once an inquiry is admitted or established to be within the jurisdiction of a legislative body to make, we think the **investigating committee has the power to require a witness to answer any question pertinent to that inquiry**, subject of course to his constitutional right against self-incrimination. The inquiry, to be within the jurisdiction of the legislative body to make, must be material or necessary to the exercise of a power in it vested by the Constitution, such as to legislate, or to expel a Member; and **every question which the investigator is empowered to coerce a witness to answer must be material or pertinent to the subject matter of the inquiry or investigation.** So a **witness may not be coerced to answer a question that obviously has no relation to the subject of the inquiry.** But from this it does not follow that every question that may be propounded to a witness be material to any proposed or possible legislation. In other words, **the materiality of the question must be determined by its direct relation to the subject of the inquiry and not by its indirect relation to any proposed or possible legislation. The reason is, that the necessity or lack of necessity for legislative action and the form and character of the action itself are determined by the sum total of the information to be gathered as a result of the investigation, and not by a fraction of such information elicited from a single question.**[187] *(emphasis supplied)*

As afore-discussed, to establish a "demonstrable specific need," there must be a showing that "**evidence is not available with due diligence elsewhere**" or that the **evidence is particularly and apparently useful.** This requirement of **lack of effective substitute** is meant to decrease the frequency of incursions into the confidentiality of Presidential communications, to enable the President and the Presidential advisers to communicate in an atmosphere of necessary confidence while engaged in decision-making. It will also help the President to focus on an energetic performance of his or her constitutional duties.[188]

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[187] 87 Phil. 29 (1950), p. 48.

[188] *Cheney v. United States District Court for the District of Columbia*, 542 U.S. 367 (2004).

Let us proceed to apply these **standards** to the case at bar: **pertinence of the question propounded and lack of effective substitute for the information sought.**

The first inquiry is the pertinence of the question propounded. The three questions propounded by the respondent Senate Committees for which Executive Secretary Ermita, by Order of the President, invoked executive privilege as stated in his letter dated November 15, 2007, are:

"a) Whether the President followed up the (NBN) project?"[189]

"b) Were you dictated to prioritize the ZTE?"[190]

"c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?"[191]

The **context** in which these questions were asked is shown in the transcripts of the Senate hearing on September 26, 2007, *viz*:

On the first question –

SEN. LACSON. So, how did it occur to you, *ano ang dating sa inyo noong naguusap kayo ng NBN project, may ibubulong sa inyo iyong chairman (Abalos) na kalaro ninyo ng golf, "Sec, may 200 ka rito." Anong pumasok sa isip ninyo noon?*

MR. NERI. I was surprised.

SEN. LACSON. You were shocked, you said.

MR. NERI. Yeah, I guess, I guess.

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[189] Letter of Executive Secretary Eduardo R. Ermita to Senator Alan Peter Cayetano as Chairman of the Committee on Accountability of Public Officers and Investigations dated November 15, 2007, Annex C of the Petition; TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 91-92.

[190] *Id*.; TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 114-115.

[191] *Id*.; TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 275-276.

SEN. LACSON. *Bakit kayo na-shock?*

MR. NERI. Well, I was not used to being offered.

SEN. LACSON. Bribed?

MR. NERI. Yeah. Second is, *medyo malaki.*

SEN. LACSON. In other words, at that point it was clear to you that you were being offered bribe money in the amount of 200 million, *kasi malaki, sabi ninyo*?

MR. NERI. I said no amount was put, but I guess given the magnitude of the project, *siguro naman hindi* ₱200 or ₱200,000, so…

SEN. LACSON. *Dahil cabinet official kayo, eh*.

MR. NERI. I guess. But I – you know.

SEN. LACSON. Did you report this attempted bribe offer to the President?

MR. NERI. I mentioned it to the President, Your Honor.

SEN. LACSON. What did she tell you?

MR. NERI. She told me, "Don't accept it."

SEN. LACSON. And then, that's it?

MR. NERI. Yeah, because we had other things to discuss during that time.

SEN. LACSON. And then after the President told you, "Do not accept it," what did she do? How did you report it to the President? In the same context it was offered to you?

MR. NERI. I remember it was over the phone, Your Honor.[192]

xxx xxx xxx

SEN. PANGILINAN. You mentioned earlier that you mentioned this to the President. Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 *ka rito*?

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[192] TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, pp. 43-44.

MR. NERI. We did not discuss it again, Your Honor.

SEN. PANGILINAN. With the President? But the issue, of course, the NBN deal, was raised again? After that, between you and the President. *Pinalow up* **(followed up)** *ba niya*?

MR. NERI. May I claim the executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature.[193]

xxx xxx xxx

MR. NERI. …Under EO 464, Your Honor, the scope is, number one, state secrets; number two, informants privilege; number three, intra-governmental documents reflecting advisory opinions, recommendations and deliberations. And under **Section 2(A) of EO 464, it includes all confidential or classified information between the President and public officers covered by the EO, such as conversations, correspondence between the President and the public official** and discussions in closed-door Cabinet meetings.

Section 2(A) was held valid in *Senate versus Ermita*.[194] (*emphasis supplied*)

On the second question –

SEN. LEGARDA. Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI (Amsterdam Holdings, Inc.) as you've previously done…

MR. NERI. As I said, Your Honor…

SEN. LEGARDA. …but to prefer or prioritize the ZTE?

MR. NERI. Yeah. As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA. I'm sorry. Can you say that again?

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[193] *Id*. at 91-92.

[194] *Id*. at 105.

MR. NERI. As I said, I would like to invoke Sec. 2(a) of EO 464.[195] (*emphasis supplied*)

On the third question –

SEN. CAYETANO, (P). …I was told that you testified, that you had mentioned to her that there was ₱200 something offer. I guess it wasn't clear how many zeroes were attached to the 200. And I don't know if you were asked or if you had indicated her response to this. I know there was something like "Don't accept." And can you just for my information, repeat.

MR. NERI. She said "Don't accept it," Your Honor.

SEN. CAYETANO, (P). And was there something attached to that like… "But pursue with a project or go ahead and approve," something like that?

MR. NERI. As I said, I claim the right of executive privilege on further discussions on the…[196]

The **Senate resolutions**, **titles of the privilege speeches**, and **pending bills** that show the **legislative purpose of the investigation** are:

Senate resolutions and privilege speeches:

1. P.S. Res. No. 127: "Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and Other Pertinent Legislations."[197]
2. P.S. Res. No. 129: "Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of

[195] *Id*. at 114-115.

[196] *Id*. at 275-276.

[197] Comment, pp. 4-5.

Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will further Protect our National Sovereignty Security and Territorial Integrity."[198]

3. P.S. Res. No. 136: "Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government."[199]

4. P.S. Res. No. 144: "Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract."[200]

5. Privilege Speech of Senator Panfilo M. Lacson, delivered on September 11, 2007, entitled "Legacy of Corruption."[201]

6. Privilege Speech of Senator Miriam Defensor Santiago delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement."[202]

Pending bills:

1. Senate Bill No. 1793: "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes."[203]

2. Senate Bill No. 1794: "An Act Imposing Safeguards in Contracting Loans Classified as Official Development

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198 *Id*. at 5.

199 *Ibid*.

200 *Ibid*.

201 *Id*. at 6.

202 *Id*. at 5-6.

203 *Id*. at 6 and 24, Annex A.

Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes."[204]

3. Senate Bill No. 1317: "An Act Mandating Concurrence to International Agreements and Executive Agreements."[205]

It is self-evident that the **three assailed questions** are **pertinent** to the subject matter of the legislative investigation being undertaken by the respondent Senate Committees. More than the **Arnault** standards, the questions to petitioner have **direct relation not only to the subject of the inquiry, but also to the pending bills thereat.**

The three assailed questions seek information on how and why the NBN-ZTE contract — an international agreement embodying a foreign loan for the undertaking of the NBN Project — was consummated. The three questions are **pertinent to at least three subject matters of the Senate inquiry**: (1) possible anomalies in the consummation of the NBN-ZTE Contract in relation to the Build-Operate-Transfer Law and other laws (P.S. Res. No. 127); (2) national security implications of awarding the NBN Project to ZTE, a foreign-owned corporation (P.S. Res. No. 129); and (3) legal and economic justification of the NBN Project (P.S. Res. No. 136).

The three questions are **also pertinent to pending legislation in the Senate**, namely: (1) the subjection of international agreements involving funds for the procurement of infrastructure projects, goods and consulting services to Philippine procurement laws (Senate Bill No. 1793);[206] (2) the imposition of safeguards

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[204] *Id*. at 7 and 24, Annex B.

[205] *Id*. at 2, 24-125, Annex C.

[206] An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes.

in the contracting of loans classified under Official Development Assistance (Senate Bill No. 1794);[207] and (3) the concurrence of the Senate in international and executive agreements (Senate Bill No. 1317).[208]

The second inquiry relates to whether there is an effective substitute for the information sought. There is none. The three questions demand information on how the President **herself** weighed options[209] and the factors she considered in concluding the NBN-ZTE Contract. In particular, the information sought by the **first question** - "Whether the President followed up the (NBN) project" - cannot be effectively substituted as it refers to the **importance of the project to the President herself.**[210] This information relates to the inquiry

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[207] An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes.

[208] An Act Mandating Concurrence to International Agreements and Executive Agreements.

[209] In the Oral Argument on March 4, 2008, counsel for the petitioner revealed that included in the conversation of the President with petitioner that respondent Senate Committees seek to be disclosed is the weighing of options of the President, *viz*:

> **ATTY. BAUTISTA:** The subject of the communications from the setting which gathered (sic), they dealt with the scenario of what if the contract were scrapped, what if it were suspended, what if it were modified this way and that way. (p. 26)
>
> x x x x x x x x x
>
> **ASSOCIATE JUSTICE DE CASTRO:** …What was the subject matter of the Executive and policy decision-making process which you cite as one of the grounds to invoke Executive privilege?
>
> x x x x x x x x x
>
> **ATTY. BAUTISTA:** That's the subject matter, Your Honor. They were discussing possible alternatives, the scenario what would happen if you scrap it… (pp. 214-215)

[210] In the Oral Argument on March 4, 2008, counsel for the petitioner argued on the question of interest of the President in the NBN project in relation to the first question, *viz*:

on the legal and economic justification of the NBN project (P.S. Res. No. 136).

Similarly, the **second question** - "Were you dictated to prioritize the ZTE?" - seeks **information on the factors considered by the President herself in opting for NBN-ZTE, which involved a foreign loan.** Petitioner testified that the President had initially given him directives that **she preferred a no-loan, no-guarantee unsolicited Build-Operate-Transfer (BOT) arrangement,** which according to petitioner, was being offered by Amsterdam Holdings, Inc.[211] The information sought cannot be effectively substituted in the inquiry on the legal and economic justification of the NBN project (P.S. Res. No. 136), the inquiry on a possible violation of the BOT Law (P.S. Res. No. 127); and in the crafting of pending bills, namely, Senate Bill No. 1793 tightening procurement processes and Senate Bill No. 1794 imposing safeguards on contracting foreign loans.

CHIEF JUSTICE PUNO: Let us be more specific. Chilling effect, that is a conclusion. The first question is, whether the President followed up the NBN Project. If that question is asked from petitioner Neri, and he answers the question, will that seriously affect the way the Chief Executive will exercise the powers and the privileges of the Office?

ATTY. BAUTISTA: Well, if the answer to that question were in the affirmative, then it would imply, Your Honor, that the President has some undue interest in the contract.

CHIEF JUSTICE PUNO: The President may have interest, but not necessarily undue interest.

ATTY. BAUTISTA: Well, but in the atmosphere that we are in, where there is already an accusatory mood of the public, that kind of information is going to be harmful to the President.

CHIEF JUSTICE PUNO: When you say accusatory, that is just your impression?

ATTY. BAUTISTA: Yes, Your Honor, but I think it's a normal and justified impression from—I am not oblivious to what goes on, Your Honor.

CHIEF JUSTICE PUNO: But that is your impression?

ATTY. BAUTISTA: Yes, Your Honor. (pp. 299-300)

[211] TSN, Senate Hearing on NBN-ZTE Contract, September 26, 2007, p. 66.

The information sought by the **third question** - "Whether the President said to go ahead and approve the project after being told about the alleged bribe?" - cannot be effectively substituted for the same reasons discussed on both the first and second questions. In fine, all three disputed questions seek information **for which there is no effective substitute.**

In the Oral Argument held on March 4, 2008, petitioner, through counsel, argued that in propounding the three questions, **respondent Senate Committees were seeking** to establish the culpability of the President for alleged anomalies attending the consummation of the NBN-ZTE Contract. Counsel, however, contended that in invoking executive privilege, **the President is not hiding any crime**.[212] The short answer to petitioner's argument is that the **motive** of respondent Senate Committees in conducting their investigation and propounding their questions is beyond the purview of the Court's power of judicial review. So long as the questions are **pertinent** and there is **no effective substitute** for the information sought, the respondent Senate Committees should be deemed to have **hurdled the evidentiary standards to prove the specific need** for the information sought.

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[212] In the Oral Argument on March 4, 2008, counsel for petitioner argued on this point, *viz*:

> **ATTY. BAUTISTA**: First, on page 2 of their Comment they said that there is information which Neri refuses to disclose which may reveal her – meaning, the President's participation in the anomalous National Broadband Project, no such thing, Your Honor. Page 27 of their Comment, there is a mention that the invocation of the privilege is to protect criminal activities like the bribery allegations of unprecedented magnitude involved in the controversial NBM Project. No such intent, Your Honor, the bribery he mentioned it - he said Chairman Abalos – "Sec, may Two Hundred *ka dito*." And what did the President say – he said - do not accept it, that is all – he did not say that the President do not accept it but ask for more and have it split, no such thing Your Honor these are all speculative. (pp. 11-12)

In the 1957 case ***Watkins v. United States***,[213] as afore-discussed**,** the U.S. Supreme Court held that the power to investigate encompasses everything that concerns the administration of existing laws, as well as proposed or possibly needed statutes.[214] It further ruled that the **improper motives** of members of congressional investigating committees will not vitiate an investigation instituted by a House of Congress if that assembly's legislative purpose is being served by the work of the committee.[215]

2) The second aspect: balancing the conflicting constitutional functions of the President and the Senate using the function impairment test

The second aspect involves a balancing of the constitutional functions between the contending branches of government, *i.e.*, the President and the Senate. The court should determine whether disclosure of the disputed information **impairs the President's ability to perform her constitutional** duties more than disclosure would **impair Congress's ability to perform its constitutional functions.**[216] The balancing should result in the promotion of the public interest.

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[213] 354 U.S. 178 (1957), pp. 194-195.

[214] *Id*. at 187.

[215] *Id*. at 178.

[216] Miller, R., "*Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*," 81 Minnesota Law Review, February 1997, 631, 684-685 citing *Mistretta v. United States*, 488 U.S. 361, 384-97 (1989) (upholding the Sentencing Guidelines promulgated by the United States Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (upholding provisions of the Ethics in Government Act); *Nixon v. Administrator of Gen. Services*., 433 U.S. 425, 441-46 (1977) (upholding the Presidential Records and Materials Preservation Act because the Act is not "unduly disruptive of the Executive Branch"); cf. *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) (suggesting that formalism should be applied "[w]here a power has been committed to a particular branch of the Government in the text of the Constitution ... [*i.e*.,] where the Constitution draws a clear line").

First, we assess whether nondisclosure of the information sought will seriously impair the performance of the constitutional function of the Senate to legislate. In their Comment, respondent Senate Committees assert that "there is an urgent need for remedial legislation to regulate the obtention (sic) and negotiation of official development assisted (ODA) projects because these have become rich source of 'commissions' secretly pocketed by high executive officials."

It cannot be successfully disputed that the information sought from the petitioner relative to the NBN Project is essential to the proposed amendments to the Government Procurement Reform Act and Official Development Assistance Act to enable Congress to plug the loopholes in these statutes and prevent financial drain on our Treasury.[217] Respondent Senate Committees well point out that Senate Bill No. 1793, Senate Bill No. 1794, and Senate Bill No. 1317 will be crafted on the basis of the information being sought from petitioner Neri, *viz*:

> Without the testimony of Petitioner, Respondent Committees are effectively **denied of their right to access to any and all kinds of useful information** and consequently, their **right to intelligently craft and propose laws to remedy** what is called **"dysfunctional procurement system of the government."** Respondents are **hampered in intelligently studying and proposing what Congress should include in the proposed bill to include "executive agreements" for Senate concurrence**, which agreements **can be used by the Executive to circumvent the requirement of public bidding** in the existing Government Procurement Reform Act (R.A. 9184). (*emphasis supplied*)[218]

In the Oral Argument held on March 4, 2008, counsel for respondent Senate Committees bolstered the claim that nondisclosure will seriously impair the functions of the respondent Senate Committees, *viz*:

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[217] Comment, p. 25.

[218] *Id*. at 26.

CHIEF JUSTICE PUNO:

Mr. Counsel, may I go back to the case of *U.S. vs. Nixon* which used the functional impairment approach.

ATTY. AGABIN:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

Is it not true that using this approach, there is the presumption in favor of the President's generalized interest in the confidentiality of his or her communication. I underscore the words generalized interest.

ATTY. AGABIN:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

Now, you seek this approach, let me ask you the sam question that I asked to the other counsel, Atty. Bautista. Reading the letter of Secretary Ermita it would seem that the Office of the President is invoking the doctrine of Executive Privilege only on not (sic) three questions.

ATTY. AGABIN:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

So, can you tell the Court how critical are these questions to the lawmaking function of the Senate. For instance, **question Number 1, whether the President followed up the NBN project**. According to the other counsel, this question has already been asked, is that correct?

ATTY. AGABIN:

Well, the question has been asked but it was not answered, Your Honor.

CHIEF JUSTICE PUNO:

Yes. But my question is how critical is this to the lawmaking function of the Senate?

ATTY. AGABIN:

I believe it is critical, Your Honor.

CHIEF JUSTICE PUNO:

Why?

ATTY. AGABIN:

For instance, **with respect to the proposed Bill of Senator Miriam Santiago, she would like to endorse a Bill to include Executive Agreements to be subject to ratification by the Senate in addition to treaties**, Your Honor.

CHIEF JUSTICE PUNO:

May not the Senate craft a Bill, assuming that the President followed up the NBN project? May not the Senate proceed from that assumption?

ATTY. AGABIN:

Well, it can proceed from that assumption, Your Honor, except that **there would be no factual basis for the Senate to say that indeed Executive Agreements had been used as a device to circumventing the Procurement Law**.

CHIEF JUSTICE PUNO:

But the question is just following it up.

ATTY. AGABIN:

I believe that may be the initial question, Your Honor, because if we look at this problem in its factual setting as counsel for petitioner has observed, there are intimations of a bribery scandal involving high government officials.

CHIEF JUSTICE PUNO:

Again, about the **second question**, "were you dictated to **prioritize this ZTE**," is that critical to the lawmaking function of the Senate? Will it result to the failure of the Senate to cobble a Bill without this question?

ATTY. AGABIN:

I think it is critical to **lay the factual foundations for a proposed amendment to the Procurement Law**, Your Honor, because the

petitioner had already testified that he was offered a ₱200 Million bribe, so if he was offered a ₱200 Million bribe it is possible that other government officials who had something to do with the approval of that contract would be offered the same amount of bribes.

CHIEF JUSTICE PUNO:

Again, that is **speculative**.

ATTY. AGABIN:

That is why they want to continue with the investigation, Your Honor.

CHIEF JUSTICE PUNO:

How about the **third question**, "whether the President said to **go ahead and approve the project after being told about the alleged bribe."** How critical is that to the lawmaking function of the Senate? And the question is may they craft a Bill, a remedial law, without forcing petitioner Neri to answer this question?

ATTY. AGABIN:

Well, they can craft it, Your Honor, based on mere speculation. And **sound legislation requires that a proposed Bill should have some basis in fact**.

CHIEF JUSTICE PUNO:

It seems to me that you say that this is critical.

ATTY. AGABIN:

Yes, Your Honor. (*emphasis supplied*)[219]

The above exchange shows how petitioner's refusal to answer the three questions will seriously impair the Senate's function of **crafting specific legislation** pertaining to procurement and concurring in executive agreements **based on facts and not speculation**.

To complete the balancing of competing interests, the Court should also assess whether disclosure will significantly impair the President's performance of her functions, especially the

[219] TSN, Oral Argument, March 4, 2008, pp. 416-422.

duty to execute the laws of the land. In the Oral Argument held on March 4, 2008, petitioner, through counsel, was asked to show how the performance of the functions of the President would be adversely affected if petitioner is compelled to answer the three assailed questions, *viz:*

CHIEF JUSTICE PUNO:

In the functional test, the thrust is to balance what you said are the benefits versus the harm on the two branches of government making conflicting claims of their powers and privileges. Now, using that functional test, please tell the Court how the Office of the President will be seriously hampered in the performance of its powers and duties, if petitioner Neri would be allowed to appear in the Senate and answer the three questions that he does not want to answer?

ATTY. BAUTISTA:

Your Honor, the effect, the chilling effect on the President, she will be scared to talk to her advisers any longer, because for fear that anything that the conversation that she has with them will be opened to examination and scrutiny by third parties, and that includes Congress. And (interrupted)

CHIEF JUSTICE PUNO:

Let us be more specific. Chilling effect, that is a conclusion. The **first question** is, "whether the **President followed up the NBN Projec**t." If that question is asked from petitioner Neri, and he answers the question, will that seriously affect the way the Chief Executive will exercise the powers and the privileges of the Office?

ATTY. BAUTISTA:

Well, **if the answer to that question were in the affirmative**, then it would imply, Your Honor, that the President has some **undue interest in the contract.**

CHIEF JUSTICE PUNO:

The President may have interest, but **not necessarily undue interest.**

ATTY. BAUTISTA:

Well, but in the atmosphere that we are in, where there is already an **accusatory mood of the public**, that kind of information is going to be harmful to the President.

CHIEF JUSTICE PUNO:

When you say **accusatory, that is just your impression**?

ATTY. BAUTISTA:

Yes, Your Honor, but I think it's a normal and justified impression from—I am not oblivious to what goes on, Your Honor.

CHIEF JUSTICE PUNO:

But that is your impression?

ATTY. BAUTISTA:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

How about the **second question, which reads, "were you dictated to prioritize the ZTE,"** again, if this question is asked to petitioner Neri, and (he) responds to it…

ATTY. BAUTISTA:

In the affirmative?

CHIEF JUSTICE PUNO:

I don't know how he will respond.

ATTY. BAUTISTA:

Yes.

CHIEF JUSTICE PUNO:

How will that affect the functions of the President, will that debilitate the Office of the President?

ATTY. BAUTISTA:

Very much so, Your Honor.

CHIEF JUSTICE PUNO:

Why? Why?

ATTY. BAUTISTA:

Because there are lists of projects, which have to be—which require financing from abroad. And if the President is known or it's made

public that she preferred this one project to the other, then she **opens herself to condemnation by those who were favoring the other projects which were not prioritized.**

CHIEF JUSTICE PUNO:

Is this not really an important project, one that is supposed to benefit the Filipino people? So if the President, says, you **prioritize this project**, **why should the heavens fall on the Office of the President**?

ATTY. BAUTISTA:

Well, there are also other projects which have, which are supported by a lot of people. Like the Cyber Ed project, the Angat Water Dam project. If she is known that she gave low priority to these other projects, she **opens herself to media and public criticism, not only media but also in rallies**, Your Honor.

CHIEF JUSTICE PUNO:

So, again, **that is just your personal impression**?

ATTY. BAUTISTA:

Well**, I cannot avoid it,** Your Honor.

CHIEF JUSTICE PUNO:

How about the **third question**, "whether the President said to go ahead and approve the project after being told the alleged bribe." Again, how will that affect the functions of the President using that balancing test of functions?

ATTY. BAUTISTA:

Well, **if the answer is in the affirmative, then it will be shown, number one, that she has undue interest** in this thing, because she sits already on the ICT and the Board.

CHIEF JUSTICE PUNO:

Again, when you say **undue interest, that is your personal opinion.**

ATTY. BAUTISTA:

Yes, Your Honor.

CHIEF JUSTICE PUNO:

It may be an interest, but it **may not be undue.**

ATTY. BAUTISTA:

But in the climate, present climate of public opinion as whipped up by people that will be the **impression,** Your Honor. She does not operate in a vacuum. She has to take into account what is going on.

CHIEF JUSTICE PUNO:

That is your **personal opinion** again?

ATTY. BAUTISTA:

Yes, Your Honor. (*emphasis supplied*)[220]

From the above exchange, it is clear that petitioner's invocation of the Presidential communications privilege is based on a **general claim** of a chilling effect on the President's performance of her functions if the three questions are answered. The general claim is unsubstantiated by specific proofs that the performance of the functions of the President will be adversely affected in a significant degree. Indeed, petitioner's counsel can only manage to submit his **own impression and personal opinion on the subject.**

Summing it up, on one end of the balancing scale is the President's **generalized** claim of confidentiality of her communications, and petitioner's failure to justify a claim that his conversations with the President involve diplomatic, military and national security secrets. We accord Presidential communications a presumptive privilege but the strength of this **privilege is weakened by the fact that the subject of the communication involves a contract with a foreign loan. The power to contract foreign loans** is a power not exclusively vested in the President, but is shared with the Monetary Board (Central Bank). We also consider the **chilling effect** which may result from the disclosure of the information sought from petitioner Neri but the chilling effect is **diminished** by the **nature**

[220] *Id*. at 297-306.

of the information sought, which is narrow, limited as it is to the three assailed questions. We take judicial notice also of the fact that in a Senate inquiry, there are **safeguards** against an indiscriminate conduct of investigation.

On the other end of the balancing scale is the **respondent Senate Committees' specific and demonstrated need** for the Presidential communications in reply to the three disputed questions. Indisputably, these questions are **pertinent** to the subject matter of their investigation, and there is **no effective substitute** for the information coming from a reply to these questions. In the absence of the information they seek, the Senate Committees' **function of intelligently enacting laws** "to remedy what is called 'dysfunctional procurement system of the government'" and to possibly include "executive agreements for Senate concurrence" to prevent them from being used to circumvent the requirement of public bidding in the existing Government Procurement Reform Act **cannot but be seriously impaired**. With all these considerations factored into the equation, **we have to strike the balance in favor of the respondent Senate Committees**[221] **and compel petitioner Neri to answer the three disputed questions.**

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[221] There is no case involving Presidential communications privilege invoked in a legislative inquiry that has reached the US Supreme Court. The case that comes closest to the facts of the case at bar is ***Senate Select Committee v. Nixon*** (498 F.2d 725 [1974]) decided by the Court of Appeals of the District of Columbia Circuit where it **laid down the "demonstrably critical test" to overcome the presumption of confidentiality of presidential communication in a Senate investigation.** In this case, the Senate Committee to investigate wrongdoing by the Nixon Administration subpoenaed taped conversations of President Nixon. The D.C. Circuit Appellate Court ruled that the Committee's showing of need for the subpoenaed tapes "must depend solely on whether the subpoenaed evidence is **demonstrably critical** to the responsible fulfillment of the Committee's functions." The subpoena did not pass the test because as observed by the court, there were two possible reasons why the Committee needed the tapes — to expose corruption in the executive branch and to determine whether new legislation was needed. The power of the Senate Committee to investigate wrongdoing by the Nixon Administration did not provide sufficient justification because the House Judiciary Committee was conducting an impeachment inquiry at the same time and already had copies of the

C. Presidential Communications Privilege and Wrongdoing

Respondent Senate Committees contend that executive privilege cannot be used **to hide a wrongdoing.**[222] A brief discussion of the contention will put it in its proper perspective.

Throughout its history — beginning with its use in 1792 by U.S. President George Washington to withhold information from a committee of Congress investigating a military expedition headed by General Arthur St. Clair against Native Americans[223] — **executive privilege has never justified the concealment of a wrongdoing.** As afore-discussed, the first U.S. President, Washington, well understood the crucial role he would play in setting precedents, and so he said that he "devoutly wished on my part that these precedents may be fixed in **true principles**."[224] (*emphasis supplied*) President Washington established that he had the right to **withhold information if disclosure would injure the public, but he did not believe that it was appropriate to withhold embarrassing or politically damaging information.**[225]

Two centuries thence, the principle that executive privilege cannot hide a wrongdoing remains unchanged.

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subpoenaed tapes. The court, therefore, concluded that the Watergate Committee's need for the subpoenaed tapes to investigate President Nixon was "merely cumulative." The court also assessed that the Committee did not need the tapes to educate itself for it to recommend legislation. Noticeably similar or at least consistent with the "function impairment approach," the "demonstrably critical test" of the D.C. Circuit Court of Appeals also weighs how nondisclosure will impair the performance of the function of the Senate Committee. Thus, subjecting the case at bar to the "demonstrably critical test," the Court should arrive at the same result using the "function impairment test."

[222] Comment, p. 27.

[223] Doherty, M., *supra* at 801.

[224] Rozell, M., *supra* note 77 at 541, 555-556, citing Letter from George Washington to James Madison (May 5, 1789), *in* 30 The Writings of George Washington, 1745-1799, at 311 (John Fitzpatrick ed., 1931-1944).

[225] *Id*. at 541, citing Raoul Berger, executive Privilege: A Constitutional Myth (1974).

While very few cases on the Presidential communications privilege have reached the U.S. Supreme Court, the District of Columbia Court of Appeals, being the appellate court in the district where the federal government sits has been more visible in this landscape. In several of its prominent decisions on the Presidential communications privilege, the D.C. Court of Appeals reiterated the rule that executive privilege cannot cover up wrongdoing. In ***Nixon v. Sirica***, the D.C. Circuit Court of Appeals rejected the contention of President Nixon that executive privilege was absolute and held that, if it were so, "the head of an executive department would have the power on his own say so to **cover up all evidence of fraud and corruption** when a federal court or grand jury was investigating malfeasance in office, and **this is not the law**."[226] (*emphasis supplied*) In ***Senate Select Committee v. Nixon*****,** the Appellate Court reiterated its pronouncement in **Sirica** that the "Executive **cannot**…invoke a general confidentiality privilege to **shield its officials and employees** from investigations by the proper governmental institutions into **possible criminal wrongdoing**."[227]

Nonetheless, while confirming the time-honored principle that executive privilege is not a shield against an investigation of wrongdoing, the D.C. Circuit Court of Appeals, in both **Sirica** and **Senate Select Committee**, also made it clear that **this time-honored principle was not the sword that would pierce the Presidential communications privilege;** it was instead the **showing of a need for information by an institution to enable it to perform its constitutional functions**.

In **Sirica**, the Appellate Court held that "(w)e emphasize that the grand jury's **showing of need in no sense relied on**

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[226] *Nixon v. Sirica*, 487 F.2d 700, p. 717, citing *Committee for Nuclear Responsibility v. Seaborg*, 149 U.S.App.D.C. 385, 391; 463 F.2d 788, 794 (1971).

[227] 498 F.2d 725, 731 (1974), citing *Committee for Nuclear Responsibility v. Seaborg,* 149 U.S.App.D.C. 385, 463 F.2d 788, 794 (1971). See *Gravel v. United States,* 408 U.S. 606, 627, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972).

any evidence that the President was involved in, or even aware of, any alleged criminal activity. We freely assume, for purposes of this opinion, that the President was engaged in the performance of his constitutional duty. Nonetheless, we hold that the District Court may order disclosure of all portions of the tapes **relevant to matters within the proper scope of the grand jury's investigations**, unless the Court judges that the public interest served by nondisclosure of *particular* statements or information outweighs the **need for that information demonstrated by the grand jury**." (*emphasis supplied*)[228]

In **Senate Select Committee**, the court reiterated its ruling in **Sirica**, *viz*: "…under ***Nixon v. Sirica***, the **showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal,**[229] **but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment.** Here also **our task requires and our decision implies no judgment whatever concerning possible presidential involvement in culpable activity**. On the contrary, we think the **sufficiency of the Committee's showing must depend solely on whether the subpoenaed evidence is demonstrably critical to the responsible fulfillment of the Committee's functions**."[230] (*emphasis supplied*)

In ***U.S. v. Nixon***, the U.S. Supreme Court ruled that the Special Prosecutor had demonstrated a specific need for the Presidential communications without mentioning that the subject tapes had been subpoenaed for criminal proceedings against former Presidential assistants charged with committing criminal conspiracy while in office. This omission was also observed by the D.C. Circuit appellate court in the 1997 case **In re**

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[228] *Nixon v. Sirica* 487 F.2d 700 at 719.

[229] 487 F.2d at 718.

[230] *Nixon v. Sirica*, 487 F.2d 700 at 731.

Sealed Case (Espy),[231] in which the court ruled that "a party seeking to **overcome the presidential privilege** seemingly must always **provide a focused demonstration of need, even when there are allegations of misconduct by high-level officials**. In holding that the Watergate Special Prosecutor had provided a sufficient showing of evidentiary need to obtain tapes of President Nixon's conversations, the **U.S. Supreme Court made no mention of the fact that the tapes were sought for use in a trial** of former Presidential assistants charged with engaging in a **criminal conspiracy** while in office."[232]

That a wrongdoing — which the Presidential communications privilege should not shield — has been committed is an allegation to be proved with the required evidence in a proper forum. The Presidential communications privilege can be pierced by a showing of a specific need of the party seeking the Presidential information in order to perform its functions mandated by the Constitution. It is after the privilege has been pierced by this demonstrated need that one can discover if the privilege was used to shield a wrongdoing, or if there is no wrongdoing after all. We should not put the cart before the horse.

D. Negotiations and Accommodations

Before putting a close to the discussion on test and procedure to determine the validity of the invocation of executive privilege, it is necessary to make short shrift of the matter of negotiations and accommodation as a procedure for resolving disputes that spawned the case at bar.

In the U.S. where we have derived the doctrine of executive privilege, most congressional requests for information from the executive branch are handled through an informal process of accommodation and negotiation, away from the judicial portals. **The success of the accommodation process** hinges on the **balance of interests between Congress and the executive**

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[231] 121 F.3d 729 (1997).

[232] *Id*. at 746 (1997).

branch. The more diffused the interest of the executive branch in withholding the disputed information, the more likely that this interest will be overcome by a specifically articulated congressional need related to the effective performance of a legislative function. Conversely, the less specific the congressional need for the information and the more definite the need for secrecy, the more likely that the dispute will be resolved in favor of the executive.[233] In arriving at accommodations, what is "required is **not simply an exchange of concessions or a test of political strength.** It is an **obligation of each branch** to make a **principled effort to acknowledge,** and if possible to **meet, the legitimate needs of the other branch."**[234]

In ***Cheney v. D.C. District Court***, the U.S. Supreme Court cautioned that executive privilege is an extraordinary assertion of power "not to be lightly invoked."[235] Once it is invoked, coequal branches of government are set on a collision course. These "occasion(s) for constitutional confrontation between the two branches" should be avoided whenever possible.[236] Once a judicial determination becomes inevitable, the courts should facilitate negotiations and settlement as did the court in ***U.S. v. American Telephone & Telegraph Co.***[237] In that case, the D.C. Circuit Court of Appeals remanded the case for negotiation of a settlement, which, however, proved unavailing.

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[233] Iraola, R., *supra* at 487.

[234] *Id*. at 1586 (August 2002), footnote 161, citing 5 Op. Off. Legal Counsel 27, 31 (1981); see also 10 Op. Off. Legal Counsel 68, 92 (1986) ("[I]n cases in which Congress has a legitimate need for information that will help it legislate and the Executive Branch has a legitimate, constitutionally recognized need to keep information confidential, the courts have referred to the obligations of each branch to accommodate the legitimate needs of the other.") (citing *United States v. AT&T,* 567 F.2d 121, 130 (D.C. Cir. 1977).

[235] *Cheney v. D.C. District Court*, 542 U.S. 367 (2004), citing *United States v. Reynolds,* 345 U.S. 1, 7, 73 S.Ct. 528, 97 L.Ed. 727 (1953).

[236] *Id*. at 367, citing *U.S. v. Nixon*, 418 U.S. 683 at 692.

[237] 567 F.2d 121, 130 (D.C. Cir. 1977).

The appellate court then outlined a procedure under which the Congressional subcommittee was granted limited access to the documents requested, with any resulting disputes surrounding the accuracy of redacted documents to be resolved by the district court *in camera*.

In facilitating a settlement, the court should consider intermediate positions, such as ordering the executive to produce document summaries, indices, representative samples, or redacted documents; or allowing Congressional committee members to view documents but forbidding members from obtaining physical custody of materials or from taking notes.[238]

The lesson is that collisions in the exercise of constitutional powers should be avoided in view of their destabilizing effects. Reasonable efforts at negotiation and accommodation ought to be exerted, for when they succeed, constitutional crises are avoided.

V. Validity of the Order of Arrest

Finally, we come to the **last issue** delineated in the Oral Argument last March 4, 2008: whether respondent Senate Committees gravely abused their discretion in ordering the arrest of petitioner for noncompliance with the subpoena. The contempt power of the respondent Senate Committees is settled in **Arnault** and conceded by petitioner.[239] What are disputed in the case at bar are the validity of the Senate Rules of Procedure Governing Inquiries in Aid of Legislation for lack of re-publication and the alleged arbitrary exercise of the contempt power.

The Senate Rules of Procedure Governing Inquiries in Aid of Legislation is assailed as invalid allegedly for failure to be re-published. It is contended that the said rules should be re-published as the Senate is not a continuing body, its membership changing every three years. The assumption is that there is a

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[238] Miller, R., "*Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*," 81 Minnesota Law Review, February 1997, 631.

[239] TSN, Oral Argument, March 4, 2008, p. 13.

new Senate after every such election and it should not be bound by the rules of the old. We need not grapple with this contentious issue which has far reaching consequences to the Senate. The precedents and practice of the Senate should instead guide the Court in resolving the issue. For one, the Senators have traditionally considered the Senate as a continuing body despite the change of a part of its membership after an election. It is for this reason that the Senate does not cease its labor during the period of such election. Its various Committees continue their work as its officials and employees. For another, the Rules of the Senate is silent on the matter of re-publication. Section 135, Rule L of the Rules of the Senate provides that, "if there is no Rule applicable to a specific case, the precedents of the Legislative Department of the Philippines shall be resorted to xxx." It appears that by tradition, custom and practice, the Senate does not re-publish its rules especially when the same has not undergone any material change. In other words, existing rules which have already undergone publication should be deemed adopted and continued by the Senate regardless of the election of some new members. Their re-publication is thus an unnecessary ritual. We are dealing with internal rules of a co-equal branch of government and unless they clearly violate the Constitution, prudence dictates we should be wary of striking them down. The consequences of striking down the rules involved in the case at bar may spawn serious and unintended problems for the Senate.

We shall now discuss the substantive aspect of the contempt power. This involves a determination of the purpose of the Senate inquiry and an assessment of the pertinence of the questions propounded to a witness.

To reiterate, there is no doubt about the **legislative purpose** of the subject Senate inquiry. It is evident in the title of the resolutions that spawned the inquiry. **P.S. Res. No. 127**[240]

[240] Resolution Directing the Blue Ribbon Committee and the Committee on Trade and Industry to Investigate, in Aid of Legislation, the Circumstances Leading to the Approval of the Broadband Contract with ZTE and the Role Played by the Officials Concerned in Getting it Consummated and to

and the privilege speech of Senator Panfilo Lacson[241] seek an investigation into the circumstances leading to the approval of the NBN-ZTE Contract and to make persons accountable for any anomaly in relation thereto. That the subject matter of the investigation is the expenditure of public funds in an allegedly anomalous government contract leaves no doubt that the investigation comes within the pale of the Senate's power of investigation in aid of legislation.

Likewise, the following are all within the purview of the Senate's investigative power: subject matter of **P.S. Res. No. 129** concerning the national sovereignty, security and territorial integrity implications of the NBN-ZTE Contract,[242] of **P.S. Res. No. 136** regarding the legal and economic justification of the National Broadband Network (NBN) project of the government,[243] of **P.S. Res. No. 144** on the cancellation of the ZTE Contract,[244] and the **Privilege Speech of Senator Miriam Defensor Santiago** on international agreements in constitutional law.[245] The Court also takes note

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Make Recommendations to Hale to the Courts of Law the Persons Responsible for any Anomaly in Connection therewith, if any, in the BOT Law and other Pertinent Legislations. (Comment, pp. 4-5)

[241] Delivered on September 11, 2007, entitled "Legacy of Corruption"; Comment, p. 5.

[242] Resolution Directing the Committee on National Defense and Security to Conduct an Inquiry in Aid of Legislation into the National Security Implications of Awarding the National Broadband Network Contract to the Chinese Firm Zhong Xing Telecommunications Equipment Company Limited (ZTE Corporation) with the End in View of Providing Remedial Legislation that Will Further Protect Our National Sovereignty Security and Territorial Integrity; Comment, p. 5.

[243] Resolution Directing the Proper Senate Committee to Conduct an Inquiry, in Aid of Legislation, on the Legal and Economic Justification of the National Broadband Network (NBN) Project of the Government; Comment, pp. 5-6.

[244] Resolution Urging President Gloria Macapagal Arroyo to Direct the Cancellation of the ZTE Contract; Comment, p. 6.

[245] Delivered on November 24, 2007, entitled "International Agreements in Constitutional Law: The Suspended RP-China (ZTE) Loan Agreement"; Comment, p. 6.

of the fact that there are three pending bills in relation to the subject inquiry: **Senate Bill No. 1793**,[246] **Senate Bill No. 1794**[247] and **Senate Bill No. 1317**.[248] It is not difficult to conclude that the subject inquiry is within the power of the Senate to conduct and that the respondent Senate Committees have been given the authority to so conduct, the inquiry.

We now turn to the pertinence of the questions propounded, which the witness refused to answer. The subpoena *ad testificandum* issued to petitioner states that he is "required to appear before the Committee on Accountability of Public Officers and Investigations (Blue Ribbon) of the Senate… testify under oath on what you know relative to the subject matter under inquiry by the said Committee." The subject matter of the inquiry was indicated in the heading of the subpoena, which stated the resolutions and privilege speeches that initiated the investigation. Respondent Senate Committees have yet to propound to petitioner Neri their questions on this subject matter; hence, he cannot conclude beforehand that these questions would not be pertinent and simply refuse to attend the hearing of November 20, 2007.

It is worth noting that the letter of Executive Secretary Ermita, signed "by Order of the President," merely **requested** that petitioner's testimony on November 20, 2007 on the NBN Contract be dispensed with, as he had exhaustively testified on the subject matter of the inquiry. Executive privilege was invoked only with respect to the three questions Neri refused

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[246] "An Act Subjecting Treaties, International or Executive Agreements Involving Funding in the Procurement of Infrastructure Projects, Goods, and Consulting Services to be Included in the Scope and Application of Philippine Procurement Laws, Amending for the Purpose, Republic Act No. 9184, Otherwise Known as the Government Procurement Reform Act, and for Other Purposes"; Comment, pp. 6-7; Annex A.

[247] "An Act Imposing Safeguards in Contracting Loans Classified as Official Development Assistance, Amending for the Purpose, Republic Act No. 8182, as Amended by Republic Act No. 8555, Otherwise Known as the Official Development Assistance Act of 1996, and for Other Purposes"; Comment, p. 7; Annex B.

[248] "An Act Mandating Concurrence to International Agreements and Executive Agreements"; Comment, p. 7; Annex C.

to answer in his testimony before respondent Senate Committees on September 26, 2007. But there is no basis for either petitioner or the Executive Secretary to assume that petitioner's further testimony will be limited only on the three disputed questions. Needless to state, **respondent Senate Committees have good reasons in citing Neri for contempt for failing to appear in the November 20, 2007 hearing**.

Next, we come to the **procedural aspect** of the power of the respondent Senate Committees to order petitioner's arrest. The question is whether the respondents followed their own rules in ordering petitioner's arrest.

The Order of arrest issued by respondent Senate Committees on January 30, 2008 states that it was issued "for failure to appear and testify in the Committees' **hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007**…AND for **failure to explain satisfactorily** why he should not be cited for contempt (**Neri letter of 29 November 2007**, herein attached)." The Order reads, *viz*:

ORDER

For failure to appear and testify in the Committees' hearing on Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007 and Tuesday, November 20, 2007, despite personal notice and a Subpoena *Ad Testificandum* sent to and received by him, which thereby delays, impedes and obstructs, as it has in fact delayed, impeded and obstructed the inquiry into the subject reported irregularities, AND for failure to explain satisfactorily why he should not be cited for contempt (Neri letter of 29 November 2007, herein attached) **ROMULO L. NERI** is hereby cited in contempt of this (sic) Committees and ordered arrested and detained in the Office of the Senate Sergeant-At-Arms until such time that he will appear and give his testimony.

The Sergeant-At-Arms is hereby directed to carry out and implement this Order and make a return hereof within twenty four (24) hours from its enforcement.

SO ORDERED.

Issued this 30th day of January, 2008 at the City of Pasay.[249]

The facts should not be obfuscated. The Order of arrest refers to several dates of hearing that petitioner failed to attend, for which he was ordered arrested, namely: **Tuesday, September 18, 2007; Thursday, September 20, 2007; Thursday, October 25, 2007; and Tuesday, November 20, 2007.** The "failure to explain satisfactorily (Neri letter of 29 November 2007)," however, refers only to the **November 20, 2007** hearing, as it was in reference to this particular date of hearing that respondent Senate Committees required petitioner to show cause why he should not be cited for contempt. This is clear from respondent Senate Committees' letter to petitioner dated November 22, 2007.[250] The records are bereft of any letter or order issued to petitioner by respondent Senate Committees for him to show cause why he should not be cited for contempt for failing to attend the hearings on **Tuesday, September 18, 2007; Thursday, September 20, 2007; and Thursday, October 25, 2007.**

We therefore examine the procedural validity of the issuance of the Order of arrest of petitioner for **his failure to attend the November 20, 2007 hearing after the respondent Senate Committees' finding that his explanation in his November 29, 2007 letter was unsatisfactory**.

Section 18 of the Senate Rules Governing Inquiries in Aid of Legislation provides, *viz*:

> Sec. 18. Contempt. - The Committee, **by a vote of a majority of all its members**, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate. Such witness may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn

[249] Supplemental Petition, Annex A.

[250] Petition, Annex A.

or to testify, or otherwise purge himself of that contempt. (*emphasis supplied*)

On March 17, 2008, the respondent Senate Committees submitted to the Court a document showing the composition of respondent Senate Committees, certified to be a true copy by the Deputy Secretary for Legislation, Atty. Adwin B. Bellen. Set forth below is the composition of each of the respondent Senate Committees, with an indication of whether the signature of a Senator appears on the Order of arrest,[251] *viz*:

1. Committee on Accountability of Public Officers and Investigations (17 members excluding 3 *ex-officio* members):

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[251] The January 30, 2008 Order of arrest shows that it was signed by the following Senators, *viz*:

Chairpersons:

1. Cayetano, Alan Peter
2. Roxas, MAR
3. Biazon, Rodolfo

Members:

4. Cayetano, Pia
5. Escudero, Francis
6. Honasan II, Gregorio Gringo
7. Aquino III, Benigno
8. Lacson, Panfilo
9. Legarda, Loren
10. Madrigal, M.A.
11. Pimentel, Jr., Aquilino

Ex-Officio Members:

12. Ejercito Estrada, Jinggoy
13. Pangilinan, Francis
14. Pimentel, Jr., Aquilino

Senate President:

15. Manuel Villar. (Supplemental Petition, Annex A)

Chairperson: Cayetano, Alan Peter - signed
Vice-Chairperson:

Members: Cayetano, Pia - signed
Defensor Santiago, Miriam
Enrile, Juan Ponce
Escudero, Francis - signed
Gordon, Richard
Honasan II, Gregorio Gringo - signed
Zubiri, Juan Miguel
Arroyo, Joker
Revilla, Jr., Ramon
Lapid, Manuel
Aquino III, Benigno - signed
Biazon, Rodolfo - signed
Lacson, Panfilo - signed
Legarda, Loren - signed
Madrigal, M.A. - signed
Trillanes IV, Antonio

Ex-Officio Members: Ejercito Estrada, Jinggoy - signed
Pangilinan, Francis - signed
Pimentel, Jr., Aquilino - signed

2. Committee on National Defense and Security (19 members excluding 2 *ex-officio* members)

Chairperson: Biazon, Rodolfo - signed
Vice-Chairperson:

Members: Angara, Edgardo
Zubiri, Juan Miguel
Cayetano, Alan Peter - signed
Enrile, Juan Ponce
Gordon, Richard
Cayetano, Pia - signed
Revilla, Jr., Ramon
Honasan II, Gregorio Gringo -signed
Escudero, Francis - signed
Lapid, Manuel
Defensor Santiago, Miriam
Arroyo, Joker

Aquino III, Benigno - signed
Lacson, Panfilo - signed
Legarda, Loren - signed
Madrigal, M.A. - signed
Pimentel, Jr. Aquilino - signed
Trillanes IV, Antonio

Ex-Officio Members: Ejercito Estrada, Jinggoy - signed
Pangilinan, Francis - signed

3. Committee on Trade and Commerce (9 members excluding 3 *ex-officio* members)

Chairperson: Roxas, MAR - signed
Vice-Chairperson:

Members: Cayetano, Pia - signed
Lapid, Manuel
Revilla, Jr., Ramon
Escudero, Francis - signed
Enrile, Juan Ponce
Gordon, Richard
Biazon, Rodolfo - signed
Madrigal, M.A.- signed

Ex-Officio Members: Ejercito Estrada, Jinggoy -signed
Pangilinan, Francis - signed
Pimentel, Jr., Aquilino - signed

Vis-a-vis the composition of respondent Senate Committees, the January 30, 2008 Order of arrest shows the satisfaction of the requirement of a majority vote of each of the respondent Senate Committees for the contempt of witness under Sec. 18 of the Rules Governing Inquiries in Aid of Legislation, *viz*:

1. Committee on Accountability of Public Officers and Investigations: nine (9) out of seventeen (17)
2. Committee on National Defense and Security: ten (10) out of nineteen (19)
3. Committee on Trade and Commerce: five (5) out of nine (9)

Even assuming *arguendo* that *ex-officio* members are counted in the determination of a majority vote, the majority requirement for each of the respondent Senate Committees was still satisfied, as all the *ex-officio* members signed the Order of arrest.

The substantive and procedural requirements for issuing an Order of arrest having been met, the respondent Senate Committees did not abuse their discretion in issuing the January 30, 2008 Order of arrest of petitioner.

Epilogue

Article VI, Section 21 of the 1987 Constitution provides for the power of the legislature to conduct inquiries in aid of legislation.[252] It explicitly provides respect for the constitutional rights of persons appearing in such inquiries. Officials appearing in legislative inquiries in representation of coequal branches of government carry with them not only the protective cover of their individual rights, but also the shield of their prerogatives – including executive privilege — flowing from the power of the branch they represent. These powers of the branches of government are independent, but they have been fashioned to work interdependently. When there is abuse of power by any of the branches, there is no victor, for a distortion of power works to the detriment of the whole government, which is constitutionally designed to function as an organic whole.

I vote to dismiss the petition.

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[252] Sec. 21. The Senate or the House of Representatives or any of its respective committees may conduct inquiries in aid of legislation in accordance with its duly published rules of procedure. The rights of persons appearing in or affected by such inquiries shall be respected.

DISSENTING OPINION

CARPIO MORALES, *J.*:

Executive Order No. 464[1] (E.O. 464) practically became a dead letter upon the promulgation of *Senate v. Ermita*,[2] and was formally interred by Memorandum Circular No. 151.[3] Its ashes have since fertilized the legal landscape on presidential secrecy.

E.O. 464 allowed executive officials not to attend investigations conducted by Congress in aid of legislation by the mere invocation of that Order, without having to explain the specific reasons why the information being requested of them may not be disclosed. When, however, the Court in *Senate v. Ermita*[4] interpreted Section 1 of that Order as applying only to the "question period" and Section 2(a) as merely a non-binding expression of opinion, and invalidated Sections 2(b) and 3 for they allowed executive officials not to attend legislative investigations without need of an explicit claim of executive privilege, E.O. 464 became powerless as a shield against investigations in aid of legislation.

Thenceforth, to justify withholding information which, in their judgment, may be validly kept confidential, executive officials have to obtain from the President, or the Executive Secretary "by order of the President," a claim of executive privilege which states the grounds on which it is based.

The present petition for *certiorari* involves one such claim of executive privilege, the validity of which claim the Court is now called upon to determine.

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[1] ENSURING OBSERVANCE OF THE PRINCIPLE OF SEPARATION OF POWERS, ADHERENCE TO THE RULE ON EXECUTIVE PRIVILEGE AND RESPECT FOR THE RIGHTS OF PUBLIC OFFICIALS APPEARING IN LEGISLATIVE INQUIRIES IN AID OF LEGISLATION UNDER THE CONSTITUTION, AND FOR OTHER PURPOSES.

[2] G.R. No. 169777, April 20, 2006, 488 SCRA 1.

[3] Issued on March 6, 2008.

[4] *Supra* note 2.

Since September 2007, respondents Senate Committees on Accountability of Public Officers and Investigations (Blue Ribbon), on Trade and Commerce, and on National Defense and Security (Senate Committees) have been holding investigatory hearings, in aid of legislation, on the National Broadband Network (NBN) – Zhong Xing Telecommunications Equipment Ltd.[5] (ZTE) Contract.

On September 26, 2007, petitioner, Romulo Neri, former Director General of the National Economic and Development Authority, testified before the Senate Committees, during which he, invoking executive privilege, refused to answer questions on what he and the President discussed on the NBN-ZTE Project after the President told him not to accept what he perceived to have been a bribe offer from former COMELEC Chairman Benjamin Abalos.

Asked by senators on whether he had a written order from the President to invoke executive privilege, petitioner answered that one was being prepared. The hearing ended without him divulging any further information on his conversations with the President following his disclosure of the perceived bribe offer of Chairman Abalos.

Respondent Senate Committees then issued a subpoena *ad testificandum* dated November 13, 2007 for petitioner to appear in another hearing to be held on November 20, 2007 (November 20 hearing). In a November 15, 2007 letter, however, Executive Secretary Eduardo Ermita (Sec. Ermita), by order of the President, formally invoked executive privilege with respect to the following questions (the three questions) addressed to petitioner:

a) Whether the President followed up the (NBN) project?

b) Were you dictated to prioritize the ZTE?

c) Whether the President said to go ahead and approve the project after being told about the alleged bribe?[6]

[5] ZTE is a corporation owned by the Government of the People's Republic of China.

[6] Sec. Ermita's November 15, 2007 letter.

Sec. Ermita then asked that petitioner's testimony be dispensed with, given that he had answered all questions propounded to him except the three questions which, so he claimed, involved executive privilege.

Petitioner having failed to appear on the November 20, 2007 hearing, the Senate Blue Ribbon Committee issued a Show Cause Order of November 22, 2007 for him to explain why he should not be cited for contempt. Petitioner personally replied via November 29, 2007 letter to the Senate Committees.

On December 7, 2007, petitioner filed the present petition for *certiorari* to nullify the Show Cause Order, praying for injunctive reliefs to restrain the Senate Committees from citing him in contempt. The Senate Committees thereafter issued an Order dated January 30, 2008 citing petitioner in contempt and ordering his arrest for his failure to appear, not only in the November 20 hearing, but also in three earlier Senate hearings to which he was also invited.[7]

On February 1, 2008, petitioner filed a Supplemental Petition for *Certiorari* to nullify the Senate's January 30, 2008 Order and prayed for urgent injunctive reliefs to restrain his impending arrest.

This Court issued a *status quo ante* order on February 5, 2008.

In his petition, petitioner alleges that his discussions with the President were "candid discussions meant to explore options in making policy decisions," citing *Almonte v. Vasquez,*[8] and "dwelt on the impact of the bribery scandal involving high [g]overnment officials on the country's diplomatic relations and economic and military affairs, and the possible loss of confidence of foreign investors and lenders in the Philippines."[9]

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[7] Hearings on September 18 and 20, and October 25, 2007.

[8] 244 SCRA 286 (1995).

[9] Petition for *Certiorari*, p. 8.

In sum, petitioner avers that the timely invocation of executive privilege upon the authority of the President was well within the parameters laid down in *Senate v. Ermita*.[10]

In determining whether the claim of privilege subject of the present petition for *certiorari* is valid, the Court should not lose sight of the fact that the same is only part of the broader issue of whether respondent Senate Committees committed grave abuse of discretion in citing petitioner in contempt and ordering his arrest.

As to that broader issue, there should be no doubt at all about its proper resolution. Even assuming *arguendo* that the claim of privilege is valid, it bears noting that the coverage thereof is clearly limited to the three questions. Thus limited, the only way this privilege claim could have validly excused petitioner's not showing up at the November 20 hearing was if respondent Committees had nothing else to ask him except the three questions. Petitioner assumed that this was so, but without any valid basis whatsoever. It was merely his inference from his own belief that he had already given an exhaustive testimony during which he answered all the questions of respondent Committees except the three.[11]

Petitioner harps on the fact that the September 26, 2007 hearing (September 26 hearing) lasted some 11 hours which length of hearing Sec. Ermita describes as "unprecedented,"[12] when actually petitioner was not the only resource person who attended that hearing, having been joined by Department of Transportation and Communications (DOTC) Secretary. Leandro Mendoza, Chairman Abalos, DOTC Assistant Secretary Lorenzo Formoso III, Vice Governor Rolex Suplico, Jose de Venecia III, Jarius Bondoc, and R.P. Sales.[13] And even if petitioner

[10] *Supra* note 2.

[11] In his November 29, 2007 letter to Senator Alan Peter Cayetano, petitioner stated: "In good faith, after that exhaustive testimony, I thought that what remained were only the three questions, where the Executive [S]ecretary claimed executive privilege."

[12] Letter of November 15, 2007.

[13] Senate TSN of September 27, 2007 hearing.

were the only resource person for the entire November 20 hearing, he would still have had no basis to believe that the only questions the senators were to ask him would all involve his conversations with the President. Surely, it could not have escaped his notice that the questions asked him during the September 26 hearing were wide ranging, from his professional opinion on the projected economic benefits of the NBN project to the role of the NEDA in the approval of projects of that nature.

Thus, insofar as petitioner can still provide respondent Committees with pertinent information on matters not involving his conversations with the President, he is depriving them of such information without a claim of privilege to back up his action. Following the ruling in *Senate v. Ermita* that "[w]hen Congress exercises its power of inquiry, the only way for department heads to exempt themselves therefrom is by a valid claim of privilege," petitioner had no legal basis for failing to appear in the November 20 hearing. He should have appeared in the hearing and refused to answer the three questions as they were asked. On that score alone, the petition should be dismissed.

Petitioner, however, claims that the power of respondent Committees to punish witnesses is limited to "direct contempt" for acts committed while present before these committees, and not for "indirect contempt," citing Section 18 of their Rules of Procedure Governing Inquiries in Aid of Legislation which seemingly limits the contempt power of the Senate to witnesses who are "before it."[14] It bears noting that petitioner raised this claim only in its January 30, 2007 letter to the Senate but not

[14] Section 18. The Committee, by a vote of a majority of all its members, may punish for contempt any witness before it who disobeys any order of the Committee or refuses to be sworn or to testify or to answer a proper question by the Committee or any of its members, or testifying, testifies falsely or evasively. A contempt of the Committee shall be deemed a contempt of the Senate. Such witnesses may be ordered by the Committee to be detained in such place as it may designate under the custody of the Sergeant-at-Arms until he agrees to produce the required documents, or to be sworn or to testify, or otherwise purge himself of that contempt.

in its main and supplemental petitions before the Court. In fact, petitioner concedes to this incidental power to punish for contempt.[15]

At all events, the *sui generis* nature of the legislature's contempt power precludes such point of comparison with the judiciary's contempt power. The former is broad enough, nay, "full and complete" to deal with any affront committed against or any defiance of legislative authority or dignity, in the exercise of its power to obtain information on which to base intended legislation.

In another vein, petitioner claims that the Rules of Procedure Governing Inquiries in Aid of Legislation has not been published. Suffice it to state that the same argument was raised by the PCGG Commissioners who were petitioners in *Sabio v. Gordon*,[16] and the Court considered the same as inconsequential in light of the more significant issue calling for resolution therein, namely, whether Section 4(b) of E.O. No. 1 was repealed by the 1987 Constitution. The argument deserves the same scant consideration in the present case.

While it is clear that petitioner may validly be cited in contempt without any grave abuse of discretion on respondents' part – and this petition consequently dismissed on that ground – the Court cannot evade the question of whether the claim of privilege subject of this case is valid. **The issue in this case does not have to do simply with the absence or presence of petitioner in respondents' hearings, but with the scope of the questions that may be validly asked of him.**

The President does not want petitioner to answer the three questions on the ground of executive privilege. Respecting the specific basis for the privilege, Sec. Ermita states that the same questions "fall under conversations and correspondence between the President and public officials which are considered executive privilege."

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[15] TSN of the March 4, 2008 Oral Arguments at the Supreme Court, p. 13.

[16] G.R. No. 174340, October 17, 2006, 504 SCRA 704.

Sec. Ermita goes on to state that "the context in which the privilege is being invoked is that the information sought to be disclosed might impair our diplomatic as well as economic relations with the People's Republic of China." Evidently, this statement was occasioned by the ruling in *Senate v. Ermita* that a claim of privilege may be valid or not depending on the ground invoked to justify it and the context in which it is made.

What was meant by "context" in *Senate v. Ermita* has more to do with the degree of need shown by the person or agency asking for information, than with additional reasons which the Executive may proffer for keeping the same information confidential Sec. Ermita apparently understood "context" in the latter sense and proceeded to point out circumstances that reinforced the claim of privilege.

Sec. Ermita's statement that disclosure of the information being asked by respondent Committees might impair our diplomatic and economic relations with China, albeit proffered as the context of his claim of the presidential communications privilege, is actually a claim of privilege by itself, it being an invocation of the diplomatic secrets privilege.

The two claims must be assessed separately, they being grounded on different public interest considerations. Underlying the presidential communications privilege is the public interest in enhancing the quality of presidential decision-making. As the Court held in the same case of *Senate v. Ermita,* "A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately." The diplomatic secrets privilege, on the other hand, has a different objective – to preserve our diplomatic relations with other countries.

Petitioner even asserts in his petition that his conversations with the President also involve military matters. This allegation, however, is too remote from the reasons actually stated by Sec. Ermita in his letter to be even considered as a basis for the claim of privilege. Evidently, it is an afterthought, either of petitioner or his counsel, which need not be seriously entertained.

Thus, two kinds of privilege are being claimed as basis to withhold the same information – the presidential communications privilege and the diplomatic secrets privilege. To sustain these claims of privilege, it must be evident from the implications of the questions, in the setting in which they are asked, that a responsive answer to these questions or an explanation of why they cannot be answered might be dangerous because injurious disclosure could result.[17] Whether the questions asked by respondent may lead to an injurious disclosure cannot, however, be determined without first having an accurate understanding of the questions themselves. For this purpose, these questions must be read in the context of the exchanges in the September 26 hearing, as recorded in the official transcript thereof.

Before petitioner invoked executive privilege in that hearing, he testified that Chairman Abalos offered him a bribe in relation to the NBN project while they were playing golf sometime in January or February of 2007.[18] Petitioner stated thus:

MR. NERI. But we had a nice golf game. The Chairman was very charming, you know, and – but **there was something that he said that surprised me and he said that, "Sec, *may 200 ka dito*."** I believe we were in a golf cart. He was driving, I was seated beside him so *medyo nabigla ako* but since he was our host, I chose to ignore it.

THE SENATE PRESIDENT *Ano'ng sinabi mo noong sabihin niyang 200*?

MR. NERI. As I said, and I guess I was too shocked to say anything, but I informed my NEDA staff that perhaps they should be careful in assessing this project viability and maybe be careful with the costings because I told them what happened, I mean, what was said to me. (Emphasis supplied)

Upon further questioning, petitioner shortly thereafter testified that he reported to the President what he perceived as Chairman Abalos' bribe offer, to wit:

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[17] *Senate v. Ermita, supra* note 2 at 67.

[18] TSN, September 26 hearing, p. 42.

SEN. LACSON. You were shocked, you said.

MR. NERI. Yeah, I guess, I guess.

SEN. LACSON. *Bakit kayo na-shock*?

MR. NERI. Well, I [am] not used to being offered.

SEN. LACSON. Bribed?

MR. NERI. Yeah. Second is, *medyo malaki.*

SEN. LACSON. In other words, at that point it was clear to you that you were being offered bribe money in the amount of 200 million, *kasi malaki, sabi niyo*?

MR. NERI. I said no amount was put, but I guess given the magnitude of the project, *siguro naman hindi P200 or P200,00*, (*sic*) so…

SEN. LACSON. *Dahil cabinet official kayo, eh*.

MR. NERI. I guess. But I – you know…

SEN. LACSON. Did you report this attempted bribe offer to the President?

MR. NERI. I mentioned it to the President, Your Honor.

SEN. LACSON. What did she tell you?

MR. NERI. She told me, "Don't accept it."

SEN. LACSON. And then, that's it?

MR. NERI. Yeah, because we had other things to discuss during that time.

SEN. LACSON. And then after the President told you, "Do not accept it," what did she do? How did you report it to the President? In the same context that it was offered to you?

MR. NERI. I remember it was over the phone, Your Honor.

SEN. LACSON. *Hindi nga. Papaano ninyo ni-report, "Inoperan (offer) ako ng bribe na ₱200* million ni Chairman Abalos" or what? How did you report it to her?

MR. NERI. Well, as I said, "Chairman Abalos offered me 200 million for this."

SEN. LACSON. Okay. That clear?

x x x x x x x x x

MR. NERI. I think so, Your Honor.

SEN. LACSON. And after she told, "Do not accept it," what did she do?

MR. NERI. I don't know anymore, Your Honor, but I understand PAGC investigated it or – I was not privy to any action of PAGC.

SEN. LACSON. You are not privy to any recommendations submitted by PAGC?

MR. NERI. No, Your Honor.

SEN. LACSON. How did she react, was she shocked also like you or was it just casually responded to as, "Don't accept it."

MR. NERI. It was over the phone, Your Honor, so I cannot see her facial expression.

SEN. LACSON. Did it have something to do with your change of heart, so to speak – your attitude towards the NBN project as proposed by ZTE?

MR. NERI. Can you clarify, Your Honor, I don't understand the change of heart?

SEN. LACSON. **Because, on March 26 and even on November 21, as early as November 21, 2006, during the NEDA Board Cabinet Meeting, you were in agreement with the President that it should be pay as you use and not take or pay. There should be no government**

subsidy and it should be BOT or BOO or any similar scheme and you were in agreement, you were not arguing. The President was not arguing with you, you were not arguing with the President, so you were in agreement and all of a sudden nauwi tayo doon sa lahat ng – ang proposal all in violation of the President's guidelines and in violation of what you thought of the project.

MR. NERI. Well, we defer to the implementing agency's choice as to how to implement the project.

SEN. LACSON. Ah, so you defer to the DOTC.

MR. NERI. Basically, Your Honor, because they are the ones who can now contract out the project and in the process of contracting, they can also decide how to finance it.

SEN. LACSON. In other words, NEDA performed a ministerial job?

MR. NERI. No, Your Honor. Basically NEDA's job is to determine the viability. And as I said, after determining the viability, NEDA tells agency, "Go ahead and . . ."

SEN. LACSON. But it did not occur to you that you were violating the specific guidelines of the President on the scheme?

MR. NERI. I am not privy to the changes anymore, Mr. Chair, Your Honors. [19]

When he was asked whether he and the President had further discussions on the NBN project after he reported to her the alleged bribe offer, petitioner began invoking executive privilege, thus:

SEN. PANGILINAN. You mentioned that you mentioned this to the President. **Did the President after that discussion over the phone, was this ever raised again, the issue of the 200 *ka rito*?**

MR. NERI. We did not discuss it again, Your Honor.

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[19] TSN of September 26, 2007 Senate Hearing, pp. 43-46.

SEN. PANGILINAN. With the President? <u>But the issue of course, the NBN deal, was raised again? After that, between you and the President. Pinalow up (followed up) ba niya?</u>

MR. NERI. May I claim executive privilege, Your Honor, because I think this already involves conversations between me and the President, Your Honor, because this is already confidential in nature.

xxx xxx xxx

SEN. PANGILINAN. Well, you can assert it. But whether we will accept it or not is up to us, and then we can probably discuss it… However, I will tackle that at a later time.[20] (Emphasis and underscoring supplied)

Although petitioner answered many other questions subsequent to his invocation of the privilege, he kept on invoking the privilege whenever, in his judgment, the questions touched on his further conversations with the President on the NBN project. Hereunder is the exchange of Senator Legarda and petitioner, quoted extensively so as to provide the context of petitioner's invocation of executive privilege in this particular instance:

SEN. LEGARDA. And when you expressed that support to AHI, does this mean the exclusion of all other proponents on the broadband project?

MR. NERI. Not at all, Your Honor. In effect, I'm telling him [Jose De Venecia III], "I think it's a great idea, please proceed." But as I said, Your Honor, we never process private sector . . .

SEN. LEGARDA. Suppliers contracts.

MR. NERI. Yeah, we do not.

SEN. LEGARDA. Okay, very clear.

Also in the letter of Chairman Ramon Sales, who is present here today, of the Commission of Information and Communications Technology [CICT] dated December 8, 2006 addressed to NEDA, he categorically stated and I quote: "That he cannot opine on the capability of the proponent" – referring to AHI which you had encouraged or supported earlier, two months earlier, to undertake

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[20] *Id*. at 91-92.

the project referring to the broadband network financially and technically as AHI has not identified strategic partners. Do you confirm receipt of this letter?

MR. NERI. I believe so, Your Honor. I remember that letter.

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SEN. LEGARDA. In what way did this opinion of the CICT affect your endorsement or encouragement of AHI?

MR. NERI. I'm not sure. I think I encouraged him first before the CICT letter.

SEN. LEGARDA. Yes, that is a chronology.

MR. NERI. Yeah. So by that time, we left it already to the line agencies to decide. **So it is not for us anymore to say which supplier is better than one over the other.**

SEN. LEGARDA. Did you ever endorse any proponent of the broadband network, Secretary Neri?

MR. NERI. No, Your Honor. When I say "endorse," not formally choosing one over another. We do not do that.

SEN. LEGARDA. Do you believe in the Broadband Network Project of the Philippines, of the Philippine government regardless of supplier?

MR. NERI. The broadband is very important, Your Honor. Because as I said earlier, if you look at the statistics in our broadband cost, Philippines is $20 per megabits per second as against…

SEN. LEGARDA. Yes, you have stated that earlier.

x x x x x x x x x

SEN. LEGARDA. But no proponent for the local broadband networks had submitted any possible bid or any proposal to the NEDA?

MR. NERI. None that we know of, Your Honor.

SEN. LEGARDA. None that you know of. **Now, earlier you were in favor of a BOT but eventually changed your mind when the NEDA endorsed the ZTE project. May we know, since NEDA is a collegial body, whether there was any voting into this project and whether you were outvoted?**

MR. NERI. Because we always defer to the line agencies as to the manner of implementation of the project.

SEN. LEGARDA. **Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority? In short, were you dictated upon not to encourage AHI as you've previously done . . .**

MR. NERI. As I said, Your Honor . . .

SEN. LEGARDA. . . . but to prefer or prioritize the ZTE?

MR. NERI. Yeah. As the question may involve – as I said a conversation/correspondence between the President and a public official, Your Honor.

SEN. LEGARDA. I'm sorry. Can you say that again?

MR. NERI. As I said, I would like to invoke Sec. 2(a) of EO 464.

SEN. LEGARDA. I was not even referring to a conversation between you and the President. Are you saying then that the prioritization of ZTE was involved during your conversation with the President?

MR. NERI. As I said, I cannot comment on that, Your Honor.

SEN. LEGARDA. Yes, but I was not referring to any conversation between you and the President but you brought it up now upon my questioning on whether there was any government official who had instructed you to favor the ZTE. We put two and two together and it is therefore assumed that the answer to the question is conveyed in your conversation with the President to which you are invoking that executive privilege.

MR. NERI. There is no higher public official than me than the President, Mr. Chair, Your Honor.

SEN. LEGARDA. There's no higher official than you? It has to be the vice president . . .

MR. NERI. In other words, when we talk about higher officials, I guess we are referring to the President, Your Honor.

SEN. LEGARDA. So, you're invoking executive privilege and therefore, that answer to that question is left hanging, whether there was any official who gave instructions to prioritize the ZTE over

other proponents of the NBN project. And you're saying now that there was no voting among the NEDA and in fact . . .

MR. NERI. Mr. Chair, Your Honor, we don't vote. We don't vote on the manner of implementation. We vote on whether the project is deemed viable or not.

SEN. LEGARDA. Yes, but were you overruled over your preference for a BOT project?

MR. NERI. As I said Your Honor, this is a consensus of the NEDA Board, NEDA ICC. **Our consensus was that the project is viable. We leave it to the line agency to implement.** My own personal preference here will not matter anymore because it's a line agency . . .

SEN. LEGARDA. But did you actually discuss this with the President and told her not to approve this project or not to proceed with this project? Did you discourage the President from pursuing this project?

MR. NERI. As I said, Mr. Chair, this covers conversations with the President.[21] (Emphasis and underscoring supplied)

Again, petitioner invoked executive privilege when Senator Pia Cayetano asked him what else the President told him besides instructing him not to accept the alleged bribe offer.

MR. NERI. She said "Don't accept it," Your Honor.

SEN. CAYETANO, (P). **And was there something attached to that like . . . "But pursued with a project (*sic*) or go ahead and approve," something like that?**

MR. NERI. As I said, I claim the right of executive privilege on further discussions on the . . .

SEN. CAYETANO, (P). Ah, so that's the part where you invoke your executive privilege, is that the same thing or is this new, this invocation of executive privilege?

My question is, after you had mentioned the 200 million and she said "Don't accept," was there any other statement from her as to what to do with the project?

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[21] *Id*. at 110-117.

MR. NERI. As I said, it was part of a longer conversation, Your Honor, so . . .

SEN. CAYETANO, (P). A longer conversation in that same – part of that conversation on an ongoing day-to-day, week-to-week conversation?

MR. NERI. She calls me regularly, Your Honor, to discuss various matters.

SEN. CAYETANO. **But in connection with, "Ma'am na-offer-an ako ng 200." – Ah, don't accept, next topic," ganoon ba 'yon? Or was there like, "Alam mo, magandang project sana 'yan, eh pero bakit naman ganyan."**

MR. NERI. As I said, Your Honor, beyond that I would not want to go any further, Your Honor.[22] (Emphasis and underscoring supplied)

Petitioner thereafter answered other questions on which he did not invoke executive privilege. However, when asked about whether he advised the President not to proceed with the NBN project in light of the alleged bribe offer, petitioner again invoked the privilege.

SEN. LACSON. x x x

Would not an offer of 200 which you later on interpreted as a 200 milion-peso bribe offer from Chairman Abalos in relation to the NBN project not posit the view that it was an outright overpriced contract?

MR. NERI. We cannot determine our pricing, Your Honor. The NEDA staff tried very, very hard . . .

SEN. LACSON. Even with an offer of 200 million, you would not think it was overpriced?

MR. NERI. That's right, Your Honor. It's possible that they take it out of their pockets. And I had a NEDA staff checked the internet for possible overpricing. The national interest issue in this

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[22] *Id*. at 276-277.

case, Your Honor, is determined by the economic rate of return. And the economic rate of return was determined at 29.6%. It is very high. Meaning that the project has its benefits despite any potential overpricing, Your Honor.

SEN. LACSON. **Did you not at least warn the President that it could be a potential stinking deal considering that it was attended by bribe offer?**

MR. NERI. For that, Your Honor, I'd like to . . .

VOICE. Executive privilege.

SEN. LACSON. Executive privilege.

MR. NERI. That's right, Your Honor.[23] (Emphasis and underscoring supplied)

A similar concern, it bears noting, was expressed by Senator Roxas, as Chairman of respondent Committee on Trade and Commerce, when he asked the following question to petitioner:

THE CHAIRMAN (SEN. ROXAS). *Oh, sige, okay. Ngayon,* I don't want to repeat anymore the debate as to the executive privilege that is still pending so I will set that aside. But my question is, since that time, since February of 2007, through the NEDA meetings, at least there were two in 2007, March 26 and March 29, when this was approved, did this subject of the bribe ever come up again? *Hindi ka ba nagtaka na ni-report mo it okay Pangulo, sinabihan ka na huwag mong tanggapin, tama naman iyong utos na iyon, huwag mong tanggapin, at matapos noon, wala nang na-take up and noong lumitaw muli itong NBN-ZTE, hindi ka ba nagkamot ng ulo,* "What happened, *bakit buhay pa rin ito, bakit hindi pa rin – naimbestigahan ito o ano bang nangyari rito*," since you reported this first hand experience of yours to the President.

From the foregoing excerpts of the September 26 hearing, it may be gleaned that the three questions fairly represent the questions actually posed by the senators respecting which petitioner invoked executive privilege.

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[23] *Id.* at 414-415.

Moreover, the same excerpts adequately provide the necessary backdrop for understanding the thrust of the three questions. While only the third question – Whether the President said to go ahead and approve the project after being told about the alleged bribe? – mentions the perceived bribe offer, it is clear from the context that the first question of whether the President followed up the NBN project was also asked in relation to the same alleged bribe. What Senator Pangilinan wanted to know was whether petitioner and the President had further discussions on the NBN project **after** petitioner informed her about the alleged bribe.

The second question – Were you dictated to prioritize the ZTE? – which was asked by Senator Legarda, was evidently aimed towards uncovering the reason why, in spite of the Executive's initial plan to implement the NBN project on a Build Operate and Transfer (BOT) basis, it ended up being financed via a foreign loan, with the ZTE as the chosen supplier. This was also the concern of Senator Lacson when he asked petitioner whether the bribe offer had anything to do with the change in the scheme of implementation from BOT to a foreign loan taken by the Philippine government.

Indeed, it may be gathered that all three questions were directed toward the same end, namely, to determine the reasons why the NBN project, despite the apparent overpricing, ended up being approved by the Executive and financed via a government loan, contrary to the original intention to follow a BOT scheme. The three questions should be understood in this light.

Having a clearer understanding of what information was being sought by respondent Committees, the assessment of the invocation of executive privilege is in order.

As earlier discussed, there are actually two kinds of privilege being claimed herein – the presidential communications and diplomatic secrets privilege.

The general criteria for evaluating claims of privilege have been laid down in *Senate v. Ermita*, to wit: "In determining the

validity of a claim of privilege, the question that must be asked is not only whether the requested information falls within one of the traditional privileges, but also whether that privilege should be honored in a given procedural setting."

To assert that certain information falls under a recognized privilege is to allege that disclosure thereof may be harmful to the public interest. It would be impossible for the courts, however, to determine whether a potential harm indeed exists were the Executive allowed to claim the privilege without further explanation. Hence, the ruling in the same case of *Senate v. Ermita* that claims of privilege should state specific reasons for preserving confidentiality.

When the privilege being invoked against a subpoena *ad testificandum* is that for presidential communications, such specificity requirement is not difficult to meet, for it need only be evident from the questions being asked that the information being demanded pertains to conversations between the President and her adviser. In petitioner's case, the three questions posed by respondent Committees clearly require disclosure of his conversations with the President in his capacity as adviser. This is obvious from Senator Pangilinan's question as to whether the President followed up on the issue of the NBN project – meaning, whether there were further discussions on the subject between the President and petitioner. Likewise, both Senator Legarda's query on whether petitioner discouraged the President from pursuing the project, and Senator Pia Cayetano's question on whether the President directed petitioner to approve the project even after being told of the alleged bribe, manifestly pertain to his conversations with the President.

While Senator Legarda's question – "Has there been any government official higher than you who dictated that the ZTE project be prioritized or given priority?" – does not necessarily require disclosure of petitioner's conversations with the President, petitioner has interpreted the same to mean "Has the President dictated you to prioritize the ZTE project?" The invocation of privilege is thus limited to this more specific question. Limited in this manner, requiring the Executive to explain more precisely

how this question would involve petitioner's conversation with the President might compel him to disclose the very thing which the privilege was meant to protect. The reasons already provided must thus be considered sufficiently precise.

Compared to claims of the presidential communications privilege, it is more difficult to meet the specificity requirement in claims of the diplomatic secrets privilege, for the Executive must be able to establish a connection between the disclosure of the information being sought with the possible impairment of our diplomatic relations with other nations.

The claim of privilege for diplomatic secrets subject of this case fails to establish this connection. It has not been shown how petitioner's response to any of the three questions may be potentially injurious to our diplomatic relations with China. Even assuming that the three questions were answered in the negative – meaning that the President did not follow up on the NBN project, did not dictate upon petitioner to prioritize the ZTE, and did not instruct him to approve the NBN project – it is not clear how our diplomatic relations with China can be impaired by the disclosure thereof, especially given that the supply contract with ZTE was, in fact, eventually approved by the President. If, on the other hand, the answers to the three questions are in the affirmative, it would be even more difficult to see how our relations with China can be impaired by their disclosure.

The second criterion laid down in *Senate v. Ermita*, namely, whether the privilege should be honored in the given procedural setting, need only be applied, in petitioner's case, to the claim of privilege based on presidential communications, the claim of privilege based on diplomatic secrets having been already ruled out in the immediately foregoing discussion.

A claim of privilege, even a legitimate one, may be overcome when the entity asking for information is able to show that the *public interest* in the disclosure thereof is **greater** than that in upholding the privilege. The weighing of interests that courts must undertake in such cases was discussed by the Court in *Senate v. Ermita*, to wit:

That a type of information is recognized as privileged does not, however, necessarily mean that it would be considered privileged in all instances. For in determining the validity of a claim of privilege, **the question that must be asked is not only whether the requested information falls within one of the traditional privileges, but also whether that privilege should be honored in a given procedural setting.**

The leading case on executive privilege in the United States is *U.S. v. Nixon*, decided in 1974. In issue in that case was the validity of President Nixon's claim of executive privilege against a subpoena issued by a district court requiring the production of certain tapes and documents relating to the Watergate investigations. The claim of privilege was based on the President's general interest in the confidentiality of his conversations and correspondences. **The U.S. Court held that while there is no explicit reference to a privilege of confidentiality in the U.S. Constitution, it is constitutionally based to the extent that it relates to the effective discharge of a President's powers. The Court, nonetheless, rejected the President's claim of privilege, ruling that the privilege must be balanced against the public interest in the fair administration of criminal justice.** Notably, the Court was careful to clarify that it was not there addressing the issue of claims of privilege in a civil litigation or against congressional demands for information.

Cases in the U.S. which involve claims of executive privilege *against Congress* are rare. Despite frequent assertion of the privilege to deny information to Congress, beginning with President Washington's refusal to turn over treaty negotiations records to the House of Representatives, **the U.S. Supreme Court has never adjudicated the issue.** However, **the U.S. Court of Appeals for the District of Columbia Circuit, in a case [*Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725; May 23, 1974.] decided in the same year as *Nixon*, recognized the President's privilege over his conversations against a congressional subpoena. Anticipating the balancing approach adopted by the U.S. Supreme Court in *Nixon*, the Court of Appeals weighed the public interest protected by the claim of privilege against the interest that would be served by disclosure to the Committee.** Ruling that the balance favored the President, the Court declined to enforce the subpoena.[24] (Emphasis and underscoring supplied)

[24] *Supra* note 2 at 47-49.

In determining whether, in a given case, the public interest in favor of disclosure outweighs the public interest in confidentiality, courts often examine the showing of need proffered by the party seeking information. A discussion of what this showing of need entails is thus in order.

The case of *Nixon v. Sirica*,[25] decided by the United States Court of Appeals for the District of Columbia, involved a claim of the presidential communications privilege by President Nixon against a subpoena *duces tecum* issued by the grand jury – an agency roughly analogous to the Ombudsman in this jurisdiction. The grand jury subpoena called on the President to produce tape recordings of certain identified meetings and telephone conversations that had taken place between him and his advisers. The Court held thus:

> The President's privilege cannot, therefore, be deemed absolute. **We think the Burr case makes clear that application of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.** We direct our attention, however, solely to the circumstances here. With the possible exception of material on one tape, the President does not assert that the subpoenaed items involve military or state secrets; nor is the asserted privilege directed to the particular kinds of information that the tapes contain. Instead, the President asserts that the tapes should be deemed privileged because of the great public interest in maintaining the confidentiality of conversations that take place in the President's performance of his official duties. This privilege, intended to protect the effectiveness of the executive decision-making process, is analogous to that between a congressman and his aides under the Speech and Debate Clause; to that among judges, and between judges and their law clerks; and similar to that contained in the fifth exemption to the Freedom of Information Act.
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> x x x x x x x x x
>
> We recognize this great public interest, and agree with the District Court that such conversations are presumptively privileged. But **we think that this presumption of privilege premised on the public**

[25] 487 F.2d 725; October 12, 1973.

interest in confidentiality must fail in the face of the uniquely powerful showing made by the Special Prosecutor in this case. The function of the grand jury, mandated by the Fifth Amendment for the institution of federal criminal prosecutions for capital or other serious crimes, is not only to indict persons when there is probable cause to believe they have committed crime, but also to protect persons from prosecution when probable cause does not exist. As we have noted, the Special Prosecutor has made a strong showing that the subpoenaed tapes contain evidence peculiarly necessary to the carrying out of this vital function – evidence for which no effective substitute is available. The grand jury here is not engaged in a general fishing expedition, nor does it seek in any way to investigate the wisdom of the President's discharge of his discretionary duties. On the contrary, the grand jury seeks evidence that may well be conclusive to its decisions in on-going investigations that are entirely within the proper scope of its authority. x x x (Emphasis and underscoring supplied)

While *Sirica* involved a conflict between the Executive and the grand jury, not between the Executive and Congress, the same court later applied the same balancing approach, even explicitly citing the *Sirica* decision, in a controversy involving the President and a Senate committee over executive privilege.

In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[26] the case that was referred to in the *Senate v. Ermita* ruling quoted earlier, the party seeking information was a Select Committee of the U.S. Senate which was formed "to determine . . . the necessity or desirability of new congressional legislation to safeguard the electoral process by which the President of the United States is chosen." Similar to what transpired in *Sirica*, the Select Committee issued a subpoena *duces tecum* addressed to President Nixon for the production of tape recordings of his conversations with one of his aides, in which they discussed alleged criminal acts occurring in connection with the presidential election of 1972. The Court of Appeals for the District of Columbia ruled thus:

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[26] 498 F.2d 725; May 23, 1974.

The staged decisional structure established in *Nixon v. Sirica* was designed to ensure that the President and those upon whom he directly relies in the performance of his duties could continue to work under a general assurance that their deliberations would remain confidential. So long as **the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of government — a showing that the responsibilities of that institution cannot responsibly be fulfilled without access to records of the President's deliberations** — we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired. Contrary, therefore, to the apparent understanding of the District Court, **we think that *Nixon v. Sirica* requires a showing of the order made by the grand jury before a generalized claim of confidentiality can be said to fail**, and before the President's obligation to respond to the subpoena is carried forward into an obligation to submit subpoenaed materials to the Court, **together with particularized claims that the Court will weigh against whatever public interests disclosure might serve.** The presumption against any judicially compelled intrusion into presidential confidentiality, and the showing requisite to its defeat, hold with at least equal force here.

Particularly in light of events that have occurred since this litigation was begun and, indeed, since the District Court issued its decision, we find that the Select Committee has failed to make the requisite showing. x x x (Emphasis and underscoring supplied)

Thus, a government agency that seeks to overcome a claim of the presidential communications privilege must be able to demonstrate that access to records of presidential conversations, or to testimony pertaining thereto, is **vital** to the responsible performance of that agency's official functions.

Parenthetically, the presumption in favor of confidentiality only takes effect after the Executive has first established that the information being sought is covered by a recognized privilege. The burden is initially with the Executive to provide precise and certain reasons for upholding his claim of privilege, in keeping with the more general presumption in favor of transparency. Once it is able to show that the information being sought is covered by a recognized privilege, the burden shifts to the party

seeking information, who may still overcome the privilege by a strong showing of need.

Turning now to the present controversy, respondent Committees must be held to have made a strong showing of need, one that certainly suffices to overcome the claim of privilege in this case.

Respondents assert that there is an urgent need for remedial legislation to regulate the obtention and negotiation of official development assisted (ODA) projects because these have become a rich source of "commissions" secretly pocketed by high executive officials. They claim that the information which they are trying to elicit from petitioner relative to the NBN project is essential and crucial to the enactment of proposed amendments to the Government Procurement Reform Act (R.A. No. 9184) and the Official Development Assistance Act (R.A. No. 8182), so that Congress will know how to plug the loopholes in these statutes and thus prevent a drain on the public treasury.

That the crafting of such remedial legislation is at least one of the objectives of respondent Committees, if not its primary one, is borne out by the existence of the following pending bills in the Senate, to wit: (1) Senate Bill (S.B.) No. 1793, AN ACT SUBJECTING TREATIES, INTERNATIONAL OR EXECUTIVE AGREEMENTS INVOLVING FUNDING IN THE PROCUREMENT OF INFRASTRUCTURE PROJECTS, GOODS, AND CONSULTING SERVICES TO BE INCLUDED IN THE SCOPE AND APPLICATION OF PHILIPPINE PROCUREMENT LAWS, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 9184, OTHERWISE KNOWN AS THE GOVERNMENT PROCUREMENT REFORM ACT, AND FOR OTHER PURPOSES, AND (2) S.B. NO. 1794, AN ACT IMPOSING SAFEGUARDS IN CONTRACTING LOANS AS OFFICIAL DEVELOPMENT ASSISTANCE, AMENDING FOR THE PURPOSE REPUBLIC ACT NO. 8182, AS AMENDED BY REPUBLIC ACT NO. 8555, OTHERWISE KNOWN AS THE OFFICIAL DEVELOPMENT ASSISTANCE ACT OF 1996, AND FOR OTHER PURPOSES.

Also worthy of note is the following statement of Senator Roxas during the September 26 hearing that the reform of the procurement process was the chief objective of the investigations, thus:

> THE CHAIRMAN (SEN. ROXAS). No, no, I'm not talking about – I'm not taking sides here whether it's AHI or ZTE or what. I'm looking at the approval process by government because that approval process which is the most important element of these entire hearings because it is that same approval process that billions and billions of government money are going through, 'no. So, we want to tighten that up. We want to make sure that what we discussed here in this very hall which is to raise VAT to 12 percent and to cover with VAT electricity and petrol is not just put to waste by approval process that is very loose and that basically has no checks and balances. (Underscoring supplied)

If the three questions were understood apart from their context, a case can perhaps be made that petitioner's responses, whatever they may be, would not be crucial to the intelligent crafting of the legislation intended in this case. As earlier discussed, however, it may be perceived from the context that they are all attempts to elicit information as to **why the NBN project, despite the apparent overpricing, ended up being approved by the Executive and financed via a government loan, contrary to the original intention to follow a BOT scheme**. This is the fundamental query encompassing the three questions.

This query is not answerable by a simple yes or no. Given its implications, it would be unreasonable to expect respondent Committees to merely hypothesize on the alternative responses and come up with legislation on that basis. This is a situation where at least a credible, if not precise, reconstruction of what really happened is necessary for the intelligent crafting of the intended legislation. Why is it that, after petitioner reported the alleged bribe to the President, things proceeded as if nothing was reported? Respondent Senate Committees are certainly acting within their rights in trying to find out the reasons for such a turn of events. If it was in pursuit of the public interest, respondents surely have a right to know what this interest was

so that it may be taken into account in determining whether the laws on government procurement, BOT, ODA and other similar matters should be amended and, if so, in what respects.

It is certainly reasonable for respondents to believe that the information which they seek may be provided by petitioner. **This is all the more so now that petitioner, contrary to his earlier testimony before the respondent Committees that he had no further discussions with the President on the issue of the bribe offer, has admitted in his petition that he had other discussions with the President regarding "the bribery scandal involving high Government officials."** These are the very same discussions which he now refuses to divulge to respondents on the ground of executive privilege.

Apropos is this Court's pronouncement in *Sabio v. Gordon*:[27]

> Under the present circumstances, the alleged anomalies in the PHILCOMSAT, PHC and POTC, ranging in the millions of pesos, and the conspiratorial participation of the PCGG and its officials **are compelling reasons for the Senate to exact vital information from the directors and officers of Philcomsat Holdings Corporation, as well as from Chairman Sabio and his Commissioners to aid it in crafting the necessary legislation to prevent corruption and formulate remedial measures and policy determination regarding PCGG's efficacy** x x x (Emphasis and underscoring supplied)

If, in a case where the intended remedial legislation has not yet been specifically identified, the Court was able to determine that a testimony is vital to a legislative inquiry on alleged anomalies – so vital, in fact, as to warrant compulsory process – *a fortiori* should the Court consider herein petitioner's testimony as vital to the legislative inquiry subject of this case where there are already pending bills touching on the matter under investigation.

Thus, the claim of privilege in this case should **not** be honored with respect to the fundamental query mentioned above. Nonetheless, petitioner's conversations with the President on all other matters on the NBN project should still be generally

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[27] *Supra* note 16.

privileged. On matters not having to do with the apparent overpricing of the NBN project and the alleged bribe offer, respondents no longer have a showing of need sufficient to overcome the privilege. The intrusion into these conversations pursuant to this opinion would thus be a limited one. In that light, it is hard to see how the impairment of the public interest in candid opinions in presidential decision-making can, in this case, outweigh the immense good that can be achieved by well-crafted legislation reforming the procurement process.

The conclusion that respondent Committees have a sufficient need for petitioner's testimony is further supported by the fact that the information is apparently unavailable anywhere else. Unlike in the *Senate Select* case, the House of Representatives in the present case is not in possession of the same information nor conducting any investigation parallel to that of the respondent Committees. These were the considerations for the court's ruling against the senate committee in the *Senate Select* case.

Still, there is another reason for considering respondents' showing of need as adequate to overcome the claim of privilege in this case.

Notably, both parties unqualifiedly conceded to the truism laid down in the *Senate Select* case that "the Executive cannot, any more than the other branches of government, invoke a general confidentiality privilege to shield its officials and employees from investigations by the proper governmental institutions into possible criminal wrongdoing."

While the U.S. Court in that case proceeded to qualify its statement by saying that

> under *Nixon v. Sirica*, the showing required to overcome the presumption favoring confidentiality turned, not on the nature of the presidential conduct that the subpoenaed material might reveal, but, instead, on the nature and appropriateness of the function in the performance of which the material was sought, and the degree to which the material was necessary to its fulfillment,

I submit that it would be unwise to infer therefrom that, in the assessment of claims of privilege, indications that the privilege

is being used to shield officials from investigation is immaterial. Otherwise, what would then be the point of stating that "[a] claim of privilege may not be used to shield executive officials and employees from investigations by the proper government institutions into possible criminal wrongdoing"?

At the very least, such indications should have the effect of severely **weakening** the presumption that the confidentiality of presidential communications in a given case is supported by public interest. Accordingly, the burden on the agency to overcome the privilege being asserted becomes less, which means that judicial standards for what counts as a "sufficient showing of need" become less stringent.

Finally, the following statement of Dorsen and Shattuck is instructive:

> x x x there should be no executive privilege when the Congress has already acquired substantial evidence that the information requested concerns criminal wrong-doing by executive officials or presidential aides. There is obviously an overriding policy justification for this position, since the opposite view would permit criminal conspiracies at the seat of government to be shrouded by a veil of an advice privilege. While the risk of abusive congressional inquiry exists, as the McCarthy experience demonstrates, the requirement of "substantial evidence" of criminal wrong-doing should guard against improper use of the investigative power.[28]

When, as in this case, Congress has gathered evidence that a government transaction is attended by corruption, and the information being withheld on the basis of executive privilege has the potential of revealing whether the Executive merely tolerated the same, or worse, is responsible therefor, it should be sufficient for Congress to show – for overcoming the privilege – that its inquiry is in aid of legislation.

In light of all the foregoing, I vote to *DISMISS* the petition.

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[28] Norman Dorsen & John H.F. Shattuck, *Executive Privilege, the Congress and the Courts* 35 OHIO ST. L.J. 1, 32 (1974).

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Disposition of cases — Lower courts must decide cases brought before them three months from the time the case is submitted for decision. (Reyes *vs*. Judge Paderanga, A.M. No. RTJ-06-1973, Mar. 14, 2008) p. 27

— Reglementary period to decide cases, when extended. *(Id.)*

Functions — One of the purposes for which courts are organized is to put an end to controversy in the determination of the respective rights of the contending parties. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

— The balancing of interests, between executive privilege on one hand and the other competing constitutionally recognized interests on the other hand, is a function of the courts. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Carpio, J., dissenting and concurring opinion*) p. 554

Jurisdiction — The active participation of a party in a case pending against him before a court is tantamount to a recognition of that court's jurisdiction. (Reyes *vs.* Judge Paderanga, A.M. No. RTJ-06-1973, Mar. 14, 2008) p. 27

Powers — The decision whether to dismiss the case or not rests on the sound discretion of the trial court where the Information was filed. (Chan *vs*. Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

DISMISSAL OF EMPLOYEES

Illegal dismissal — When it does not amount to an unfair labor practice. (Garcia *vs.* Malayan Ins. Co., Inc. and NLRC, G.R. No. 160339, Mar. 14, 2008) p. 230

DISREGARD OF AGE

As an aggravating circumstance — Absorbed in the qualifying circumstance of treachery. (People *vs.* Malolot, G.R. No. 174063, Mar. 14, 2008) p. 444

DUE PROCESS

Administrative due process — In administrative proceedings, due process is served by the mere fact that each party is afforded an opportunity to air its side, not necessarily through verbal argumentation, but also through pleadings in which the parties may explain their side of the controversy. (Garcia *vs.* Malayan Ins. Co., Inc. and NLRC, G.R. No. 160339, Mar. 14, 2008) p. 230

Essence of — Due process is simply an opportunity to be heard, or, as applied to administrative proceedings, an opportunity to explain one's side or an opportunity to seek for a reconsideration of the action or ruling complained of. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

Procedural due process — A witness should be informed of the rules governing his appearance and testimony before the Senate Committees so that he may be aware of any deviation from the established procedure. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Chico-Nazario, J., separate concurring opinion*) p. 554

EMPLOYMENT, TERMINATION OF

Serious misconduct as a ground — Theft and cover-up, a case of serious misconduct. (Garcia *vs.* Malayan Ins. Co., Inc. and NLRC, G.R. No. 160339, Mar. 14, 2008) p. 230

ESTAFA

Damage — Explained. (Luces *vs.* Damole, G.R. No. 150900, Mar. 14, 2008) p. 153

ESTAFA THROUGH MISAPPROPRIATION OR CONVERSION

Commission of — Elements. (Luces *vs.* Damole, G.R. No. 150900, Mar. 14, 2008) p. 153

— Imposable penalty applying the Indeterminate Sentence Law. *(Id.)*

— To misappropriate for one's own use includes not only conversion to one's personal advantage, but also every attempt to dispose of the property of another without a right. *(Id.)*

***EX POST FACTO* LAW**

Proscription against ex-post facto law — Aimed against the retrospectivity of penal laws. (Presidential *Ad Hoc* Fact-Finding Committee on Behest Loans *vs.* Hon. Desierto, G.R. No. 145184, Mar. 14, 2008) p. 72

EXECUTIVE PRIVILEGE

Basis — Explained. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Velasco, Jr., J., separate concurring opinion*) p. 554

Claim of executive privilege — Depends, not only on the ground invoked but also on the procedural setting or the context in which the claim is made. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008) p. 554

— May be rejected due to grave implications on public accountability and government responsibility. *(Id.; Ynares-Santiago, J., separate opinion*)

— Steps. *(Id.; Velasco, Jr., J., separate concurring opinion)*

Definition — The right of the President and high-level executive branch officials to withhold information from Congress,

the courts, and the public. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Puno, C. J., dissenting opinion)* p. 554

(Id.; Carpio, J., dissenting and concurring opinion)

(Id.; Chico-Nazario, J., separate concurring opinion)

(Id.; Velasco, Jr., J., separate concurring opinion)

Diplomatic secrets privilege — Elucidated. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Carpio-Morales, J., dissenting opinion)*

— The President may find it necessary to refuse disclosure of sensitive diplomatic secrets to the Legislature or the public. *(Id.; Carpio, J., dissenting and concurring opinion)*

Doctrine of — Applies only to certain types of information of a sensitive character that would be against the public interest to divulge. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Ynares-Santiago, J., separate opinion*) p. 554

— Could never be sanctioned by the Constitution as a shield for official wrongdoing. *(Id.; Ynares-Santiago, J., separate opinion)*

Exercise of — Executive privilege must be exercised by the President in pursuance of his official powers and functions. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Carpio, J., dissenting and concurring opinion*) p. 554

— When the President claims that certain information is covered by executive privilege, the said information must be presumptively privileged. *(Id.; Chico-Nazario, J.; separate concurring opinion*)

Feature — Elucidated. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Brion, J., separate concurring opinion*) p. 554

Kinds — Defined. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008) p. 554

— Elucidated. *(Id.; Puno, C J., dissenting opinion)*

Limitation — Could never be sanctioned by the Constitution as a shield for official wrongdoing. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Ynares Santiago, J., separate opinion*) p. 554

— Executive privilege cannot be used to shield criminal activity or wrongdoing. *(Id.; Nachura, J., separate concurring opinion)*

(Id.; Brion, J., separate concurring opinion)

— Executive privilege is not absolute. *(Id.; Carpio, J., dissenting and concurring opinion)*

(Id.; Ynares Santiago, J., separate opinion)

— Executive privilege must be invoked by the President with specificity. *(Id.; Carpio, J., dissenting and concurring opinion)*

Military and national security secrets — Assessment of the validity of the privilege, procedure. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Puno, C J., dissenting opinion*) p. 554

— The President may find it necessary to withhold sensitive military and national security secrets from the Legislature or the public. *(Id.; Carpio, J., dissenting and concurring opinion)*

Presidential communications — Factors to be considered to determine the strength of the presumption of confidentiality of the Presidential Communication. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Puno; C.J., dissenting opinion*) p. 554

— May be overcome when the entity asking for information is able to show that the public interest in its disclosure is greater than that in upholding the privilege. *(Id.; Carpio-Morales, J., dissenting opinion)*

— Must be formally claimed or asserted by the appropriate executive official. *(Id.; Nachura, J., separate concurring opinion)*

— Must yield to requirements in the fair administration of criminal justice. *(Id.; Id.)*

— Qualified presumption is overcome by sufficient showing or demonstration of specific need for the withheld information on the branch of government seeking its disclosure. *(Id.; Puno, C J., dissenting opinion)*

— Qualified presumption; rationale. *(Id.; Id.)*

— There is a need to protect the confidentiality of the internal deliberations of the President with his Cabinet and advisers. *(Id.; Carpio, J., dissenting and concurring opinion)*

Presumptive privilege for presidential communications — Characterized as generic privilege. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Tinga, J., separate concurring opinion*) p. 554

— Fundamental to the operation of government and inextricably rooted in the separation of powers under the Constitution. *(Id.; Id.)*

— Must be acknowledged by the courts, otherwise the traditional exercise of functions by all three branches of government will falter. *(Id.; Id.)*

— The presumption that the privilege is privileged can be overcome only by mere showing of a public need by the branch seeking access to conversations. *(Id.)*

Rationale — Explained. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Chico-Nazario, J., separate concurring opinion*) p. 554

EXTORTION

Allegation of — Evidentiary in nature and a matter of defense which must be presented and heard during the trial. (Chan *vs.* Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

FORUM SHOPPING

Certificate of non-forum shopping — May be signed by one of the principal parties only. (Juaban *vs.* Espina, G.R. No. 170049, Mar. 14, 2008) p. 357

— Requirement, not complied with in case at bar. (Sps. Oliveros *vs.* Judge Sison A.M. No. RTJ-07-2050, Mar. 14, 2008) p. 45

Liability for forum shopping — One can be liable for forum shopping regardless of the presence or absence of a certification against forum shopping. (Juaban *vs.* Espina, G.R. No. 170049, Mar. 14, 2008) p. 357

Rule against forum shopping — The purpose of the rule is to promote and facilitate the orderly administration of justice. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

FRAME-UP

Defense of — Evidentiary in nature and a matter of defense which must be presented and heard during the trial. (Chan *vs.* Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

GRAVE ABUSE OF DISCRETION

Definition — Such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Chico-Nazario, J., separate concurring opinion*) p. 554

ILLEGITIMATE CHILDREN

Proof of filiation — Voluntary recognition and judicial or compulsory recognition, distinguished. (Tayag *vs.* Tayag-Gallor**,** G.R. No. 174680, Mar. 24, 2008) p. 545

INTERPLEADER

Action for — Proper when the lessee does not know to whom payment of rentals should be made due to conflicting claims on the property or on the right to collect. (Pasricha *vs*. Don Luis Dison Realty, Inc., G.R. No. 136409, Mar. 14, 2008) p. 52

INTERVENTION

Definition — Intervention is a remedy by which a third party, not originally impleaded in the proceedings, becomes a litigant therein to enable him, her or it to protect or preserve a right or interest which may be affected by such proceedings. (Asia's Emerging Dragon Corp. *vs.* DOTC, G.R. No. 169914, Mar. 24, 2008) p. 523

Intervention of a non-party — Requisites. (Asia's Emerging Dragon Corp. *vs.* DOTC, G.R. No. 169914, Mar. 24, 2008) p. 523

Legal interest — A person whose interest is merely indirect, contingent and inchoate has no right to intervene. (Asia's Emerging Dragon Corp. *vs.* DOTC, G.R. No. 169914, Mar. 24, 2008) p. 523

— The interest contemplated by law must be actual, substantial, material, direct and immediate. *(Id.)*

JUDGES

Disqualification of — When a case does not fall under the instances covered by the Rule on mandatory disqualification of judges, inhibition is discretionary and primarily a matter of conscience and sound discretion on the part of the judge. (Reyes *vs.* Judge Paderanga, A.M. No. RTJ-06-1973, Mar. 14, 2008) p. 27

Gross ignorance of the law — A judge's lack of conversance with basic legal principles is a case of gross ignorance of the law; penalty. (Reyes *vs.* Judge Paderanga, A.M. No. RTJ-06-1973, Mar. 14, 2008) p. 27

Motion to inhibit — Shall be denied if filed after a member of the court had already given an opinion on the merits of the case. (Pasricha *vs.* Don Luis Dison Realty, Inc., G.R. No. 136409, Mar. 14, 2008) p. 52

— The suspicion that a judge is partial to one of the parties should be substantiated by evidence. *(Id.)*

Undue delay in rendering a decision or order — Illustrated. (Reyes *vs.* Judge Paderanga, A.M. No. RTJ-06-1973, Mar. 14, 2008) p. 27

JUDICIAL DEPARTMENT

Judiciary — The final arbiter on the question of whether or not a branch of government or any of its officials has acted with grave abuse of discretion. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Chico-Nazario, J., separate concurring opinion*) p. 554

JUDICIAL NOTICES

Proceedings in other cases — Courts may take judicial notice of proceedings in other cases that are closely related to the matter in controversy. (Juaban *vs.* Espina, G.R. No. 170049, Mar. 14, 2008) p. 357

JUDICIAL REVIEW

Constitutional issue — Will not be entertained unless it is the very *lis mota* of the case or if the case can be disposed of on some other grounds, such as the application of a statute or a general law. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

JURISDICTION

Courts — When the interest on the loan is a primary and inseparable component of the cause of action, it must be included in the determination of which court has jurisdiction. (Gomez *vs.* Montalban, G.R. No. 174414, Mar. 14, 2008) p. 460

Defense of lack of jurisdiction — May be raised at any time; exception. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

Determination of — Jurisdiction is determined by the cause of action as alleged in the complaint and not by the amount ultimately substantiated and awarded. (Gomez *vs.* Montalban, G.R. No. 174414, Mar. 14, 2008) p. 460

LABOR CASES

Factual questions — Should be resolved by the labor tribunals. (Flourish Maritime Shipping *vs.* Almanzor, G.R. No. 177948, Mar. 14, 2008) p. 476

Surety bond — Posting of surety bond accomplishes purpose of Labor Code on civil liability of indirect employer as interest of complainant is adequately protected. (Meralco Industrial Engineering Services Corp. *vs.* NLRC, G.R. No. 145402, Mar. 14, 2008) p. 94

LAW OF THE CASE

Principle of — When an appellate court passes on a question and remands the case to the lower court for further proceedings, the question there settled becomes the law of the case upon subsequent appeal. (Meralco Industrial Engineering Services Corp. *vs.* NLRC, G.R. No. 145402, Mar. 14, 2008) p. 94

LEASE

Ejectment of lessee — Allowed in case of non-payment of the monthly rentals. (Pasricha *vs.* Don Luis Dison Realty, Inc., G.R. No. 136409, Mar. 14, 2008) p. 52

LEGISLATIVE DEPARTMENT

Legislative inquiries — A committee has the power to require the witness to answer any question pertinent to the subject of inquiry and punish an unwilling witness for contempt. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Velasco, Jr., J., separate concurring opinion*) p. 554

— Non-publication of the Rules of Procedure governing inquiries is inconsequential. *(Id.; Carpio-Morales, J., dissenting opinion)*

— Power to detain and power to arrest, distinguished. *(Id.; Corona, J., concurring opinion)*

— Requisites. *(Id., Velasco, Jr., J., separate concurring opinion)*

— Rules of procedure, discussed. *(Id.; Puno, C J., dissenting opinion)*

— The committee has to show whether subpoenaed materials are critical to the performance of its legislative functions. *(Id.; Nachura, J., separate concurring opinion)*

— The Constitution requires Congress to lay down and publish specific and clear Rules of Procedure. *(Id.; Corona, J., concurring opinion)*

— The Rules governing inquiries in aid of legislation does not authorize committees to issue a warrant of arrest. *(Id.; Brion, J., separate concurring opinion)*

— The Rules of Procedure of the Senate governing inquiries in aid of legislation is unenforceable due to non-publication. *(Id.; Carpio, J., dissenting and concurring opinion)*

— The Senate committees are without jurisdiction to gather evidence of a crime. *(Id.; Chico-Nazario, J., separate concurring opinion)*

— Three-fold limitation. *(Id.; Corona, J., concurring opinion)*

Power of congressional oversight — Undertaken by Congress to enhance its understanding of and influence over implementation of legislation it has enacted. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Puno, C J., dissenting opinion*) p. 554

Power of contempt — Broad enough to deal with any affront committed against or any defiance of legislative authority or dignity, in the exercise of its power to obtain information on which to base intended legislation. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Carpio-Morales, J., dissenting opinion*) p. 554

— The contempt power of the legislature is *sui generis* which is analogous to that exercised by courts of justice. *(Id.; Corona, J., concurring opinion)*

— The proper subject of contempt power is any witness before the committees. *(Id.; Id.)*

Power of investigation and power of contempt — Requisites. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Puno, C J., dissenting opinion*) p. 554

Power to detain — The power to order the detention of a contumacious witness can not be expanded to include the power to issue an order of arrest. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Corona, J., concurring opinion*) p. 554

Powers — Legislative and oversight powers, distinguished. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008) p. 554

— Legislative and oversight powers, distinguished as to the use of compulsory process. *(Id.)*

LEGISLATIVE INQUIRIES

Nature — Inherent power to enforce by compulsion the power of inquiry, elucidated. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Carpio, J., dissenting and concurring opinion*) p. 554

— Legislative inquiries do not share the same goals as the criminal trial or the impeachment process. *(Id.; Tinga, J., separate concurring opinion)*

Procedural safeguards — Legislative inquiries and criminal or impeachment trials, distinguished. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Tinga, J., separate concurring opinion*) p. 554

Purpose — The purpose of a legislative inquiry is constitutionally and jurisprudentially linked to the function of legislation or formulating laws. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Tinga, J., separate concurring opinion*) p. 554

(Id.; Carpio, J., dissenting and concurring opinion)

LETTERS OF ADMINISTRATION

Order of preference — The order of preference in the appointment of a regular administrator does not apply to the selection of a special administrator. (Tan *vs.* Judge Gedorio, Jr., G.R. No. 166520, Mar. 14, 2008) p. 303

Petition — Must be filed by an interested person. (Tayag *vs.* Tayag-Gallor, G.R. No. 174680, Mar. 24, 2008) p. 545

Special administrators — When appointed. (Tan *vs.* Judge Gedorio, Jr., G.R. No. 166520, Mar. 14, 2008) p. 303

LOCAL GOVERNMENTS

Power to expropriate property — Requisites. (Francia, Jr. *vs.* Municipality of Meycauayan, G.R. No. 170432, Mar. 24, 2008) p. 531

— The determination of a public purpose is not a condition precedent to the issuance of a writ of possession. *(Id.)*

LOCUS STANDI

Doctrine of — Requires a litigant to have a material interest in the outcome of a case. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

Nature — A mere procedural technicality which may be waived, if at all, to adequately thresh out an important constitutional issue. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

Requirement of injury — Fact of payment of levy is sufficient injury for purposes of *locus standi* as there is a direct injury suffered in case at bar. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

MANDAMUS

Petition for — Proper remedy to compel the performance of a ministerial duty. (MWSS *vs.* Bautista, G.R. No. 171351, Mar. 14, 2008) p. 383

MIGRANT WORKERS AND OVERSEAS FILIPINOS ACT OF 1995 (R.A. NO. 8042)

Illegal dismissal — Monetary award granted to an illegally dismissed overseas contract worker, elucidated. (Flourish Maritime Shipping *vs.* Almanzor, G.R. No. 177948, Mar. 14, 2008) p. 476

MOOT AND ACADEMIC CASES

Moot and academic — The petition to consolidate is rendered moot and academic by the issuance of the writ of possession in case at bar. (Sps. Leong *vs.* Judge Tanguanco, G.R. No. 154632, Mar. 14, 2008) p. 168

MOTION TO DISMISS

Failure to state a cause of action — A motion to dismiss on the ground of failure to state a cause of action in the complaint hypothetically admits the truth of the facts alleged therein. (Tayag *vs.* Tayag-Gallor, G.R. No. 174680, Mar. 24, 2008) p. 545

OBLIGATIONS

Substantial compliance in good faith — Entitles the obligor to the full payment of the contract amount, less actual damages suffered by the obligee. (Diesel Construction Co., Inc. *vs.* UPSI Property Holdings, Inc., G.R. No. 154885, Mar. 24, 2008) p. 494

OMBUDSMAN

Powers — The Ombudsman has the power to directly impose administrative sanctions on erring government officials. (Deputy Ombudsman for the Visayas Primo C. Miro *vs.* Abugan, G.R. No. 168892, Mar. 24, 2008) p. 514

— The primary function of the Ombudsman is to determine the presence or absence of probable cause against those in public office during a preliminary investigation. (Presidential *Ad Hoc* Fact-Finding Committee on Behest Loans *vs.* Hon. Desierto, G.R. No. 145184, Mar. 14, 2008) p. 72

PARTITION

Phases — Elucidated. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

PLEA OF GUILTY

Searching inquiry — Guidelines. (People *vs.* Aguilar, G.R. No. 172868, Mar. 14, 2008) p. 431

PLEADINGS

Defenses and objections — Defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. (Heirs of Cesar Marasigan *vs.* Marasigan, G.R. No. 156078, Mar. 14, 2008) p. 190

POLICE POWER

Exercise of — Test of lawful subjects and lawful means, explained. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

PREJUDICIAL QUESTION

Principle of — A finding in the civil case for or against accused is not *juris et de jure* determinative of her innocence or guilt in the estafa. (Luces *vs.* Damole, G.R. No. 150900, Mar. 14, 2008) p. 153

PRELIMINARY INVESTIGATION

Power of review — The findings of the Secretary of Justice are not subject to judicial review unless made with grave abuse of discretion. (Chan *vs.* Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

— The Justice Secretary's power to review the prosecutor's findings subsists even after the information is filed in court; effect. *(Id.)*

PRESCRIPTION OF OWNERSHIP

Acquisitive prescription — When does not lie. (Rep. of the Phils. *vs.* Heirs of Francisca Dignos-Sorono, G.R. No. 171571, Mar. 24, 2008) p. 535

PRESUMPTIONS

Presumption of regularity in the performance of official duty — Prevails unless there be evidence to the contrary. (Dacles *vs.* People, G.R. No. 171487, Mar. 14, 2008) p. 412

— Stands in the absence of contrary evidence that will overcome the presumption. (Chan *vs.* Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

PREVENTIVE SUSPENSION

Payment of backwages — The payment of backwages during the period of suspension of a civil servant who is subsequently reinstated is proper if he is found innocent

of the charges and the suspension is unjustified. (Civil Service Commission *vs.* Rabang, G.R. No. 167763, Mar. 14, 2008) p. 316

PROBABLE CAUSE

Concept — Probable cause implies probability of guilt and requires more than bare suspicion but less than evidence which would justify a conviction. (Chan *vs.* Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

Finding of — Needs only to rest on evidence showing that, more likely than not, a crime has been committed by the suspect. (Chan *vs.* Sec. of Justice, G.R. No. 147065, Mar. 14, 2008) p. 118

PROOF BEYOND REASONABLE DOUBT

Conviction — Sustained on the basis of the evidence presented by the prosecution showing the guilt beyond reasonable doubt of the accused. (People *vs.* Aguilar, G.R. No. 172868, Mar. 14, 2008) p. 431

PUBLIC DOCUMENTS

Admissibility — The duly accomplished form of the Civil Service is an official document of the Commission which is admissible in evidence without need of further proof. (OCAD *vs.* Bermejo, A.M. No. P-05-2004, Mar. 14, 2008) p. 6

PUBLIC OFFICERS AND EMPLOYEES

Administrative liability — Separate and distinct from the penal and civil liabilities. (Ferrer, Jr. *vs.* Sandiganbayan, G.R. No. 161067, Mar. 14, 2008) p. 244

Criminal liability — Determination thereof is not affected by the ruling in the administrative proceeding. (Ferrer, Jr. *vs.* Sandiganbayan, G.R. No. 161067, Mar. 14, 2008) p. 244

Dismissal of administrative case — Does not necessarily bar the filing of a criminal prosecution for the same or similar acts which were the subject of the administrative complaint. (Ferrer, Jr. *vs.* Sandiganbayan, G.R. No. 161067, Mar. 14, 2008) p. 244

Resignation from public office — Acceptance of resignation is necessary for resignation of a public officer to be operative and effective. (Rep. of the Phils. *vs.* Singun, G.R. No. 149356, Mar. 14, 2008) p. 140

— Notice of acceptance of resignation is required. *(Id.)*

— Until the resignation is accepted, the tender or offer to resign is revocable. *(Id.)*

RECONSTITUTION OF TITLE

Order of reconstitution — Considered void for lack of jurisdiction if the certificate of title to be reconstituted is not lost. (Villanueva *vs*. Viloria, G.R. No. 155804, Mar. 14, 2008) p. 183

REGIONAL TRIAL COURTS

Jurisdiction — The RTC has jurisdiction to resolve the constitutionality of a statute, presidential decree or an executive order. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

RELIEF FROM JUDGMENT

Petition — May be availed of only against a final and executory judgment. (Gomez *vs.* Montalban, G.R. No. 174414, Mar. 14, 2008) p. 460

RELIEFS

Grant of — It is the material allegations of the fact in the complaint, not the legal conclusions made in the prayer, that determine the relief to which the plaintiff is entitled. (Juaban *vs.* Espina, G.R. No. 170049, Mar. 14, 2008) p. 357

RULES OF PROCEDURE

Application of — Liberal application of the rules is proper to support the substantive rights of the parties. (Muñoz *vs.* People, G.R. No. 162772, Mar. 14, 2008) p. 258

SALARY STANDARDIZATION LAW (R.A. NO. 6758)

Cost of living allowance — Employees of government-owned and controlled corporations, whether incumbent or not,

are entitled to the COLA from 1989 to 1999 as a matter of right. (MWSS *vs.* Bautista, G.R. No. 171351, Mar. 14, 2008) p. 383

SEPARATION OF POWERS

Principle of — Characteristic. (Neri *vs.* Senate Committee on Accountability of Public Officers and Investigations, G.R. No. 180643, Mar. 25, 2008; *Chico-Nazario, J., separate concurring opinion*) p. 554

— Not absolute. *(Id.; Puno, C.J., dissenting opinion*)

SEPARATION PAY

Liability for separation pay — Instance when the principal can also be held liable with the independent contractor or subcontractor for the separation pay of the latter's employees. (Meralco Industrial Engineering Services Corp. *vs.* NLRC, G.R. No. 145402, Mar. 14, 2008) p. 94

SHERIFFS

Duty — A sheriff must exercise due care and reasonable skill in the performance of his duties. (Gillana *vs.* Germinal, A.M. No. P-07-2307, Mar. 14, 2008) p. 15

— When a writ is placed in the hands of a sheriff, it becomes his ministerial duty to proceed with reasonable promptness to implement the same. (Estoque *vs.* Girado, A.M. No. P-06-2250, Mar. 24, 2008) p. 483

Execution of writs — Good faith or lack of it in a proceeding to enforce a writ is immaterial. (Estoque *vs.* Girado, A.M. No. P-06-2250, Mar. 24, 2008) p. 483

Simple misconduct — Committed by the sheriff's act of receiving money from a party to implement a court process without observing the proper procedure laid down by the rules; penalty. (Gillana *vs.* Germinal, A.M. No. P-07-2307, Mar. 14, 2008) p. 15

Simple neglect of duty — Committed in case of failure to make a return upon satisfaction of the judgment in part or in full. (Gillana *vs.* Germinal, A.M. No. P-07-2307, Mar. 14, 2008) p. 15

— Refusal of a sheriff to execute a writ, a case of. (Estoque *vs.* Girado, A.M. No. P-06-2250, Mar. 24, 2008) p. 483

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Police power — Distinguished from eminent domain. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

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Concept — Explained. (Pasricha *vs.* Don Luis Dison Realty, Inc., G.R. No. 136409, Mar. 14, 2008) p. 52

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UNJUST ENRICHMENT

Principle of — Every person who, through an act of performance by another comes into possession of something at the expense of the latter without just or legal ground shall return the same to him. (Planters Products, Inc. *vs.* Fertiphil Corp., G.R. No. 166006, Mar. 14, 2008) p. 270

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Elements — The elements to be proved and resolved are the fact of lease and the expiration or violation of its terms. (Pasricha *vs.* Don Luis Dison Realty, Inc., G.R. No. 136409, Mar. 14, 2008) p. 52

WAGES

Payment of — Indirect employers can only be held solidarily liable with the independent contractor or subcontractor in the event that the latter fails to pay the wages of its employees. (Meralco Industrial Engineering Services Corp. *vs.* NLRC, G.R. No. 145402, Mar. 14, 2008) p. 94

WITNESSES

Credibility of — Findings of the trial court thereon are entitled to the highest respect and will not be disturbed on appeal; rationale. (People *vs*. Malolot, G.R. No. 174063, Mar. 14, 2008) p. 444

(Dacles *vs.* People, G.R. No. 171487, Mar. 14, 2008) p. 412

— Minor variances in the details of a witness' account are badges of truth rather than an *indicia* of falsehood and they bolster the probative value of the testimony. (People *vs.* Malolot, G.R. No. 174063, Mar. 14, 2008) p. 444

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