PHILIPPINE REPORTS

VOL. 580

JULY 14, 2008 TO JULY 16, 2008

VOLUME 580

REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

OF THE

PHILIPPINES

FROM

JULY 14, 2008 TO JULY 16, 2008

SUPREME COURT
MANILA
2013

Prepared
by

The Office of the Reporter
Supreme Court
Manila
2013

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PHILIPPINE REPORTS
CONTENTS

PHILIPPINE REPORTS

Page

Page

Page

REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

EN BANC

[A.C. No. 4515. July 14, 2008]

CECILIA A. AGNO, *complainant, vs.* **ATTY. MARCIANO J. CAGATAN,** *respondent.*

SYLLABUS

1. LEGAL ETHICS; ATTORNEYS; DISBARMENT; PROCEEDINGS FOR DISBARMENT, SUSPENSION OR DISCIPLINE OF ATTORNEYS MAY BE TAKEN BY THE SUPREME COURT *MOTU PROPRIO* OR BY THE IBP UPON THE VERIFIED COMPLAINT OF ANY PERSON; SUSTAINED. — Section 1, Rule 139-B of the Rules of Court explicitly provides that proceedings for disbarment, suspension or discipline of attorneys may be taken by the Supreme Court *motu proprio*, or by the IBP upon the verified complaint of **any person.** Accordingly, we held in *Navarro v. Meneses III*, as reiterated in *Ilusorio-Bildner v. Lokin,* that: The argument of respondent that complainant has no legal personality to sue him is unavailing. Section 1, Rule 139-B of the Rules of Court provides that proceedings for the disbarment, suspension or discipline of attorneys may be taken by the Supreme Court *motu proprio* or by the Integrated Bar of the Philippines (IBP) upon the verified complaint of any person. **The right to institute a disbarment proceeding is not confined to clients nor is it necessary that the person complaining suffered injury from the alleged wrongdoing.** Disbarment proceedings are matters of public interest and the only basis for judgment is the proof or failure of proof of the charges. The evidence

submitted by complainant before the Commission on Bar Discipline sufficed to sustain its resolution and recommended sanctions. The *rationale* was explained by us in *Rayos-Ombac v. Rayos, viz*: [The] rule is premised on the nature of disciplinary proceedings. A proceeding for suspension or disbarment is not in any sense a civil action where the complainant is a plaintiff and the respondent lawyer is a defendant. Disciplinary proceedings involve no private interest and afford no redress for private grievance. They are undertaken and prosecuted solely for the public welfare. They are undertaken for the purpose of preserving courts of justice from the official ministration of persons unfit to practice in them. The attorney is called to answer to the court for his conduct as an officer of the court. The complainant or the person who called the attention of the court to the attorney's alleged misconduct is in no sense a party, and has generally no interest in the outcome except as all good citizens may have in the proper administration of justice.

2. ID.; ID.; CANON OF PROFESSIONAL RESPONSIBILITY; EMPHASIS ON HIGH STANDARD OF HONESTY AND FAIRNESS OF LAWYERS NOT ONLY IN THE PRACTICE OF LEGAL PROFESSION BUT IN PERSONAL DEALINGS AS WELL, EXPLAINED.— The Code of Professional Responsibility specifically mandates the following: Canon 1. A lawyer shall uphold the constitution, obey the laws of the land and promote respect for law and legal processes. Rule 1.01. A lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct. Canon 7. A lawyer shall at all times uphold the integrity and dignity of the legal profession and support the activities of the Integrated Bar. Rule 7.03 A lawyer shall not engage in conduct that adversely reflects on his fitness to practice law, nor shall he, whether in public or private life, behave in a scandalous manner to the discredit of the legal profession. The afore-cited canons emphasize the high standard of honesty and fairness expected of a lawyer not only in the practice of the legal profession but in his personal dealings as well. A lawyer must conduct himself with great propriety, and his behavior should be beyond reproach anywhere and at all times. For, as officers of the courts and keepers of the public's faith, they are burdened with the highest degree of social responsibility and are thus mandated to behave at all times in a manner consistent with truth and honor. Likewise, the oath

that lawyers swear to impresses upon them the duty of exhibiting the highest degree of good faith, fairness and candor in their relationships with others. Thus, lawyers may be disciplined for any conduct, whether in their professional or in their private capacity, if such conduct renders them unfit to continue to be officers of the court.

3. ID.; ID.; ISSUANCE OF WORTHLESS CHECK CONSTITUTES GROSS MISCONDUCT.— In *Sanchez v. Somoso*, the Court ruled that a lawyer who paid another with a personal check from a bank account which he knew has already been closed exhibited an extremely low regard to his commitment to the oath he took when he joined his peers, thereby seriously tarnishing the image of the profession which he should hold in high esteem. In *Moreno v. Araneta,* we held that the issuance of worthless checks constitutes gross misconduct, as the effect transcends the private interests of the parties directly involved in the transaction and touches the interests of the community at large.

4. ID.; ID.; ID.; PENALTY.— We find the recommended penalty of suspension from the practice of law for two (2) years by the IBP Board of Governors to be too harsh considering that this is respondent's first administrative offense. It is settled that the appropriate penalty which the Court may impose on an errant lawyer depends on the exercise of sound judicial discretion based on the surrounding facts. Accordingly, for employing deceit and misrepresentation in his personal dealings as well as for issuing a worthless check, we rule and so hold that the penalty of suspension for one (1) year and one (1) month from the practice of law is sufficient to be meted out to respondent.

APPEARANCES OF COUNSEL

Estayan & Associates Law Office for complainant.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

This is a complaint for disbarment filed by Cecilia A. Agno against respondent Atty. Marciano J. Cagatan for violation of the Code of Professional Responsibility.

The record shows that respondent was the President of International Services Recruitment Corporation (ISRC), a corporation engaged in the recruitment of Filipino workers for overseas employment. On July 12, 1988, ISRC's recruitment license was cancelled by the Department of Labor and Employment (DOLE) for violation of labor law provisions and subsequently, on August 9, 1988, ISRC was forever banned from participating in overseas recruitment.[1]

On September 19, 1988, the respondent appealed the DOLE's cancellation of ISRC's license with the Office of the President. The appeal was resolved by the said office in respondent's favor in the Resolution dated March 30, 1993[2] which set aside the order of cancellation and directed both the DOLE and the Philippine Overseas Employment Agency (POEA) to renew the recruitment license of ISRC subject to the payment of a guarantee bond which was double the amount required by law.

Since ISRC's recruitment license had already expired on September 17, 1989, ISRC filed on April 12, 1994, an application for renewal of its recruitment license with the POEA.[3]

However, during the pendency of the aforementioned appeal with the Office of the President, particularly on August 9, 1992, the respondent entered into a Memorandum of Agreement[4] with a United Arab Emirates (U.A.E.) national, Mr. Khalifa H. Juma,[5] the husband of herein complainant, Cecilia A. Agno. The Memorandum of Agreement is quoted *in toto* hereunder:

MEMORANDUM OF AGREEMENT

KNOW ALL MEN BY THESE PRESENTS:

That the undersigned, Mr. JOMA HUMED KHALIFA, U.A.E. national, and Mr. MARCIANO J. CAGATAN, Filipino citizen, have

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[1] POEA Certification dated June 29, 1995; *rollo*, p. 181.

[2] *Id*., pp. 33-39.

[3] *Id*., p. 45.

[4] *Id*., p. 5.

[5] Also referred to as Joma Humed Khalifa or Khalifa Humed Juma Al-Nasser.

entered into this Memorandum of Agreement this 9th day of August 1992, at Manila, Philippines, concerning the joint ownership and operation of INTERNATIONAL SERVICING AND RECRUITMENT CORPORATION (ISRC) and have mutually agreed, in connection therewith, as follows:

1. That ISRC shall be jointly owned by the herein parties on a 50-50 basis and accordingly, immediate steps shall be taken to submit the necessary documents to the Securities and Exchange Commission to legalize the arrangement and to cause the issuance of the corresponding certificate of stocks to Mr. Khalifa and his group;

2. That likewise, the sharing of the profits shall be on an equal basis (50-50) after deducting all the pertinent expenses that the officers of the corporation shall be: Chairman of the Board of Directors – Mr. JOMA HUMED KHALIFA, President and General Manager, Mr. MARCIANO J. CAGATAN or his designated representative, Treasurer, Ms. Cecilia Agno all of whom shall be members of the Board of Trustees together with two others;

3. That for and in consideration of the above joint ownership of the corporation, Mr. KHALIFA undertakes as his contribution to the stock ownership thereof, the following:

(a) To pay the amount of TWO HUNDRED FIFTY THOUSAND PESOS (₱250,000.00) initially on or before AUGUST 25, 1992, said amount to be used to have the license of ISRC reinstated;

(b) Upon the release of the license, to pay the additional amount of TWO HUNDRED FIFTY THOUSAND PESOS (₱250,000.00) to start the business operations of the corporation and to liquidate pending government and other obligations, if any;

4. The management of the corporation shall be handled by Mr. KHALIFA and his group while the legal and government liaisonship shall be the responsibility of Mr. CAGATAN; mutual consideration with each other in the course of the business operations shall be maintained in order to avoid problem with the government, the workers and the employers;

5. There shall be a regular accounting of the business every month, with the assistance of a qualified accountant and each of the herein parties shall be furnished copy thereof; the share of the parties may

be released to each of them as often as the parties agree, however, advances against the share of each may be agreed upon by the parties;

6. Any claim of workers or other parties against the ISRC before the signing of this agreement shall be the sole responsibility of Mr. CAGATAN and Mr. KHALIFA or his 50% ownership shall be free from such claims.

Manila, August 9, 1992.

JOMA HUMED KHALIFA MARCIANO J. CAGATAN

CECILIA AGNO

WITNESSES:

_____ _____

On December 26, 1995, which was more than three (3) years after the execution of the aforesaid agreement, a Complaint-Affidavit[6] for disbarment was filed with this Court by the complainant against the respondent claiming that the latter used fraud, deceit and misrepresentation, in enticing her husband, Khalifa, to join ISRC and invest therein the amount of ₱500,000.00 and that although the respondent received the aforesaid amount, the complainant learned from her inquiries with the Securities and Exchange Commission (SEC) and the POEA that the respondent failed to comply with the terms of the Memorandum of Agreement. The complainant found out that the said Memorandum of Agreement could not be validated without the approval of the Board of Directors of ISRC. While respondent even had the complainant sign an affidavit stating that she was then the acting Treasurer of ISRC, her appointment as Treasurer was not submitted to the SEC. The records of the SEC showed that the Board of Directors, officers and stockholders of ISRC remained unchanged and her name and that of her husband did not appear as officers and/or stockholders thereof. From the POEA, on the other hand, the complainant learned that ISRC's recruitment license was yet to be reinstated.

The complainant claimed that respondent used for his own personal benefit the ₱500,000.00 that she and her husband

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

invested in ISRC. When she demanded that respondent return the said sum of money, respondent issued a bank check dated March 30, 1994[7] in favor of the complainant in the amount of ₱500,000.00 which was dishonored for being drawn against a closed account. Despite repeated demands by complainant, the respondent failed to settle his obligation or redeem his dishonored check, prompting the complainant to file a case for violation of *Batas Pambansa Blg. 22* against the respondent. An information was filed before the Municipal Trial Court of Cainta, Rizal, charging the respondent with the said offense and a warrant of arrest was issued against respondent after the latter failed several times to attend his arraignment. The complainant prayed for the disbarment of the respondent for issuing a bouncing check and for his act of dishonesty in assuring her and her husband that the Memorandum of Agreement would suffice to install them as stockholders and officers of ISRC which induced them to invest in said corporation the amount of ₱500,000.00.

In his Comment,[8] respondent denied the charges against him and averred that while ISRC's recruitment license was cancelled by the DOLE in 1988, such cancellation was lifted by the Office of the President on March 30, 1993, on appeal. During the pendency of the said appeal, he and complainant's husband Khalifa entered into a Memorandum of Agreement because the latter offered to buy shares of stock of ISRC in order to finance the then pending appeal for the reinstatement of the ISRC license and for Khalifa and the complainant to undertake the full management and operation of the corporation. The respondent further alleged that Khalifa H. Juma, through the complainant, paid on various dates the total amount of ₱500,000.00, which respondent claimed he used to reimburse borrowed sums of money to pursue the appeal with the Office of the President. According to the respondent, while there were still legal procedures to be observed before the sale of shares of ISRC to non-stockholders, Khalifa and complainant were in a hurry to start the business operation of ISRC. Consequently, respondent sold and assigned his own shareholdings in ISRC for ₱500,000.00

[7] *Id.,* p. 15.

[8] *Id.,* pp. 23-29.

to Khalifa as evidenced by a Deed of Assignment[9] dated April 26, 1993. The respondent, in turn, issued a check in the amount of ₱500,000.00, which was not intended to be encashed but only to guarantee the reimbursement of the money to Khalifa and the complainant in case the appeal would be decided adversely against ISRC. Conversely, the check would be returned to respondent if the appeal is resolved in favor of ISRC. The respondent denied employing fraud or misrepresentation since allegedly, Khalifa and the complainant decided to buy his shares after being told, upon inquiry in Malacañang, that ISRC had a good case. The respondent averred that complainant was motivated by bad faith and malice in allegedly fabricating criminal charges against him instead of seeking rescission of the Deed of Assignment and refund of the consideration for the sale of the shares of stock. The respondent surmised that they decided not to proceed with the Memorandum of Agreement when complainant had secured her own license after she had received the Deed of Assignment and assumed the position of acting treasurer of the ISRC. The respondent justified the non-submission of copies of the Memorandum of Agreement, Deed of Assignment and complainant's appointment as Acting Treasurer with the SEC because of the cancellation of ISRC's license to recruit and the pendency of the appeal for reinstatement since 1989. Aside from a copy of the Deed of Assignment in favor of the complainant and her husband Khalifa regarding the five hundred shares of stock, respondent also presented in support of his allegations copies of 1) his Letter[10] dated April 12, 1994 to the POEA requesting the renewal of ISRC's license, and 2) a Letter[11] dated May 24, 1994 from the Licensing and Regulation Office of the POEA requiring him: (1) to submit an escrow agreement with a reputable commercial banking corporation in the amount of ₱400,000.00 to answer for any valid and legal claim of recruited workers; cash bond deposit of ₱200,000.00; and surety bond of ₱100,000.00; and (2) to clear ISRC's pending cases

[9] *Id.,* p. 44.

[10] *Id.,* p. 45.

[11] *Id.,* pp. 42-43.

with said agency before respondent's request for reinstatement of ISRC's license as a land based agency.

In a Resolution[12] dated May 22, 1996, this Court referred the case to the Integrated Bar of the Philippines (IBP) for investigation, report and recommendation.

The IBP's Commission on Bar Discipline (CBD), through Commissioner Milagros V. San Juan, held several hearings, the last of which was on November 13, 2003. During those hearings, the complainant presented her evidence. For his part, the respondent, instead of presenting his defense before the CBD in open court, opted to present a position paper which was allowed by the Order dated April 20, 2004[13] of Commissioner San Juan. However, in lieu of said position paper, the respondent submitted a Memorandum[14] after the complainant had filed her formal offer of evidence. Eventually, on October 12, 2004, Commissioner San Juan submitted her Report and Recommendation.[15] Said the Commissioner in her report:

> There is no question that the Memorandum of Agreement between the parties was executed on 9 [August] 1992. In said Memorandum, no mention was made of the assignment of shares of stock in favor of the complainant and her husband. The conditions stated therein was that the amount to be contributed by the complainant shall be used for the reinstatement of the license of the ISRC. No mention was made regarding the assignment of shares in favor of the complainant and her husband. Respondent presented a Deed of Assignment of shares of stock in favor of the complainant and her husband worth ₱500,000.00 dated 26 April 1993, however, it is noted that there is a super imposed date of 24 November 1994 in a notarial series of 1993 of Mario S. Ramos, Notary Public, which raises doubt as to the date it was executed. Apparently, the Deed of Assignment was executed when the complainant started her investigation regarding the true condition of the corporation. Anent the reinstatement of the license of the company there is no showing that the respondent

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[12] *Id.*, p. 66.

[13] *Id.*, p. 194.

[14] *Id.*, pp. 195-211.

[15] *Id.*, pp. 512-516.

used the amount he received from the complainant in compliance with the respondent's undertakings in the Memorandum of Agreement. The accusation of enticement employed by respondent is supported by the fact that complainant was made to appear that she will be appointed as treasurer of the corporation, however there was no action on the part of the respondent to change the composition of the Board of Directors and the treasurer in the records of the corporation on file with the Securities and Exchange Commission. The respondent did not fully reveal the true condition of the corporation regarding the reinstatement of the corporation's license to operate. Likewise the issuance of a check in favor of the complainant on 30 March 1994 against a closed account shows the respondent had no desire to return the money entrusted to him for the reinstatement of the license of the corporation. The letter of the POEA dated 24 May 1994 xxx clearly show that the payment of surety bond will not suffice to reinstate the license of the corporation in view of several cases of violations of recruitment pending before the POEA against said corporation. This fact was not disclosed to complainant when the Memorandum of Agreement was entered into by the parties.

Thus, the Commissioner's recommendation:

Given all the foregoing, it is submitted that respondent manifested lack of candor, when he knowingly failed to provide the complainant with accurate and complete information due her under the circumstances. It is respectfully recommended that respondent be **SUSPENDED** from the practice of law in the maximum period prescribed by law and to return the money received from the complainant.

On October 22, 2005, the Board of Governors of the IBP passed Resolution No. XVII-2005-102[16] adopting and approving, with modification, the afore-quoted report and recommendation of the investigating commissioner, to wit:

RESOLVED to ADOPT and APPROVE, as it is hereby ADOPTED and APPROVED, **with modification**, the Report and Recommendation of the Investigating Commissioner of the above-entitled case, herein made part of this Resolution as Annex "A", and finding, the Recommendation fully supported by the evidence on record and the applicable laws and rules, and considering Respondent's lack of candor when he knowingly failed to provide complainant

[16] *Rollo*, p. 511.

with the accurate and complete information due her, Atty. Marciano J. Cagatan is hereby **SUSPENDED** from the practice of law for two (2) years and **Restitution** of the money received from complainant.

Two (2) days later, or on November 24, 2005, the IBP Commission on Bar Discipline transmitted to this Court the Notice of Resolution together with the records of Administrative Case No. 4515.[17]

On January 4, 2006, respondent filed a Motion for Reconsideration[18] of the Investigating Commissioner's Report and Recommendation with the IBP Committee on Bar Discipline. In IBP Resolution No. XVII-2006-83[19] dated January 28, 2006, the IBP Board of Governors denied respondent's motion on the ground that it has no more jurisdiction to consider and resolve a matter already endorsed to the Supreme Court pursuant to Section 12 (b) of Rule 139-B of the Rules of Court.

After this Court noted the aforementioned IBP Resolution on June 28, 2006, a Motion for Reinvestigation[20] was filed by the respondent on September 12, 2006.

Subsequently, on November 15, 2006, the parties were required to manifest within ten (10) days from notice, if they were willing to submit this case for resolution based on the pleadings filed.[21]

In our Resolution[22] dated March 5, 2007, we noted without action respondent's motion for reinvestigation in view of respondent' subsequent compliance and Manifestation dated December 27, 2006. In the same resolution, the Court noted (1) the said respondent's compliance and manifestation of December 27, 2006 relative to the aforementioned November 15, 2006 Resolution; (2) complainant's Manifestation dated

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[17] *Id.,* p. 510.

[18] *Id.,* pp. 518-526.

[19] *Id.,* p. 517.

[20] *Id.,* pp. 542-546.

[21] *Id.,* p. 547.

[22] *Id.,* p. 559.

December 19, 2006, stating that she was willing to submit the case for resolution based on the pleadings filed and the resolution of the IBP Board of Governors; (3) respondent's Comment on Complainant's Manifestation dated January 4, 2007; and (4) complainant's Manifestation dated January 10, 2007.

At the outset, the Court shall resolve respondent's challenge as to complainant's personality to file this complaint. In his Motion for Reconsideration[23] of the IBP Investigating Commissioner's Report and Recommendation of October 12, 2004, respondent contends that complainant, not being a party-in-interest in the agreement between respondent and Mr. Khalifa H. Juma, has no legal standing to file the instant complaint.

Respondent's argument lacks merit.

Section 1, Rule 139-B[24] of the Rules of Court explicitly provides that proceedings for disbarment, suspension or discipline of attorneys may be taken by the Supreme Court *motu proprio*, or by the IBP upon the verified complaint of **any person**. Accordingly, we held in *Navarro v. Meneses III*,[25] as reiterated in *Ilusorio-Bildner v. Lokin*,[26] that:

> The argument of respondent that complainant has no legal personality to sue him is unavailing. Section 1, Rule 139-B of the Rules of Court provides that proceedings for the disbarment, suspension or discipline of attorneys may be taken by the Supreme Court *motu proprio* or by the Integrated Bar of the Philippines (IBP) upon the verified complaint of any person. **The right to institute a disbarment proceeding is not confined to clients nor is it**

[23] *Id.*, pp. 518-526.

[24] In full, this provision reads:

> SECTION 1. How instituted. – Proceedings for disbarment, suspension or discipline of attorneys may be taken by the Supreme Court *motu proprio*, or by the Integrated Bar of the Philippines (IBP) upon the verified complaint of any person. The complaint shall state clearly and concisely the facts complained of and shall be supported by affidavits of persons having personal knowledge of the facts therein alleged and/or by such documents as may substantiate said facts.

[25] CBD A.C. No. 313, January 30, 1998, 285 SCRA 586.

[26] A.C. No. 6554, December 14, 2005, 477 SCRA 634.

necessary that the person complaining suffered injury from the alleged wrongdoing. Disbarment proceedings are matters of public interest and the only basis for judgment is the proof or failure of proof of the charges. The evidence submitted by complainant before the Commission on Bar Discipline sufficed to sustain its resolution and recommended sanctions. (Emphasis ours)

The *rationale* was explained by us in *Rayos-Ombac v. Rayos*,[27] *viz*:

[The] rule is premised on the nature of disciplinary proceedings. A proceeding for suspension or disbarment is not in any sense a civil action where the complainant is a plaintiff and the respondent lawyer is a defendant. Disciplinary proceedings involve no private interest and afford no redress for private grievance. They are undertaken and prosecuted solely for the public welfare. They are undertaken for the purpose of preserving courts of justice from the official ministration of persons unfit to practice in them. The attorney is called to answer to the court for his conduct as an officer of the court. The complainant or the person who called the attention of the court to the attorney's alleged misconduct is in no sense a party, and has generally no interest in the outcome except as all good citizens may have in the proper administration of justice. (Word in brackets ours)

Prescinding therefrom, it is, therefore, immaterial whether or not complainant herein was a party to the subject transaction. In any event, complainant is actually a party-in-interest thereto because she is mentioned as the treasurer of ISRC in the Memorandum of Agreement;[28] as well as one of the assignees in the Deed of Assignment of shares of ISRC stocks which respondent alleged to have executed;[29] and as the payee in the bank check issued by the respondent for the amount of ₱500,000.00.[30]

We shall now proceed to the merits of the case.

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[27] A.C. No. 2884, January 28, 1998, 285 SCRA 93.

[28] Paragraph 2, Memorandum of Agreement; *Rollo*, p. 5.

[29] *Supra*, at note 9.

[30] *Supra*, at note 7.

The pivotal issue herein is whether respondent employed fraud, deceit or misrepresentation when he entered into the Memorandum of Agreement with Khalifa and received from the latter a sum of money in the amount of ₱500,000.00.

We rule in the affirmative.

The complainant contends that pursuant to their agreement, she gave the amount of ₱500,000.00 to the respondent to be used for the reinstatement of ISRC's recruitment license as well as to start the business operation of the corporation. The respondent, however, claims that complainant misinterpreted their agreement because the ₱500,000.00 the latter gave him was in payment of his personal shares of ISRC stock, as evidenced by a Deed of Assignment.

We are constrained to give credence to the complainant's contention. The due execution and authenticity of the Memorandum of Agreement (MOA) between the parties are undisputed. Moreover, the terms thereof are clear and explicit that for and in consideration of the joint ownership of ISRC, the husband of the complainant, Mr. Khalifa Juma, would pay the amount of ₱500,000.00, ₱250,000.00 of which would be used for the reinstatement of ISRC's license, while the other ₱250,000.00 was for the start of the operation of the corporation and to liquidate pending government and other obligations, if any.[31] Nowhere in said MOA is the alleged assignment of shares mentioned. The testimony of the complainant[32] on this score is more credible than that of the respondent because it conforms with the written stipulations in the MOA. In contrast, the respondent's explanations with respect to the ₱500,000.00 in question had been inconsistent. The respondent averred in his Comment that the ₱500,000.00 was given to him initially for the purpose of pursuing the appeal with the Office of the President and that he used the same to pay loans or to "reimburse borrowed money" spent for the said purpose. However, respondent also alleged that since the complainant was in a hurry to start the business operation of ISRC, the money was used to buy his

[31] Paragraph 3, Memorandum of Agreement; *rollo*, p. 5.

[32] TSN, 19 April 2002, pp. 264, 269 & 283.

own shareholdings in the corporation for which he executed a Deed of Assignment in complainant's favor, which respondent claimed he could validly do without the approval of ISRC's Board of Directors. His subsequent Memorandum[33] submitted to the IBP contained new allegations that aside from the ₱500,000.00 paid by the complainant for his personal shares of ISRC stocks, an additional ₱500,000.00 should have been given to him as fresh capital of the corporation and because of this failure of complainant to put up the alleged fresh capital, ISRC was not able to put up the deposits required by the POEA resulting in the non-renewal of the license of ISRC up to the present.

Indeed, the deceit and misrepresentation employed by the respondent was seemingly evident right at the outset when he entered into the MOA concerning the joint ownership and operation of ISRC with the complainant's husband, knowing fully well that he could not do so without the consent of and/or authority from the corporation's Board of Directors. The unilateral execution by respondent of the Deed of Assignment is a lame excuse offered by the respondent. We agree with the observation of Commissioner San Juan that the said deed, which was not at all mentioned in the MOA, was executed by the respondent after the complainant had conducted her investigation of the true condition of the corporation. The so-called "guarantee check" appears to have also been issued by respondent for the same reason.

Moreover, while the respondent made it appear in the MOA that the complainant would be appointed treasurer and her husband Chairman of the Board of ISRC, the respondent had not complied with the said undertaking as per the Certification[34] dated October 13, 1995 of the Securities and Exchange Commission (SEC). The respondent could not justify his non-compliance with the terms of the MOA by citing ISRC's inability to comply with other governmental requirements for the reinstatement of its license for various reasons, since the respondent failed to disclose the same to the complainant and her husband.

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[33] *Rollo*, pp. 195-211.

[34] *Id.*, p. 177.

Particularly, the respondent failed to apprise the complainant as to the true state of ISRC's affairs that the reinstatement of the corporation's recruitment license would require not only a favorable action by the Office of the President on ISRC's appeal and the payment of a surety bond, but also ISRC's clearance or exoneration in its other cases for recruitment violations pending with the POEA.[35] The respondent could not pass the blame to the complainant because of his belated excuse that complainant failed to infuse an additional amount of ₱500,000.00. This new defense is clearly an afterthought and not supported by evidence.

In view of the foregoing, the Court holds that respondent has violated the Code of Professional Responsibility as well as his attorney's oath.

The Code of Professional Responsibility specifically mandates the following :

Canon 1. A lawyer shall uphold the constitution, obey the laws of the land and promote respect for law and legal processes.

> Rule 1.01. A lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct.

Canon 7. A lawyer shall at all times uphold the integrity and dignity of the legal profession and support the activities of the Integrated Bar.

> Rule 7.03 A lawyer shall not engage in conduct that adversely reflects on his fitness to practice law, nor shall he, whether in public or private life, behave in a scandalous manner to the discredit of the legal profession.

The afore-cited canons emphasize the high standard of honesty and fairness expected of a lawyer not only in the practice of the legal profession but in his personal dealings as well.[36] A lawyer must conduct himself with great propriety, and his behavior should be beyond reproach anywhere and at all times.[37] For, as

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[35] Letter from POEA; *rollo*, p. 45.

[36] *Sanchez v. Somoso*, A.C. No. 6061, October 3, 2003, 412 SCRA 569, 571.

[37] *Id*.

officers of the courts and keepers of the public's faith, they are burdened with the highest degree of social responsibility and are thus mandated to behave at all times in a manner consistent with truth and honor.[38] Likewise, the oath that lawyers swear to impresses upon them the duty of exhibiting the highest degree of good faith, fairness and candor in their relationships with others.[39] Thus, lawyers may be disciplined for any conduct, whether in their professional or in their private capacity, if such conduct renders them unfit to continue to be officers of the court.[40]

Hence, in this case, we are in accord with the findings of the IBP Commissioner, as affirmed by the IBP Board of Governors. What is more, we find respondent to be guilty of gross misconduct for issuing a worthless check.

In *Sanchez v. Somoso*,[41] the Court ruled that a lawyer who paid another with a personal check from a bank account which he knew has already been closed exhibited an extremely low regard to his commitment to the oath he took when he joined his peers, thereby seriously tarnishing the image of the profession which he should hold in high esteem. In *Moreno v. Araneta*,[42] we held that the issuance of worthless checks constitutes gross misconduct, as the effect transcends the private interests of the parties directly involved in the transaction and touches the interests of the community at large.

Respondent herein admitted having issued a check but claimed that it was only to guarantee the reimbursement of the ₱500,000.00 given to him by the complainant in case of an adverse decision in ISRC's appeal with the Office of the President. We note, however, that said check was issued on March 30, 1994 or one year after the appeal adverted to had already been favorably acted upon on March 30, 1993. Hence, our conclusion is that

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[38] *Olbes v. Deciembre*, A.C. No. 5365, April 27, 2005, 457 SCRA 341, 352.

[39] *Id*.

[40] *Id*.

[41] *Supra* at note 17, p. 572.

[42] A.C. No. 1109, April 27, 2005, 457 SCRA 329, 337.

the check was issued only after the complainant demanded the return of their ₱500,000.00 investment in ISRC. In any event, respondent's act of issuing a guarantee check for ₱500,000.00, when he was presumably aware that at the time of his issuance thereof his bank account against which the check was drawn was already closed, clearly constitutes gross misconduct for which he should be penalized.

In sum, the amount of ₱500,000.00 was received by the respondent for the reinstatement of the license, but there is no showing that it was used for such purpose, as the respondent failed to give any credible accounting or explanation as to the disbursement of the said amount in accordance with the stipulations in the MOA. Respondent failed to disclose all the existing hindrances to the renewal of ISRC's recruitment license, which enticed complainant and her husband to part with the aforesaid sum of money. He also admittedly issued a check drawn against a closed account, which evinced his lack of intention to return the money to the complainant pursuant to his supposed guarantee. It is thus proper for the Court to order its restitution as recommended by the IBP.

We find the recommended penalty of suspension from the practice of law for two (2) years by the IBP Board of Governors to be too harsh considering that this is respondent's first administrative offense. It is settled that the appropriate penalty which the Court may impose on an errant lawyer depends on the exercise of sound judicial discretion based on the surrounding facts.[43] Accordingly, for employing deceit and misrepresentation in his personal dealings as well as for issuing a worthless check, we rule and so hold that the penalty of suspension for one (1) year and one (1) month from the practice of law is sufficient to be meted out to respondent.

WHEREFORE, respondent Atty. Marciano J. Cagatan is *SUSPENDED FOR ONE (1) YEAR and ONE (1) MONTH* from the practice of law with warning that repetition of the same or similar acts will merit a more severe penalty; and ordered to *RESTITUTE* the amount of ₱500,000.00 to the complainant.

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[43] *Soriano v. Reyes*, A.C. No. 4676, May 4, 2006, 489 SCRA 328, 343.

Let copies of this Decision be furnished all courts, the Integrated Bar of the Philippines, the Office of the Bar Confidant and spread in respondent's personal records.

SO ORDERED.

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

Chico-Nazario, J., on leave.

EN BANC

[A.C. No. 7747. July 14, 2008]

CATHERINE & HENRY YU, *complainants, vs.* **ATTY. ANTONIUTTI K. PALAÑA,** *respondent.*

SYLLABUS

1. LEGAL ETHICS; ATTORNEYS; LAWYERS MAY BE DISCIPLINED BOTH IN THEIR PROFESSIONAL AND IN THEIR PRIVATE CAPACITY; RATIONALE.— Lawyers are instruments in the administration of justice. As vanguards of our legal system, they are expected to maintain not only legal proficiency but also a high standard of morality, honesty, integrity and fair dealing. In so doing, the people's faith and confidence in the judicial system is ensured. Lawyers may be disciplined – whether in their professional or in their private capacity – for any conduct that is wanting in morality, honesty, probity and good demeanor.

2. ID.; ID.; ADMINISTRATIVE CASES AGAINST A LAWYER ARE DISTINCT AND MAY PROCEED INDEPENDENTLY FROM CRIMINAL CASES INVOLVING THE SAME SETS OF FACTS; JUSTIFIED.— The fact that the criminal case against the respondent involving the same set of facts is still

pending in court is of no moment. Respondent, being a member of the bar, should note that administrative cases against lawyers belong to a class of their own. They are distinct from and they may proceed independently of criminal cases. A criminal prosecution will not constitute a prejudicial question even if the same facts and circumstances are attendant in the administrative proceedings. Besides, it is not sound judicial policy to await the final resolution of a criminal case before a complaint against a lawyer may be acted upon; otherwise, this Court will be rendered helpless to apply the rules on admission to, and continuing membership in, the legal profession during the whole period that the criminal case is pending final disposition, when the objectives of the two proceedings are vastly disparate. Disciplinary proceedings involve no private interest and afford no redress for private grievance. They are undertaken and prosecuted solely for the public welfare and for preserving courts of justice from the official ministration of persons unfit to practice law. The attorney is called to answer to the court for his conduct as an officer of the court.

3. ID.; ID.; DISBARMENT; WHEN PROPER. — Time and again, we have stated that disbarment is the most severe form of disciplinary sanction, and, as such, the power to disbar must always be exercised with great caution for only the most imperative reasons and in clear cases of misconduct affecting the standing and moral character of the lawyer as an officer of the court and a member of the bar. The Court notes that this is not the first time that respondent is facing an administrative case, for he had been previously suspended from the practice of law in *Samala v. Palaña* and *Sps. Amador and Rosita Tejada v. Palaña.* In *Samala*, respondent also played an important role in a corporation known as First Imperial Resources Incorporated (FIRI), being its legal officer. As in this case, respondent committed the same offense by making himself part of the money trading business when, in fact, said business was not among the purposes for which FIRI was created. Respondent was thus meted the penalty of suspension for three (3) years with a warning that a repetition of the same or similar acts would be dealt with more severely. Likewise, in *Tejada*, he was suspended for six (6) months for his continued refusal to settle his loan obligations. The fact that respondent went into hiding in order to avoid service upon him of the warrant of arrest issued by the court (where his criminal case is pending)

exacerbates his offense. Verily, respondent's failure to comply with the orders of the IBP without justifiable reason manifests his disrespect of judicial authorities. As a lawyer, he ought to know that the compulsory bar organization was merely deputized by this Court to undertake the investigation of complaints against lawyers. In short, his disobedience to the IBP is in reality a gross and blatant disrespect of the Court. By his repeated cavalier conduct, the respondent exhibited an unpardonable lack of respect for the authority of the Court. Considering the serious nature of the instant offense and in light of his prior misconduct herein-before mentioned for which he was penalized with a three-year suspension with a warning that a repetition of the same or similar acts would be dealt with more severely; and another six-month suspension thereafter, the contumacious behavior of respondent in the instant case which grossly degrades the legal profession indeed warrants the imposition of a much graver penalty - - - disbarment. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them underfoot and to ignore the very bonds of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. Respondent Antoniutti K. Palaña is hereby **DISBARRED,** and his name is **ORDERED STRICKEN** from the Roll of Attorneys. Let a copy of this Decision be entered in his record as a member of the Bar; and let notice of the same be served on the Integrated Bar of the Philippines, and on the Office of the Court Administrator for circulation to all courts in the country.

D E C I S I O N

***PER CURIAM*:**

On November 16, 2006, complainants Henry and Catherine Yu filed a complaint[1] for disbarment against respondent Atty. Antoniutti K. Palaña for alleged acts of defraudation, before the Commission on Bar Discipline (CBD) of the Integrated Bar of the Philippines (IBP).[2] Complainants attached therewith their

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

[2] The complaint was docketed as CBD Case No. 06-1871.

Consolidated Complaint-Affidavit[3] which they earlier filed before the City Prosecutor's Office of Makati, charging the respondent and his co-accused (in the criminal case), with syndicated *estafa* and violation of Batas Pambansa Blg. 22 (BP 22).

The facts, as found by the CBD, are as follows:

Sometime in 2004, complainants met a certain Mr. Mark Anthony U. Uy (Mr. Uy) who introduced himself as the Division Manager of Wealth Marketing and General Services Corporation (Wealth Marketing), a corporation engaged in spot currency trading.[4] Mr. Uy persuaded the complainants, together with other investors, to invest a minimum amount of ₱100,000.00 or its dollar equivalent with said company. They were made to believe that the said company had the so-called "stop-loss mechanism" that enabled it to stop trading once the maximum allowable loss fixed at 3%-9% of the total contributions, would be reached. If, on the other hand, the company would suffer loss, Wealth Marketing would return to the investors the principal amount including the monthly guaranteed interests. Further, Wealth Marketing promised to issue, as it had in fact issued, postdated checks covering the principal investments.[5]

It turned out, however, that Wealth Marketing's promises were false and fraudulent, and that the checks earlier issued were dishonored for the reason "account closed." The investors, including the complainants, thus went to Wealth Marketing's office. There, they discovered that Wealth Marketing had already ceased its operation and a new corporation was formed named Ur-Link Corporation (Ur-Link) which supposedly assumed the rights and obligations of the former. Complainants proceeded to Ur-Link office where they met the respondent. As Wealth Marketing's Chairman of the Board of Directors, respondent assured the complainants that Ur-Link would assume the obligations of the former company.[6] To put a semblance of

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[3] *Rollo*, pp. 5-11.

[4] *Id.* at 5.

[5] *Id.* at 5-8.

[6] Commissioner's Report, pp. 2-3.

validity to such representation, respondent signed an Agreement[7] to that effect which, again, turned out to be another ploy to further deceive the investors.[8] This prompted the complainants to send demand letters to Wealth Marketing's officers and directors which remained unheeded. They likewise lodged a criminal complaint for syndicated *estafa* against the respondent and his co-accused.[9]

Despite the standing warrant for his arrest, respondent went into hiding and has been successful in defying the law, to this date.

In an Order[10] dated November 17, 2006, Director for Bar Discipline Rogelio B. Vinluan required respondent to submit his Answer to the complaint but the latter failed to comply. Hence, the motion to declare him in default filed by the complainants.[11] The case was thereafter referred to Commissioner Jose I. De la Rama, Jr. (the Commissioner) for investigation. In his continued defiance of the lawful orders of the Commission, respondent failed to attend the mandatory conference and to file his position paper. Respondent was thereafter declared in default and the case was heard *ex parte*.

In his report,[12] the Commissioner concluded that Wealth Marketing's executives (which included respondent herein) conspired with one another in defrauding the complainants by engaging in an unlawful network of recruiting innocent investors to invest in foreign currency trading business where, in fact, no such business existed, as Wealth Marketing was not duly licensed by the Securities and Exchange Commission (SEC) to engage in such undertaking. This was bolstered by the fact that Wealth Marketing's financial status could not support the investors'

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[7] *Rollo*, pp. 48-50.

[8] *Id*. at 31.

[9] *Id*. at 5-11.

[10] *Id*. at 20.

[11] *Id*. at 21.

[12] Commissioner's Report, pp. 1-9.

demands involving millions of pesos. It also appears, said the Commissioner, that Ur-Link was created only to perpetuate fraud and to avoid obligations. The Commissioner likewise found that respondent had been previously suspended by this Court for committing similar acts of defraudation.[13] Considering the gravity of the acts committed, as well as his previous administrative case and defiance of lawful orders, the Commissioner recommended that respondent be disbarred from the practice of law, the pertinent portion of which reads:

> WHEREFORE, in view of the foregoing, after a careful evaluation of the documents presented, including the jurisprudence laid down by the complainants involving the same respondent, and said decision of the Supreme Court forms part of the law of the land, the undersigned commissioner is recommending that respondent Atty. Antoniutti K. Palaña be disbarred and his name be stricken off the Roll of Attorneys upon the approval of the Board of Governors and the Honorable Supreme Court.[14]

In its Resolution dated August 17, 2007, the IBP Board of Governors adopted and approved the Commissioner's report and recommendation.[15]

This Court agrees with the IBP Board of Governors.

Lawyers are instruments in the administration of justice. As vanguards of our legal system, they are expected to maintain not only legal proficiency but also a high standard of morality, honesty, integrity and fair dealing. In so doing, the people's faith and confidence in the judicial system is ensured. Lawyers

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[13] *Samala v. Palana,* A.C. No. 6595, April 15, 2005, 456 SCRA 100.

[14] Commissioner's Report, p. 9.

[15] The pertinent portion of the Resolution reads:

> RESOLVED to ADOPT and APPROVE, as it is hereby ADOPTED and APPROVED the Report and Recommendation of the Investigating Commissioner of the above-entitled case, herein made part of this Resolution as Annex "A"; and, finding the recommendation fully supported by the evidence on record and the applicable laws and rules, and for Respondent's violation of Batas Pambansa Blg. (P.D.) (sic) 22, for being a recidivist and for showing no "modicum of compassion," Atty. Antoniutti K. Palaña is hereby DISBARRED from the practice of law and that his name be stricken off the Roll of Attorneys.

may be disciplined – whether in their professional or in their private capacity – for any conduct that is wanting in morality, honesty, probity and good demeanor.[16]

In the present case, two corporations were created where the respondent played a vital role, being Wealth Marketing's Chairman of the Board and Ur-Link's representative. We quote with approval the Commissioner's findings, thus:

> As correctly pointed out by the City Prosecutor's Office of Makati, it appears that the executive officers of Wealth Marketing Corporation conspired with each (sic) other to defraud the investors by engaging in unlawful network of recruiting innocent investors to invest in foreign currency trading business. The truth of the matter is that there was no actual foreign currency trading since said corporation is not duly licensed or authorized by the Securities and Exchange Commission to perform such task.
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> In the General Information Sheet (Annex "I") of Wealth Marketing and General Services Corporation, the authorized capital stock is only ₱9,680,000.00 and the paid up capital, at the time of [in]corporation is (sic) only ₱605,000.00. Said corporation, as the records will show, has been dealing with investors with millions of pesos on hand, with the hope that their money would earn interests as promised. However, their company resources and financial status will show that they are not in the position to meet these demands if a situation such as this would arise.
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> x x x x x x x x x
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> Furthermore, in order to evade the investors who were then asking for the return of their investments, said respondent even formed and made him part of a new company, Ur-Link Corporation, which according to the complainants, when they met the respondent, would assume the obligations of the defunct Wealth Marketing Corporation. It is also evident that respondent is frolicking with the Securities and Exchange Commission for the purpose of employing fraud.[17]

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[16] *Tomlin II v. Moya II*, A.C. No. 6971, February 23, 2006, 483 SCRA 154, 159.

[17] Commissioner's Report, pp. 4-5.

To be sure, respondent's conduct falls short of the exacting standards expected of him as a vanguard of the legal profession.

The fact that the criminal case against the respondent involving the same set of facts is still pending in court is of no moment. Respondent, being a member of the bar, should note that administrative cases against lawyers belong to a class of their own. They are distinct from and they may proceed independently of criminal cases. A criminal prosecution will not constitute a prejudicial question even if the same facts and circumstances are attendant in the administrative proceedings.[18] Besides, it is not sound judicial policy to await the final resolution of a criminal case before a complaint against a lawyer may be acted upon; otherwise, this Court will be rendered helpless to apply the rules on admission to, and continuing membership in, the legal profession during the whole period that the criminal case is pending final disposition, when the objectives of the two proceedings are vastly disparate.[19] Disciplinary proceedings involve no private interest and afford no redress for private grievance. They are undertaken and prosecuted solely for the public welfare and for preserving courts of justice from the official ministration of persons unfit to practice law.[20] The attorney is called to answer to the court for his conduct as an officer of the court.[21]

As to the recommended penalty of disbarment, we find the same to be in order.

Section 27, Rule 138 of the Rules of Court provides:

A member of the bar may be disbarred or suspended from his office as attorney by the Supreme Court for any deceit, malpractice, or other gross misconduct in such office, grossly immoral conduct, or by reason of his conviction of a crime involving moral turpitude,

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[18] *Tomlin II v.* Moya, *supra* note 16, at 161; *Gatchalian Promotions Talents Pool, Inc. v. Atty. Naldoza*, 374 Phil. 1, 10 (1999).

[19] *Tomlin II v. Moya II*, *id*.

[20] *Soriano v. Reyes*, A.C. No. 4676, May 4, 2006, 489 SCRA 328, 339; *Barrios v. Martinez*, A.C. No. 4585, November 12, 2004, 442 SCRA 324, 335.

[21] *Soriano v. Reyes*, *id*.

or for any violation of the oath which he is required to take before admission to practice, or for a willful disobedience of any lawful order of a superior court, or for corruptly or willfully appearing as an attorney for a party to a case without authority to do so. x x x.

Time and again, we have stated that disbarment is the most severe form of disciplinary sanction, and, as such, the power to disbar must always be exercised with great caution for only the most imperative reasons and in clear cases of misconduct affecting the standing and moral character of the lawyer as an officer of the court and a member of the bar.[22]

The Court notes that this is not the first time that respondent is facing an administrative case, for he had been previously suspended from the practice of law in *Samala v. Palaña*[23] and *Sps. Amador and Rosita Tejada v. Palaña*.[24] In *Samala*, respondent also played an important role in a corporation known as First Imperial Resources Incorporated (FIRI), being its legal officer. As in this case, respondent committed the same offense by making himself part of the money trading business when, in fact, said business was not among the purposes for which FIRI was created. Respondent was thus meted the penalty of suspension for three (3) years with a warning that a repetition of the same or similar acts would be dealt with more severely.[25] Likewise, in *Tejada*, he was suspended for six (6) months for his continued refusal to settle his loan obligations.[26]

The fact that respondent went into hiding in order to avoid service upon him of the warrant of arrest issued by the court (where his criminal case is pending) exacerbates his offense.[27]

Finally, we note that respondent's case is further highlighted by his lack of regard for the charges brought against him. As in

[22] *Id*. at 343.

[23] A.C. No. 6595, April 15, 2005, 456 SCRA 100.

[24] A.C. No. 7434, August 23, 2007, 530 SCRA 771.

[25] *Samala v. Palaña*, *supra* note 23, at 106.

[26] *Sps. Amador and Rosita Tejada v. Palaña*, *supra* note 24.

[27] *Cuizon v. Macalino*, A.C. No. 4334, July 7, 2004, 433 SCRA 479, 484.

Tejada, instead of meeting the charges head on, respondent did not bother to file an answer and verified position paper, nor did he participate in the proceedings to offer a valid explanation for his conduct.[28] The Court has emphatically stated that when the integrity of a member of the bar is challenged, it is not enough that he denies the charges against him; he must meet the issue and overcome the evidence against him. He must show proof that he still maintains that degree of morality and integrity which at all times is expected of him.[29] Verily, respondent's failure to comply with the orders of the IBP without justifiable reason manifests his disrespect of judicial authorities.[30] As a lawyer, he ought to know that the compulsory bar organization was merely deputized by this Court to undertake the investigation of complaints against lawyers. In short, his disobedience to the IBP is in reality a gross and blatant disrespect of the Court.[31] By his repeated cavalier conduct, the respondent exhibited an unpardonable lack of respect for the authority of the Court.[32]

Considering the serious nature of the instant offense and in light of his prior misconduct herein-before mentioned for which he was penalized with a three-year suspension with a warning that a repetition of the same or similar acts would be dealt with more severely; and another six-month suspension thereafter, the contumacious behavior of respondent in the instant case which grossly degrades the legal profession indeed warrants the imposition of a much graver penalty — disbarment.[33] Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them underfoot and to ignore the very bonds of society, argues

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[28] *Sps. Amador and Rosita Tejada v. Palaña*, *supra* note 24.

[29] *Id*.

[30] *Tomlin II v. Moya II*, *supra* note 16, at 161-162.

[31] *Sps. Amador and Rosita Tejada v. Palaña*, *supra* note 24.

[32] *Cuizon v. Macalino*, *supra* note 27, at 484.

[33] *Maligsa v. Atty. Cabanting*, 338 Phil. 913, 917-918 (1997).

recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic.[34]

WHEREFORE, respondent Antoniutti K. Palaña is hereby *DISBARRED,* and his name is *ORDERED STRICKEN* from the Roll of Attorneys. Let a copy of this Decision be entered in his record as a member of the Bar; and let notice of the same be served on the Integrated Bar of the Philippines, and on the Office of the Court Administrator for circulation to all courts in the country.

SO ORDERED.

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

Chico-Nazario, J., on leave.

SECOND DIVISION

[A.M. No. 08-1-07-MeTC. July 14, 2008]

OFFICE OF THE COURT ADMINISTRATOR, *petitioner, vs.* **EMMA ANNIE D. ARAFILES, Court Legal Researcher, Metropolitan Trial Court (MeTC), Branch 48, Pasay City,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; CIVIL SERVICE LAW; HABITUAL TARDINESS; WHEN INCURRED.— The law requires all government officials and employees to render not less than eight (8) hours of work per day for five (5) days a week, or a total of forty (40) hours of work per week, exclusive of time for lunch. As a rule, these hours are from eight (8) o'clock in the morning to five (5) o'clock in the afternoon.

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[34] *Barrios v. Martinez*, *supra* note 20, at 341.

Under CSC Memorandum Circular No. 14, S. 1991, an officer or employee of the civil service is considered habitually tardy if he incurs tardiness, regardless of the number of minutes, ten (10) times a month for at least two (2) months in a semester or for at least two (2) consecutive months during the year.

2. ID.; ID.; COURT PERSONNEL; NON-OFFICE OBLIGATIONS, PERFORMANCE OF HOUSEHOLD CHORES, TRAFFIC PROBLEMS, AND HEALTH, DOMESTIC AND FINANCIAL CONCERNS ARE NOT SUFFICIENT REASONS TO EXCUSE HABITUAL TARDINESS; RATIONALE.— We have previously ruled that non-office obligations, household chores, traffic problems, and health, domestic and financial concerns are not sufficient reasons to excuse or justify habitual tardiness. These are the types of reasons Ms. Arafiles gave; hence, we cannot free her from liability for her infractions. Time and again, we have reminded officials and employees of the Judiciary that by reason of the nature and functions of their office, they must be role models in the faithful observance of the constitutional principle that public office is a public trust. A way of doing this is through the strict observance of prescribed office hours and the efficient use of every working moment, if only to give back the true worth of what the Government, and ultimately, the people, pay in maintaining the Judiciary. In short, in the public service, punctuality is a virtue, absenteeism and tardiness are impermissible.

3. ID.; ID.; ID.; WHEN GUILTY OF HABITUAL TARDINESS; PENALTY.— We agree with Court Administrator Elepaño that "(B)y being habitually tardy, she [respondent] has fallen short of the stringent standard conduct demanded from everyone connected with the administration of justice" and thus merits the prescribed penalty. Under Section 52(c)(4), Rule VI of CSC Memorandum Circular No. 19, Series of 1999, habitual tardiness is penalized as follows: first offense, reprimand; second offense, suspension for 1-30 days; and third offense, dismissal from the service.

R E S O L U T I O N

BRION, *J.*:

The Leave Division of the Office of the Court Administrator submitted a Report of Tardiness on December 6, 2007 stating

that Ms. Emma Annie D. Arafiles, Court Legal Researcher, Metropolitan Trial Court (MeTC), Branch 48, Pasay City, incurred tardiness in September and October 2007. She was tardy 11 times in September and 16 times in October. The Report was docketed as A.M. No. 08-107-MeTC (Habitual Tardiness of Emma Annie D. Arafiles, MeTC, Branch 48, Pasay City.)

Court Administrator Zenaida N. Elepaño (through a 1st Indorsement dated January 14, 2008) required Ms. Arafiles to comment on the report within ten (10) days from receipt.

Ms. Arafiles complied with a letter-comment dated January 30, 2008. She admitted the tardiness and gave various explanations, specifically: that she had no maid; that she had to attend to the needs of her school children ages eight (8) and two (2) years; and that she was hypertensive. She asked for "human consideration" and apologized for her tardiness, promising that she would no longer be tardy in the future.

Court Administrator Elepaño evaluated Ms. Arafiles' explanation and found no justification for her habitual tardiness. The Court Administrator recommended (1) that the Report be redocketed as a regular administrative matter, and (2) that Ms. Arafiles be given a reprimand with a warning that a repetition of the same offense would warrant the imposition of a more severe penalty.

The law requires all government officials and employees to render not less than eight (8) hours of work per day for five (5) days a week, or a total of forty (40) hours of work per week, exclusive of time for lunch. As a rule, these hours are from eight (8) o'clock in the morning to five (5) o'clock in the afternoon.[1]

Under CSC Memorandum Circular No. 14, S. 1991,[2] an officer or employee of the civil service is considered habitually tardy

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[1] Re: *Anonymous Complaint Against Ms. Rowena Marinduque, assigned at PHILJA Dev't Center, Tagaytay City*, A.M. No. 2004-25-SC, January 23, 2006, 479 SCRA 343, citing Section 5, Rule XVII, CSC Resolution No. 91-1631, Rules Implementing Book V of Executive Order No. 292 and Other Pertinent Civil Service Rules dated December 27, 1991.

[2] See also CSC Memorandum Circular No. 23, S. 1998.

if he incurs tardiness, regardless of the number of minutes, ten (10) times a month for at least two (2) months in a semester or for at least two (2) consecutive months during the year.

We have previously ruled that non-office obligations, household chores, traffic problems, and health, domestic and financial concerns are not sufficient reasons to excuse or justify habitual tardiness.[3] These are the types of reasons Ms. Arafiles gave; hence, we cannot free her from liability for her infractions.

Time and again, we have reminded officials and employees of the Judiciary that by reason of the nature and functions of their office, they must be role models in the faithful observance of the constitutional principle that public office is a public trust. A way of doing this is through the strict observance of prescribed office hours and the efficient use of every working moment, if only to give back the true worth of what the Government, and ultimately, the people, pay in maintaining the Judiciary.[4] In short, in the public service, punctuality is a virtue, absenteeism and tardiness are impermissible.[5]

We agree with Court Administrator Elepaño that "(B)y being habitually tardy, she [respondent] has fallen short of the stringent standard conduct demanded from everyone connected with the administration of justice" and thus merits the prescribed penalty. Under Section 52(c)(4), Rule VI of CSC Memorandum Circular No. 19, Series of 1999, habitual tardiness is penalized as follows: first offense, reprimand; second offense, suspension for 1-30 days; and third offense, dismissal from the service.

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[3] *Ibid,* citing *Re: Imposition of Corresponding Penalties on Employees of this Court for Habitual Tardiness Committed During the Second Semester of 2000,* A.M. No. 00-6-09-SC, November 27, 2002, 393 SCRA 1.

[4] Administrative Circular No. 2-99, "Strict Observance of Working Hours and Disciplinary Action for Absenteeism and Tardiness, dated January 15, 1999.

[5] *Re: Imposition of Corresponding Penalties for Habitual Tardiness Committed During the Second Semester of 2002, supra,* footnote (2), citing *Re: Imposition of Corresponding Penalties for Habitual Tardiness Committed During the Second Semester of 2002,* A.M. No. 00-6-69-SC, November 27, 2002, 393 SCRA 1.

WHEREFORE, we find respondent Ms. Emma Annie D. Arafiles, Court Legal Researcher, MeTC, Branch 48, Pasay City, *GUILTY* of habitual tardiness. Pursuant to Section 52(c)(4), Rule VI of CSC Memorandum Circular No. 19, Series of 1999, this first offense merits the penalty of *REPRIMAND* with the *WARNING* that a more severe penalty shall be imposed for the repetition of the same or a similar offense in the future.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Tinga, and *Velasco, Jr., JJ.,* concur.

SECOND DIVISION

[A.M. No. P-08-2430. July 14, 2008]
(Formerly OCA IPI No. 07-2643-P)

ATTY. LEOPOLDO C. LACAMBRA, JR., *complainant, vs.* **CHRISTOPHER T. PEREZ, Deputy Sheriff, Branch 74, Regional Trial Court, Olongapo City,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; COURT PERSONNEL; SHERIFFS; DUTY TO EXECUTE JUDGMENT AND MAKE A RETURN ON THE WRIT OF EXECUTION WITHIN THE PERIOD PROVIDED BY THE RULES; MANDATORY.— It is mandatory for a sheriff to execute a judgment and make a return on the writ of execution within the period provided by the Rules of Court. Section 14, Rule 39 of the Rules on Civil Procedure provides that the writ of execution shall be returnable to the court immediately after the judgment had been satisfied in part or in full. If the judgment cannot be satisfied in full within 30 days after his receipt of the writ, the officer shall report to the court and state the reason

therefor. He is likewise required to make a report to the court every 30 days until judgment is satisfied in full or its effectivity expires. Such periodic reporting on the status of the writs must be done by the sheriff regularly and consistently every 30 days until the writs are returned fully satisfied.

2. ID.; ID.; ID.; ID.; WHEN GUILTY OF NEGLECT OF DUTY.— The delay of more than three years and the failure to submit periodic reports clearly show that Perez neglected his duty. Perez cannot seek refuge from inconveniences caused by distance or the complainant's clients' financial constraints to justify his failure to implement the subject writ. Sheriffs play an important role in the administration of justice. They are tasked to execute final judgments of the courts. If not enforced, such decisions become empty victories of the prevailing parties. As agents of the law, sheriffs are called upon to discharge their duties with due care and utmost diligence because in serving the court's writs and processes and implementing its orders, they cannot afford to err without affecting the integrity of their office and the efficient administration of justice. The duty of sheriffs to promptly execute a writ is mandatory and ministerial. Sheriffs have no discretion on whether or not to implement a writ. There is no need for the litigants to "follow-up" its implementation. When writs are placed in their hands, it is their ministerial duty to proceed with reasonable celerity and promptness to execute them in accordance with their mandate. Unless restrained by a court order, they should see to it that the execution of judgments is not unduly delayed. Perez was obviously wanting in the amount of diligence required of him in the performance of his solemn duties. x x x We emphasize that execution puts an end to litigation, giving justice to the prevailing party; thus, a decision left unexecuted because of the sheriff's inefficiency, negligence, misconduct or ignorance negates all the painstaking efforts exerted by the entire judiciary to render justice to litigants. A sheriff who fails to execute, or who selectively executes, a final judgment commits not only a great disservice to the entire judiciary, he also diminishes the people's faith in the judiciary. Certainly, such negligence cannot be countenanced as it in fact renders him administratively liable.

3. ID.; ID.; ID.; ID.; ID.; PENALTY.— Under the Uniform Rules on Administrative Cases in the Civil Service, Simple Neglect of Duty is a less grave offense which carries a penalty of one month and one day to six months suspension for the first offense.

Considering that this is Perez's first offense, we agree that suspension of two months would be sufficient.

4. REMEDIAL LAW; LEGAL FEES; STEPS TO BE FOLLOWED REGARDING THE PAYMENTS OF EXPENSES WHICH MAY BE INCURRED IN THE EXECUTION OF WRITS AND OTHER PROCESSES.— The sheriff may receive only the court-approved sheriff's fees and the acceptance of any other amount is improper, even if applied for lawful purposes. It must be stressed that there are well-defined steps provided in the Rules of Court, particularly in the former provisions of Section 9, now Section 10, of Rule 141, regarding the payment of expenses that might be incurred in the execution of writs and other processes as follows: (1) the sheriff must make an estimate of the expenses to be incurred by him; (2) he must obtain court approval for such estimated expenses; (3) the approved estimated expenses shall be deposited by the interested party with the clerk of court and *ex-officio* sheriff; (4) the clerk of court shall disburse the amount to the executing sheriff; and (5) the executing sheriff shall liquidate his expenses within the same period for rendering a return on the writ.

R E S O L U T I O N

QUISUMBING, *J.*:

Before us is an administrative complaint for neglect of duty, delay in the administration of justice, dishonesty, and violation of Republic Act No. 3019[1] filed by complainant Atty. Leopoldo C. Lacambra, Jr., against respondent Christopher T. Perez, Deputy Sheriff of the Regional Trial Court (RTC), Branch 74, of Olongapo City.

The antecedent facts are as follows:

Complainant Atty. Lacambra is the counsel for the plaintiff in a case for damages, docketed as Civil Case No. 243-0-02, entitled "*Mariz Madrid and Myrna Madrid, assisted by Danilo Madrid v. Ricky Mistica y Susano and Joycilyn D. Gumin*" before the RTC, Branch 74, of Olongapo City.[2]

[1] ANTI-GRAFT AND CORRUPT PRACTICES ACT, approved on August 17, 1960.

[2] *Rollo*, pp. 9-13.

On December 8, 2003, the Court rendered a Decision[3] in favor of the plaintiffs. On March 5, 2004, the Court issued an Order[4] directing the issuance of a writ of execution as the said decision had already become final and executory. Subsequently, on March 23, 2004, a Writ of Execution[5] was issued.

On March 24, 2004, Perez received ₱5,000 from the plaintiffs for the implementation of the writ. No official receipt was issued but merely an acknowledgment receipt.[6] However, despite the receipt of the said amount, Perez failed to implement the writ. Thus, on August 19, 2006 or more than two years from the issuance of the writ, Atty. Lacambra made a final demand on Perez.[7]

As of March 20, 2007, or almost three years from the issuance of the writ, Perez has yet to implement the subject writ, thus prompting Atty. Lacambra to file the instant administrative complaint against him.[8]

In his Comment[9] dated June 28, 2007, Perez denied Atty. Lacambra's allegations. He narrated that on March 24, 2004, Atty. Lacambra informed him about his clients' financial status and said that they have no money to pay for the expenses of the implementation of the writ. Atty. Lacambra, however, gave him ₱5,000. Perez told Atty. Lacambra that the amount was in fact insufficient to cover all the expenses for the implementation of the writ considering the distance from Olongapo City to Quezon City, where defendants Mistica and Gumin reside. Perez, however, received said amount, having been convinced by the explanation given by Atty. Lacambra. Perez also told Atty. Lacambra that in order to save expenses, the implementation of the writ will depend on his scheduled trips to Manila.

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[3] *Id*. at 17-19. Penned by Executive Judge Ramon S. Caguioa.

[4] *Id*. at 20.

[5] *Id*. at 21-22.

[6] *Id*. at 23.

[7] *Id*. at 24.

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

[9] *Id*. at 29-31.

Perez's first attempt to implement the writ was on April 16, 2004. He proceeded to No. 15, Legarda St., Tierra Verde Homes, Tandang Sora, Quezon City where the defendants reside. However, Perez found out that neither the defendants nor any of their household members were around.

On June 2, 2004, Perez, together with Atty. Lacambra, again tried to implement the writ but failed allegedly due to time constraints. He claimed that Atty. Lacambra attended to numerous errands before service of the writ that it became too late to coordinate with the Office of the Clerk of Court, RTC, Quezon City to implement service of the writ.

Two years after, or on September 22, 2006, Perez again attempted to implement the subject writ. Upon arrival at the defendants' residence, he saw a woman about to leave the house who, upon inquiry, turned out to be defendant Gumin. Thus, he gave her a copy of the writ and explained the contents thereof. Gumin informed him that she has been staying in Angeles City and she just dropped by in her place to get some things. She said nobody lives at the Quezon City house and since she had an urgent business appointment, she just left Perez her cellphone number and promised that she will call him soon. They agreed that they will instead meet at Clark, Pampanga because it is nearer to Olongapo City. However, Perez averred that a week after his conversation with Gumin, he lost his cellular phone and hence, had no means of contacting her. Perez asserted that he did not neglect his duty because he exerted efforts to implement the subject writ.

Unconvinced, the Office of the Court Administrator (OCA) recommended that Perez be held liable for simple neglect of duty and be suspended for two months.[10]

Considering the circumstances in this complaint, we are in agreement to adopt the recommendation of the OCA.

It is mandatory for a sheriff to execute a judgment and make a return on the writ of execution within the period provided by the Rules of Court. Section 14, Rule 39 of the Rules on Civil

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[10] *Id*. at 1-5.

Procedure provides that the writ of execution shall be returnable to the court immediately after the judgment had been satisfied in part or in full. If the judgment cannot be satisfied in full within 30 days after his receipt of the writ, the officer shall report to the court and state the reason therefor. He is likewise required to make a report to the court every 30 days until judgment is satisfied in full or its effectivity expires.[11] Such periodic reporting on the status of the writs must be done by the sheriff regularly and consistently every 30 days until the writs are returned fully satisfied.

Here, the non-implementation of the writ of execution is undisputed. Records show that from the time the writ of execution was issued on March 23, 2004, the same remained unimplemented for more than three years. We note that Perez's last attempt to execute the writ was on September 22, 2006 or more than two years from his previous attempt on June 2, 2004. Certainly, the long delay in the execution of the writ negates his claim that he exerted his best effort to implement the same.

Likewise, as shown by the records, Perez failed to submit periodic reports to update the court of the proceedings undertaken to implement the writ. His last submission of the Sheriff's Partial Report[12] was on June 14, 2004. Since then, he has not submitted any report to the court.

The delay of more than three years and the failure to submit periodic reports clearly show that Perez neglected his duty. Perez cannot seek refuge from inconveniences caused by distance or the complainant's clients' financial constraints to justify his failure to implement the subject writ.

Sheriffs play an important role in the administration of justice. They are tasked to execute final judgments of the courts. If not enforced, such decisions become empty victories of the prevailing parties. As agents of the law, sheriffs are called upon to discharge

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[11] *Sibulo v. San Jose*, A.M. No. P-05-2088, November 11, 2005, 474 SCRA 464, 468.

[12] *Rollo*, pp. 36-37.

their duties with due care and utmost diligence because in serving the court's writs and processes and implementing its orders, they cannot afford to err without affecting the integrity of their office and the efficient administration of justice.[13]

The duty of sheriffs to promptly execute a writ is mandatory and ministerial. Sheriffs have no discretion on whether or not to implement a writ. There is no need for the litigants to "follow-up" its implementation.[14] When writs are placed in their hands, it is their ministerial duty to proceed with reasonable celerity and promptness to execute them in accordance with their mandate. Unless restrained by a court order, they should see to it that the execution of judgments is not unduly delayed. Perez was obviously wanting in the amount of diligence required of him in the performance of his solemn duties.

Similarly, undisputed is the fact that Perez received ₱5,000 directly from Atty. Lacambra. Whether Atty. Lacambra gave the money voluntarily is of no moment. Neither should the Court consider whether the money, in whole or in part, had indeed been spent in the implementation of the writ. The sheriff may receive only the court-approved sheriff's fees and the acceptance of any other amount is improper, even if applied for lawful purposes.[15]

It must be stressed that there are well-defined steps provided in the Rules of Court, particularly in the former provisions of Section 9, now Section 10, of Rule 141, regarding the payment of expenses that might be incurred in the execution of writs and other processes as follows: (1) the sheriff must make an estimate of the expenses to be incurred by him; (2) he must obtain court approval for such estimated expenses; (3) the approved estimated

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[13] *Mendoza v. Tuquero*, A.M. No. P-99-1343, June 28, 2001, 360 SCRA 21, 26-27; See also *Legaspi v. Tobillo*, A.M. No. P-05-1978, March 31, 2005, 454 SCRA 228, 239.

[14] *Mendoza v. Tuquero*, *supra* at 26.

[15] *Cobarrubias v. Apostol*, A.M. No. P-02-1612, January 31, 2006, 481 SCRA 20, 30.

expenses shall be deposited by the interested party with the clerk of court and *ex-officio* sheriff; (4) the clerk of court shall disburse the amount to the executing sheriff; and (5) the executing sheriff shall liquidate his expenses within the same period for rendering a return on the writ.[16]

Undoubtedly, Perez sidestepped the abovementioned procedures. The money was not deposited with the clerk of court and there was no showing that the amount was subjected to the court's prior approval. Perez should have waited for the money to be officially disbursed to him if indeed due or required for expenses. Likewise, he also failed to properly liquidate the alleged expenses he incurred.

We emphasize that execution puts an end to litigation, giving justice to the prevailing party; thus, a decision left unexecuted because of the sheriff's inefficiency, negligence, misconduct or ignorance negates all the painstaking efforts exerted by the entire judiciary to render justice to litigants. A sheriff who fails to execute, or who selectively executes, a final judgment commits not only a great disservice to the entire judiciary, he also diminishes the people's

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[16] Rule 141 of the Rules of Court, as revised by A.M. No. 04-2-04-SC, effective as of August 16, 2004.

Section 10 provides:

SEC. 10. *Sheriffs, PROCESS SERVERS and other persons serving processes.*—

x x x x x x x x x

With regard to sheriff's expenses in executing writs issued pursuant to court orders or decisions or safeguarding the property levied upon, attached or seized, including kilometrage for each kilometer of travel, guards' fees, warehousing and similar charges, the interested party shall pay said expenses in an amount estimated by the sheriff, subject to 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. The liquidation shall be approved by the court. 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.

faith in the judiciary.[17] Certainly, such negligence cannot be countenanced as it in fact renders him administratively liable.

However, as to the charges of dishonesty and graft and corruption, we find that there is insufficient evidence to prove them. It must also be stressed that the charge of graft and corruption is criminal in nature; thus, the resolution thereof cannot be threshed out in the instant administrative proceeding.

Under the Uniform Rules on Administrative Cases in the Civil Service,[18] Simple Neglect of Duty is a less grave offense which carries a penalty of one month and one day to six months suspension for the first offense. Considering that this is Perez's first offense, we agree that suspension of two months would be sufficient.

WHEREFORE, the Court finds Christopher T. Perez, Deputy Sheriff, Branch 74, Regional Trial Court, Olongapo City, *LIABLE for NEGLECT OF DUTY*. He is *SUSPENDED* for two (2) months without pay and hereby *WARNED* that a repetition of the same or similar offense in the future shall be dealt with more severely.

SO ORDERED.

Carpio Morales, Tinga, Velasco, Jr., and *Brion, JJ.,* concur.

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[17] *Mendoza v. Doroni*, A.M. No. P-04-1872, January 31, 2006, 481 SCRA 41, 54.

[18] Resolution No. 991936, UNIFORM RULES ON ADMINISTRATIVE CASES IN THE CIVIL SERVICE, approved on August 31, 1999.

RULE IV: PENALTIES

Section 52. ***Classification of Offenses***.–Administrative offenses with corresponding penalties are classified into grave, less grave or light, depending on their gravity or depravity and effects on the government service.

x x x x x x x x x

B. The following are ***less grave offenses*** with the corresponding penalties:

1. Simple Neglect of Duty

1st Offense–Suspension (1 mo. 1 day to 6 mos.)

x x x x x x x x x

SECOND DIVISION

[A.M. No. P-08-2482. July 14, 2008]
(Formerly A.M. No. 08-1-03-MeTC)

HABITUAL TARDINESS: AIDA JOSEFINA J. IGNACIO, MeTC-OCC, Pasay City.

SYLLABUS

1. **POLITICAL LAW; ADMINISTRATIVE LAW; COURT PERSONNEL; WHEN GUILTY OF HABITUAL TARDINESS.—** Civil Service Memorandum Circular No. 23, series of 1998 describes habitual tardiness as follows: Any employee shall be considered habitually tardy if he incurs tardiness, regardless of the number of minutes, ten (10) times a month for at least two (2) months in a semester or at least two (2) consecutive months during the year.

2. **ID.; ID.; ID.; ID.; MORAL OBLIGATIONS, PERFORMANCE OF HOUSEHOLD CHORES, TRAFFIC PROBLEMS AND HEALTH, DOMESTIC AND FINANCIAL CONCERNS ARE NOT SUFFICIENT REASONS TO EXCUSE HABITUAL TARDINESS; RATIONALE.—** Moral obligations, performance of household chores, traffic problems and health, domestic and financial concerns are not sufficient reasons to excuse habitual tardiness. Ignacio fell short of the stringent standard of conduct demanded from everyone connected with the administration of justice. By reason of the nature and functions of the judiciary where she belongs, its employees must be role models in the faithful observance of the constitutional canon that public office is a public trust. Inherent in this mandate is the observance of prescribed office hours and the efficient use of every moment thereof for public service, if only to recompense the government, and ultimately the people who shoulder the cost of maintaining the judiciary. Thus, to inspire public respect for the justice system, court officials and employees are at all times behooved to strictly observe official time. As punctuality is a virtue, absenteeism and tardiness are impermissible.

3. ID.; ID.; ID.; ID.; PENALTY.— Section 52(c)(4), Rule VI of Civil Service Circular No. 19, series of 1999 on the Revised Uniform Rules on Administrative Cases in the Civil Service, provides: C. The following are Light Offenses with corresponding penalties: x x x 4. Frequent unauthorized tardiness (Habitual Tardiness) 1st Offense - Reprimand; 2nd Offense - Suspension 1-30 days; 3rd Offense – Dismissal x x x Considering that this is Ignacio's first offense, the penalty of reprimand is appropriate.

R E S O L U T I O N

TINGA, *J.*:

Before us is an administrative matter which concerns the habitual tardiness of Aida Josefina J. Ignacio (Ignacio), clerk III of the Metropolitan Trial Court of Pasay City, Branch 48.

The Certification[1] dated 6 December 2007 issued by Chief Judicial Staff Officer Hermogena F. Bayani of the Office of the Administrative Services, Office of the Court Administrator (OCA) shows that Ignacio had incurred tardiness as follows:

April 2007	10 times
May 2007	12 times
July 2007	18 times
August 2007	11 times
September 2007	13 times
October 2007	14 times[2]

In her Letter[3] dated 30 January 2008, Ignacio explained that she often came in late for work because she always had to attend to the needs of her parents as her father had suffered a second stroke in January 2007 and her mother was suffering

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[1] *Rollo*, p. 2.

[2] *Id*.

[3] *Id*. at 10.

from hypertension and high blood sugar condition. She also stated that being the only child of her parents remaining in the country, she often acted as their sole caregiver. Nevertheless, she expressed deep regrets for her tardiness and accordingly pledged to report for work on time.

The OCA found that Ignacio's explanation does not merit consideration to justify her habitual tardiness and recommended that she be reprimanded and warned that a repetition of the same or similar offense will warrant the imposition of a more severe penalty.

The Court approves the OCA's findings and recommendations.

Civil Service Memorandum Circular No. 23, series of 1998 describes habitual tardiness as follows:

> Any employee shall be considered habitually tardy if he incurs tardiness, regardless of the number of minutes, ten (10) times a month for at least two (2) months in a semester or at least two (2) consecutive months during the year.

It is unequivocal that Ignacio is guilty of habitual tardiness. Her explanation and apology failed to justify the tardiness she had incurred and her exemption from the imposition of the penalties provided by law. Moral obligations, performance of household chores, traffic problems and health, domestic and financial concerns are not sufficient reasons to excuse habitual tardiness.[4]

Ignacio fell short of the stringent standard of conduct demanded from everyone connected with the administration of justice. By reason of the nature and functions of the judiciary where she belongs, its employees must be role models in the faithful observance of the constitutional canon that public office is a public trust. Inherent in this mandate is the observance of prescribed office hours and the efficient use of every moment

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[4] *Re: Habitual Tardiness of Mrs. Natividad M. Calingao*, Clerk III, RTC, Br. 255, Las Piñas City, A.M. No. P-05-2080, 5 October 2005, 472 SCRA 88, 90.

thereof for public service, if only to recompense the government, and ultimately the people who shoulder the cost of maintaining the judiciary. Thus, to inspire public respect for the justice system, court officials and employees are at all times behooved to strictly observe official time. As punctuality is a virtue, absenteeism and tardiness are impermissible.[5]

Section 52(c)(4), Rule VI of Civil Service Circular No. 19, series of 1999 on the Revised Uniform Rules on Administrative Cases in the Civil Service, provides:

C. The following are Light Offenses with corresponding penalties:

x x x x x x x x x

4. Frequent unauthorized tardiness (Habitual Tardiness)

1st Offense	-	Reprimand
2nd Offense	-	Suspension 1-30 days
3rd Offense	-	Dismissal

x x x x x x x x x

Considering that this is Ignacio's first offense, the penalty of reprimand is appropriate.

WHEREFORE, Aida Josefina J. Ignacio, Clerk III of the Metropolitan Trial Court of Pasay City, Branch 48, is found guilty of habitual tardiness and is hereby *REPRIMANDED* with a stern warning that a repetition of the same or similar offense shall be dealt with more severely.

SO ORDERED.

Quisumbing (Chairperson), Ynares-Santiago, Carpio Morales, and *Velasco, Jr., JJ.,* concur.

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[5] *Re: Habitual Tardiness of Ma. Socorro E. Arnaez*, Court Stenographer III, RTC, Br. 18, Cebu City, A.M. No. P-04-1867 (Formerly A.M. No. 04-6-355-RTC), 23 September 2005, 470 SCRA 604, 606-607.

SECOND DIVISION

[A.M. No. RTJ-08-2123. July 14, 2008]
(Formerly OCA-I.P.I. No. 07-2679-RTJ)

ALFREDO J. LAGAMON, *complainant, vs.* **JUDGE RUSTICO D. PADERANGA, RTC, Branch 28, Mambajao, Camiguin,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; JUDGES; DUTY TO DECIDE CASE WITHIN THE REGLEMENTARY PERIOD; EXTENSION OF TIME TO DECIDE CASE MAY, HOWEVER, BE REQUESTED.— Section 15 (1), Article VIII of the Constitution provides that all cases filed before lower courts must be decided within three (3) months from the time they are submitted for decision. Section 5, Canon 6 of the New Code of Judicial Conduct for the Philippine Judiciary, which took effect on 1 June 2004, likewise enjoins judges to "perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness." However, it has also been consistently stressed that whenever circumstances arise that render judges incapable of seasonably acting on and deciding a case, all that a judge should do is to request the Court, with justification, for an extension of time to resolve or decide the pending matter. The Court would almost always grant said request, aware as it is of the caseload of judges and mindful of the numerous difficulties which a judge may encounter in the timely disposition of cases.

2. ID.; ID.; ID.; ID.; ID.; DELAY IN DECIDING CASE WITHOUT REQUEST FOR EXTENSION THEREOF IS GROSS INEFFICIENCY WARRANTING THE IMPOSITION OF ADMINISTRATIVE SANCTIONS.— Although the Court notes the fact that indeed respondent may have had difficulty in meeting the deadline prescribed for deciding the Criminal Case on account of the reasons he submitted, still, he has been remiss in not requesting for an extension of time to decide the said case. His failure to do so constitutes gross inefficiency and warrants the imposition of administrative sanctions. It bears stressing that judges must dispose of the court's business promptly. Delay in the disposition of cases erodes the faith and confidence of our people

in the judiciary, lowers its standards, and brings it to disrepute. Hence, judges are enjoined to decide cases with dispatch.

3. ID.; ID.; ID.; UNDUE DELAY IN RENDERING DECISION; PROPER PENALTY; CASE AT BAR.— Undue delay in rendering a decision or order constitutes a less serious charge under Section 9, Rule 140 of the Rules of Court, and a finding of guilt results in either suspension from office without salary and other benefits for not less than one (1) month or more than three (3) months, or a fine of more than ₱10,000.00 but not exceeding ₱20,000.00. Then again, in view of the fact that the Criminal Case has already been decided, albeit belatedly, which fact shows an effort on the part of respondent judge to attend to his duties with zeal, the Court finds well-taken the recommendation of the OCA to impose a nominal fine of ₱2,000.00.

APPEARANCES OF COUNSEL

Lagamon Law Office for complainant.

R E S O L U T I O N

TINGA, *J.*:

This is an administrative complaint against respondent Judge Rustico D. Paderanga of the Regional Trial Court of Mambajao, Camiguin, Branch 28, relative to *"People v. Alfredo Simene,"* a criminal case for rape, docketed as Criminal Case No. 1124 (the Criminal Case) for failure to terminate its trial within sixty (60) days from initial trial and for failure to decide the same within thirty (30) days from the time it was submitted for decision, in violation of Administrative Order No. 104-96.[1]

In a Letter-complaint[2] dated 23 March 2007, complainant Alfredo J. Lagamon alleged that the accused in the Criminal Case was arraigned on 3 June 2003, but the trial commenced

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[1] RE: DESIGNATION OF SPECIAL COURTS FOR KIDNAPPING, ROBBERY, CARNAPPING, DANGEROUS DRUGS CASES AND OTHER HEINOUS CRIMES, INTELLECTUAL PROPERTY RIGHTS VIOLATIONS AND JURISDICTION IN LIBEL CASES; dated 21 October 1996.

[2] *Rollo*, pp. 4-5.

only on 15 December 2003 or more than six (6) months thereafter. Complainant moreover stated that the Criminal Case was submitted for decision on 27 February 2006 or two (2) years and forty-three (43) days from the date the trial commenced, and that the decision thereon was promulgated on 21 February 2007 or three hundred forty-six (346) days after it had been submitted for decision.[3]

In his Comment[4] dated 4 June 2007, respondent judge contended that complainant was neither the accused nor the private complainant in the Criminal Case and, hence, has no legal personality to file the instant administrative complaint. He also maintained that the administrative complaint partakes of a harassment suit as the Criminal Case had already been tried, decided and brought to a higher court on appeal.

Respondent judge admitted not having complied with the periods for the resolution of cases as prescribed by Circular No. 38-98,[5] but he pleaded for the Court's understanding for the following reasons:

a) Respondent Judge's court is the only Regional Trial Court in Camiguin province and it has a total caseload of 266 cases. As such, much as he had wanted to dispose of the case within the prescribed period, he had to attend to equally important cases;

b) Respondent Judge's court has no Clerk of Court and has only three (3) stenographers one of whom was seriously injured in motorcycle accident. The stenographer who was assigned to transcribe the proceedings of the Criminal Case is not computer literate and relies heavily on typewriters;

c) The Public Attorney's Office (PAO) of the Camiguin District which handled the defense of the accused in the Criminal Case had

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[3] *Id*. at 4.

[4] *Id*. at 26-32.

[5] IMPLEMENTING THE PROVISIONS OF R.A. NO. 84-93, (AN ACT TO ENSURE A SPEEDY TRIAL OF ALL CASES BEFORE THE SANDIGANBAYAN, REGIONAL TRIAL COURT, METROPOLITAN TRIAL COURT, MUNICIPAL TRIAL COURT IN CITIES, MUNICIPAL TRIAL COURT, MUNICIPAL CIRCUIT TRIAL COURT, APPROPRIATING FUNDS THEREOF AND FOR OTHER PURPOSES); EFFECTIVE 15 SEPTEMBER 1998.

only one lawyer during the trial of the case. The assigned lawyer appeared only on Mondays or Fridays depending on her availability.[6]

In a Report[7] dated 15 October 2007, the Office of the Court Administrator (OCA) found respondent judge guilty of undue delay in rendering a decision which is punishable by suspension from office without salary or other benefits for not less than one (1) month nor more than three (3) months, or a fine of more than ₱10,000.00 but not exceeding ₱20,000.00. However, considering that respondent judge's infraction concerned only a single case which he had eventually disposed of albeit beyond the prescribed period, the OCA recommended the reduction of the penalty to a fine of ₱2,000.00.

In a Resolution[8] dated 12 December 2007, the Court noted both the letter-complaint and respondent judge's Comment and directed the parties to manifest their willingness to submit the case for resolution on the basis of the pleadings filed. Complainant, in his Manifestation[9] dated 7 February 2008, informed the Court of his willingness to submit the case for resolution on the basis of the pleadings already filed and submitted. Respondent judge manifested the same willingness in his Manifestation[10] dated 15 February 2008.

The Court adopts the findings of the OCA.

Section 15 (1), Article VIII of the Constitution provides that all cases filed before lower courts must be decided within three (3) months from the time they are submitted for decision. Section 5, Canon 6 of the New Code of Judicial Conduct for the Philippine Judiciary, which took effect on 1 June 2004, likewise enjoins judges to "perform all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness." However, it has also been consistently stressed that whenever circumstances arise that render judges incapable

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[6] *Rollo,* pp. 5-6.

[7] *Id*. at 1-2.

[8] *Id*. at 70.

[9] *Id*. at 79.

[10] *Id*. at 85-87.

of seasonably acting on and deciding a case, all that a judge should do is to request the Court, with justification, for an extension of time to resolve or decide the pending matter. The Court would almost always grant said request, aware as it is of the caseload of judges and mindful of the numerous difficulties which a judge may encounter in the timely disposition of cases.[11]

Although the Court notes the fact that indeed respondent may have had difficulty in meeting the deadline prescribed for deciding the Criminal Case on account of the reasons he submitted, still, he has been remiss in not requesting for an extension of time to decide the said case. His failure to do so constitutes gross inefficiency and warrants the imposition of administrative sanctions. It bears stressing that judges must dispose of the court's business promptly. Delay in the disposition of cases erodes the faith and confidence of our people in the judiciary, lowers its standards, and brings it to disrepute. Hence, judges are enjoined to decide cases with dispatch.[12]

Undue delay in rendering a decision or order constitutes a less serious charge under Section 9, Rule 140 of the Rules of Court, and a finding of guilt results in either suspension from office without salary and other benefits for not less than one (1) month or more than three (3) months, or a fine of more than ₱10,000.00 but not exceeding ₱20,000.00.[13] Then again, in view of the fact that the Criminal Case has already been decided, albeit belatedly, which fact shows an effort on the part of respondent judge to attend to his duties with zeal, the Court finds well-taken the recommendation of the OCA to impose a nominal fine of ₱2,000.00.[14]

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[11] *Request of Peter Ristig for Assistance Regarding the Delay in the Proceedings of Criminal Case No. 95-227-R*, MTCC, Br. 6, Cebu City, A.M. No. 02-5-107-MTCC, 9 December 2004, 445 SCRA 538, 549.

[12] *Atty. Montes v. Judge Bugtas*, 408 Phil. 662, 667 (2001).

[13] A.M. No. RTJ-02-1718. August 26, 2002, *Miguela Bontuyan, complainant, v. Judge Gaudioso D. Villarin*, RTC Branch 59, Toledo City (then Judge Designate, MTCC-Branch 5, Cebu City), respondent.

[14] Re: Report on the Judicial Audit Conducted in the RTC-Br. 26, Manila, 9 August 2001, 362 SCRA 382, 388.

WHEREFORE, Judge Rustico D. Paderanga of the Regional Trial Court of Mambajao, Camiguin, Branch 28 is meted out a *FINE* of Two Thousand Pesos (₱2,000.00), and is *STERNLY WARNED* that a repetition of the same or similar acts will be dealt with more severely.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Velasco, Jr., and *Brion, JJ.,* concur.

SECOND DIVISION

[G.R. No. 140377. July 14, 2008]

PATRICIA L. TIONGSON, SPS. EDUARDO GO and PACITA GO, ROBERTO LAPERAL III, ELISA MANOTOK, MIGUEL A.B. SISON, *ET AL.*, *petitioners, vs.* **NATIONAL HOUSING AUTHORITY, *** *respondent.*

SYLLABUS

REMEDIAL LAW; SPECIAL CIVIL ACTIONS; EMINENT DOMAIN; JUST COMPENSATION; RECKONING DATE IN CASE AT BAR.— The present petition for review on *certiorari* raises the question of from what date should just compensation of the subject properties sought to be expropriated be reckoned – whether it is from the taking of the property or on the filing of the complaint. Respondent National Housing Authority (NHA) took possession in 1978 of the properties belonging to petitioners Patricia L. Tiongson, *et al*. pursuant to **P.D. No. 1669** and **PD No. 1670.** In **GR Nos. 55166**," *"Elisa R. Manotok, et al. vs. NHA, et al.* and **55167**, *"Patricia Tiongson, et al. vs. NHA, et al.,"* this Court, by Decision of May 21,

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* Under Section 4 of Rule 45, the court *a quo* need not be impleaded as party.

1987, held that "Presidential Decree Nos. 1669 and 1670, which respectively proclaimed the Tambunting Estate and the Estero de Sunog-Apoy area expropriated, are declared unconstitutional and, therefore, null and void," they being violative of the therein petitioners' right to due process of law. The decision had then become final and executory. Subsequently, or on September 14, 1987, NHA filed before the Regional Trial Court (RTC) of Manila a complaint against herein petitioners, docketed as Civil Case No. 87-42018, which was later amended, for expropriation of parcels of land – part of those involved in GR No. 55166. By Order of April 29, 1997, Branch 41 of the Manila RTC, to which the complaint for expropriation was raffled, it held that the determination of just compensation of the properties should be reckoned from the date of filing of NHA's petition or on September 14, 1987. This was reversed by the Court of Appeals holding that the just compensation should be "based on the actual taking of the property in 1978." Here in Court, petitioners argue that since PD No. 1669 pursuant to which NHA took possession of their properties in 1978 was declared unconstitutional, "[n]ecessarily, in thereafter resurrecting the filing of another (*sic*) complaint for expropriation of the same properties," it would be unlawful. . . to fix the reckoning period for purposes of computing the just compensation. . . based on [NHA's] previous unlawful taking of said properties in 1978." The Court agrees with the petitioners. Following then Rule 67, Section 4 of the Rules of Court reading: "SEC. 4. *Order of expropriation*. – If the objections to and the defenses against the right of the plaintiff to expropriate the property are overruled, or when no party appears to defend as required by this Rule, the court may issue an order of expropriation declaring that the plaintiff has a lawful right to take the property sought to be expropriated, for the public use or purpose described in the complaint, upon the payment of just compensation to be determined as of the **date** of the taking of the property or the **filing of the complaint,** whichever came first." *vis a vis* the factual backdrop of the case, the just compensation of petitioners' properties must be determined "as of the date of. . . the filing of [NHA's] complaint" on September 14, 1987."

APPEARANCES OF COUNSEL

Felix B. Lerio for petitioners.
Office of the Government Corporate Counsel for respondent.

D E C I S I O N

CARPIO MORALES, *J.*:

The present petition for review on *certiorari* raises the question of from what date should just compensation of the subject properties sought to be expropriated be reckoned – whether it is from the taking of the property or on the filing of the complaint.

Respondent National Housing Authority (NHA) took possession in 1978 of properties belonging to petitioners Patricia L. Tiongson, *et al*. pursuant to ***P.D. No. 1669*****,** "AN ACT PROVIDING FOR THE EXPROPRIATION OF THE PROPERTY KNOWN AS THE 'TAMBUNTING ESTATE' REGISTERED UNDER TCT NOS. 119059, 122450, 122459, 122452 AND LOT NOS. 1-A, 1-C, 1-D, 1-E, 1-F, 1-G AND 1-H Of (LRC) PSD-230517 (PREVIOUSLY COVERED BY TCT No. 119058) OF THE REGISTER OF DEEDS OF MANILA AND FOR THE SALE AT COST OF THE LOTS THEREIN TO THE BONA FIDE OCCUPANTS AND OTHER SQUATTERS FAMILIES AND TO UPGRADE THE SAME, AND AUTHORIZING THE APPROPRIATION OF FUNDS FOR THE PURPOSE" (underscoring supplied), and of properties belonging to Patricia Tiongson, *et al*. pursuant to **P.D. No. 1670,** "AN ACT PROVIDING FOR THE EXPROPRIATION OF THE PROPERTY ALONG THE ESTERO DE SUNOG-APOY FORMERLY CONSISTING OF LOTS NOS. 55-A, 55-B AND 55-C, BLOCK 2918 OF THE SUBDIVISION PLAN PSD-11746, COVERED BY TCT NOS. 49286, 49287 AND 49288, RESPECTIVELY, OF THE REGISTER OF DEEDS OF MANILA AND FOR THE SALE AT COST OF THE LOTS THEREIN TO THE BONA FIDE OCCUPANTS AND OTHER SQUATTER FAMILIES AND TO UPGRADE THE SAME, AND AUTHORIZING THE APPROPRIATION OF FUNDS FOR THE PURPOSE" (underscoring supplied).

In **G.R. Nos. 55166**, "*Elisa R. Manotok, et al. v. National Housing Authority et al.,*" and **55167**, "*Patricia Tiongson et al. v. National Housing Authority, et al*.," this Court, by Decision of May 21, 1987,[1] held that "Presidential Decree Numbers 1669

[1] 150 SCRA 89-112.

and 1670, which respectively proclaimed the Tambunting Estate and the Estero de Sunog-Apoy area expropriated, are declared unconstitutional and, therefore, null and void," they being violative of the therein petitioners' right to due process of law. The decision had become final and executory.

Subsequently or on September 14, 1987, NHA filed before the Regional Trial Court of Manila a complaint against petitioners, docketed as Civil Case No. 87-42018, which was later amended, for expropriation of parcels of land – part of those involved in G.R. No. 55166.

By Order of April 29, 1997,[2] Branch 41 of the Manila RTC[3] to which the complaint for expropriation was raffled brushed aside a previous order dated June 15, 1988 of the then Presiding Judge of said branch of the RTC[4] and held that the determination of just compensation of the properties should be reckoned from the date of filing of NHA's petition or on September 14, 1987. The NHA moved to reconsider the said April 29, 1997 Order of the trial court, contending that the determination of the just compensation should be reckoned from the time it took possession of the properties in 1978. The trial court, by Order of August 5, 1997,[5] denied NHA's motion for reconsideration.

The NHA assailed the above-stated trial court's Orders of April 29, 1997 and August 5, 1997 via petition for *certiorari* before the Court of Appeals. The appellate court, by the challenged Decision of June 16, 1999,[6] reversed and set aside the trial court's orders and held that the just compensation should be "based on the actual taking of the property in 1978." Thus it disposed:

WHEREFORE, the lower court's Order dated April 29, 1997 ruling that the amount of just compensation should be based on the date

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[2] Annex "C" of NHA's Petition for *Certiorari* before the Court of Appeals, CA *rollo*, p. 21.

[3] Presided by Judge Rodolfo Ponferrada.

[4] Judge Domingo Panis.

[5] Annex "B" to NHA's Petition for *Certiorari* before the Court of Appeals, CA *rollo*, p. 22.

[6] *Rollo*, pp. 44-48.

of the filing of the complaint in 1987, as well as the Order dated August 5, 1997 denying the motion for reconsideration are hereby set aside and the appointed commissioners are ordered to re-convene and submit to the court a recommendation on the amount of just compensation of subject property based on the actual taking of the property in 1978. (Underscoring supplied)

Petitioners moved for a reconsideration of the appellate court's decision but the same was denied by Resolution of October 7, 1999,[7] hence, the present petition for review on *certiorari*.

In its Petition for Expropriation filed before the RTC on September 14, 1987, the NHA alleged, *inter alia*, that:

x x x x x x x x x

9. Pursuant to Presidential Decree No. 1669 providing for the expropriation of the subject properties and granting the plaintiff the authority to immediately take possession, control and disposition, with power of demolition of the subject properties, plaintiff took and had been in possession of the subject properties, **until** Presidential Decree No. 1669 was declared unconstitutional by the Supreme Court in the case entitled *Patricia Tiongson, et al. vs. National Housing Authority and Republic of the Philippines*, G.R. No. 5516[6].[8] (Emphasis and underscoring supplied) x x x,

and prayed as follows:

WHEREFORE, it is respectfully prayed of this Honorable Court that:

1. An order be issued provisionally fixing the value of said properties in the amount equal to the assessed value of the same and **authorizing the plaintiff to enter or take possession** and/or placing the plaintiff in possession of the parcels of land described above; (Emphasis and underscoring supplied)

x x x x x x x x x

In the present petition, petitioners argue that since P.D. No. 1669 pursuant to which NHA took possession of their properties in 1978 was declared unconstitutional, "[n]ecessarily, in thereafter resurrecting the filing of another (*sic*) complaint

[7] *Id*. at 50.

[8] *Id*. at 78.

for expropriation of the same properties," it would be unlawful . . . to fix the reckoning period for purposes of computing the just compensation . . . based on [NHA's] previous unlawful taking of said properties in 1978." They thus maintain that the trial court's Order of April 29, 1997 holding that the determination of the just compensation of their properties should be reckoned from the date NHA filed the petition before the RTC on September 14, 1987 is in order.

The petition is impressed with merit.

In declaring, in its challenged Decision, that the determination of just compensation should be reckoned from NHA's taking of the properties in 1978, the appellate court simply relied on Annex "C" of NHA's petition before it, the Order dated June 15, 1988 of the then Presiding Judge of the trial court reading:

> In this condemnation proceedings, by agreement of the parties, the total value of the properties to be condemned is hereby fixed at ₱14,264,465.00, provisionally, and considering the **admission of the parties** that plaintiff has taken possession of the properties in question sometime in 1978, or long before the complaint in this case was filed, plaintiff is hereby authorized to retain possession thereof upon its depositing with the City Treasurer of Manila the aforesaid sum of ₱14,264,465.00 subject to the Orders of this Court and forthwith submit the Official Receipt of the said deposit to this Court,[9] (Emphasis and underscoring supplied),

and thus concluded that "the parties admitted that [NHA] took possession of the subject properties as early as 1978." The appellate court reached that conclusion, despite its recital of the antecedents of the case including herein petitioners' sustained moves, even before the trial court, in **maintaining** that the reckoning of just compensation should be from the date of filing of the petition for expropriation on September 14, 1987.

The earlier-quoted allegations of the body and prayer in NHA's Petition for Expropriation filed before the RTC constitute judicial admissions[10] of NHA — that it possessed the subject properties

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[9] CA *rollo,* p. 23.

[10] *Vide* Sec. 4 of Rule 129, RULES OF COURT.

until this Court's declaration, in its above-stated Decision in G.R. No. 55166 promulgated on May 21, 1987, that P.D. No. 1669 pursuant to which NHA took possession of the properties of petitioners in 1978 was unconstitutional and, therefore, null and void. These admissions, the appellate court either unwittingly failed to consider or escaped its notice.

Petitioners even brought to the appellate court's attention, in their Motion for Reconsideration[11] of its Decision of June 16, 1999, the fact that they had called the trial court's attention to NHA's allegation-admissions in the body and prayer of its petition. But the appellate court, by Resolution of October 7, 1999,[12] denied petitioners' motion upon the ground that it raised substantially the same issues that were already considered and passed upon in arriving at its decision. The appellate court's June 16, 1999 decision glaringly shows, however, that the matter of judicial admissions of NHA in the body and prayer in its petition were not considered by it.

Following then Rule 67, Section 4 of the Rules of Court reading:

> SEC. 4. *Order of expropriation.* – If the objections to and the defenses against the right of the plaintiff to expropriate the property are overruled, or when no party appears to defend as required by this Rule, the court may issue an order of expropriation declaring that the plaintiff has a lawful right to take the property sought to be expropriated, for the public use or purpose described in the complaint, upon the payment of just compensation to be determined as of the **date** of the taking of the property or the **filing of the complaint**, whichever came first.
>
> x x x (Emphasis and underscoring supplied),

vis a vis the factual backdrop of the case, the just compensation of petitioners' properties must be determined "as of the date of . . . the filing of [NHA's] complaint" on September 14, 1987."

WHEREFORE, the challenged June 16, 1999 Decision of the Court of Appeals is *REVERSED* and *SET ASIDE* and the

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[11] CA *rollo*, pp. 89-100.

[12] *Supra* note 7.

April 29, 1997 Order of Branch 41 of the Regional Trial Court of Manila in Civil Case No. 87-42018 is *REINSTATED*.

SO ORDERED.

Quisumbing (Chairperson), Tinga, Velasco, Jr., and *Brion, JJ.,* concur.

THIRD DIVISION

[G.R. No. 147406. July 14, 2008]

VENANCIO FIGUEROA *y* CERVANTES,[1] *petitioner, vs.* **PEOPLE OF THE PHILIPPINES,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; JURISDICTION; CONFERRED BY LAW IN FORCE AT THE TIME OF THE INSTITUTION OF THE ACTION UNLESS STATUTE PROVIDES FOR A RETROACTIVE APPLICATION THEREOF.— Applied uniformly is the familiar rule that the jurisdiction of the court to hear and decide a case is conferred by the law in force at the time of the institution of the action, unless such statute provides for a retroactive application thereof.

2. ID.; ID.; MTC HAS JURISDICTION TO HEAR AND TRY A CHARGE OF RECKLESS IMPRUDENCE RESULTING IN HOMICIDE.— In this case, at the time the criminal information for reckless imprudence resulting in homicide with violation of the Automobile Law (now Land Transportation and Traffic Code) was filed, Section 32(2) of *Batas Pambansa* (B.P.) *Blg.* 129 had already been amended by Republic Act No. 7691. The said provision thus reads: Sec. 32. *Jurisdiction of Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts in Criminal Cases.*—Except in cases falling within the exclusive original jurisdiction of Regional Trial Courts

[1] In the records, "Venancio" is also spelled as "Vinancio."

and the Sandiganbayan, the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts shall exercise: x x x (2) Exclusive original jurisdiction over all offenses punishable with imprisonment not exceeding six (6) years irrespective of the amount of fine, and regardless of other imposable accessory or other penalties, including the civil liability arising from such offenses or predicated thereon, irrespective of kind, nature, value or amount thereof: *Provided, however,* That in offenses involving damage to property through criminal negligence, they shall have exclusive original jurisdiction thereof. As the imposable penalty for the crime charged herein is *prision correccional* in its medium and maximum periods or imprisonment for 2 years, 4 months and 1 day to 6 years, jurisdiction to hear and try the same is conferred on the Municipal Trial Courts (MTCs).

3. ID.; ID.; ESTOPPEL BY LACHES; CASE OF *TIJAM V. SIBONGHANOY*.— In *Tijam v. Sibonghanoy,* the Court ruled that a party may be barred by laches from invoking lack of jurisdiction at a late hour for the purpose of annulling everything done in the case with the active participation of said party invoking the plea. We expounded, thus: A party may be estopped or barred from raising a question in different ways and for different reasons. Thus, we speak of estoppel *in pais*, of estoppel by deed or by record, and of estoppel by *laches*. Laches, in a general sense, is failure or neglect, for an unreasonable and unexplained length of time, to do that which, by exercising due diligence, could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. The doctrine of laches or of "stale demands" is based upon grounds of public policy which requires, for the peace of society, the discouragement of stale claims and, unlike the statute of limitations, is not a mere question of time but is principally a question of the inequity or unfairness of permitting a right or claim to be enforced or asserted. It has been held that a party cannot invoke the jurisdiction of a court to secure affirmative relief against his opponent and, after obtaining or failing to obtain such relief, repudiate or question that same jurisdiction (*Dean vs. Dean*, 136 Or. 694, 86 A.L.R. 79). In the case just cited, by way of explaining the rule, it was further said that the question whether the court had jurisdiction either

of the subject matter of the action or of the parties was not important in such cases because the party is barred from such conduct *not because the judgment or order of the court is valid and conclusive as an adjudication, but for the reason that such a practice cannot be tolerated—obviously for reasons of public policy*. Furthermore, it has also been held 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. (*Pease vs. Rathbun-Jones etc*., 243 U.S. 273, 61 L. Ed. 715, 37 S.Ct. 283; *St. Louis etc. vs. McBride*, 141 U.S. 127, 35 L. Ed. 659). And in *Littleton vs. Burgess*, 16 Wyo. 58, the Court said that it is not right for a party who has affirmed and invoked the jurisdiction of a court in a particular matter to secure an affirmative relief, to afterwards deny that same jurisdiction to escape a penalty. Upon this same principle is what We said in the three cases mentioned in the resolution of the Court of Appeals of May 20, 1963 (*supra*)—to the effect that we frown upon the "undesirable practice" of a party submitting his case for decision and then accepting the judgment, only if favorable, and attacking it for lack of jurisdiction, when adverse— x x x.

4. ID.; ID.; ID.; ID.; CASE AT BAR.— The general rule should be, as it has always been, that *the issue of jurisdiction may be raised at any stage of the proceedings, even on appeal, and is not lost by waiver or by estoppel. Estoppel by laches, to bar a litigant from asserting the court's absence or lack of jurisdiction, only supervenes in exceptional cases similar to the factual milieu of Tijam v. Sibonghanoy.* Indeed, the fact that a person attempts to invoke unauthorized jurisdiction of a court does not estop him from thereafter challenging its jurisdiction over the subject matter, since such jurisdiction must arise by law and not by mere consent of the parties. This is especially true where the person seeking to invoke unauthorized jurisdiction of the court does not thereby secure any advantage or the adverse party does not suffer any harm. Applying the said doctrine to the instant case, the petitioner is in no way estopped by laches in assailing the jurisdiction of the RTC, considering that he raised the lack thereof in his appeal before the appellate court. At that time, no considerable period had yet elapsed for laches to attach. True, delay alone, though unreasonable, will not sustain the defense of "estoppel by laches" *unless it further appears that the party, knowing his rights, has not sought to enforce them until the condition of the party*

pleading laches has in good faith become so changed that he cannot be restored to his former state, if the rights be then enforced, due to loss of evidence, change of title, intervention of equities, and other causes. In applying the principle of estoppel by laches in the exceptional case of *Sibonghanoy*, the Court therein considered the patent and revolting inequity and unfairness of having the judgment creditors go up their Calvary once more after more or less 15 years. The same, however, does not obtain in the instant case. We note at this point that estoppel, being in the nature of a forfeiture, is not favored by law. It is to be applied rarely—only from necessity, and only in extraordinary circumstances. The doctrine must be applied with great care and the equity must be strong in its favor. When misapplied, the doctrine of estoppel may be a most effective weapon for the accomplishment of injustice. Moreover, a judgment rendered without jurisdiction over the subject matter is void. Hence, the Revised Rules of Court provides for remedies in attacking judgments rendered by courts or tribunals that have no jurisdiction over the concerned cases. No laches will even attach when the judgment is null and void for want of jurisdiction. As we have stated in *Heirs of Julian Dela Cruz and Leonora Talaro v. Heirs of Alberto Cruz*, It is axiomatic that the jurisdiction of a tribunal, including a quasi-judicial officer or government agency, over the nature and subject matter of a petition or complaint is determined by the material allegations therein and the character of the relief prayed for, irrespective of whether the petitioner or complainant is entitled to any or all such reliefs. *Jurisdiction over the nature and subject matter of an action is conferred by the Constitution and the law, and not by the consent or waiver of the parties where the court otherwise would have no jurisdiction over the nature or subject matter of the action. Nor can it be acquired through, or waived by, any act or omission of the parties. Moreover, estoppel does not apply to confer jurisdiction to a tribunal that has none over the cause of action.* x x x Indeed, the jurisdiction of the court or tribunal is not affected by the defenses or theories set up by the defendant or respondent in his answer or motion to dismiss. Jurisdiction should be determined by considering not only the status or the relationship of the parties but also the nature of the issues or questions that is the subject of the controversy. x x x *The proceedings before a court or tribunal without jurisdiction, including its decision, are null and void, hence, susceptible to direct and collateral attacks*.

APPEARANCES OF COUNSEL

Roderick M. Santos for petitioner.
The Solicitor General for respondent.

D E C I S I O N

NACHURA, *J.*:

When is a litigant estopped by laches from assailing the jurisdiction of a tribunal? This is the paramount issue raised in this petition for review of the February 28, 2001 Decision[2] of the Court of Appeals (CA) in CA-G.R. CR No. 22697.

Pertinent are the following antecedent facts and proceedings:

On July 8, 1994, an information[3] for reckless imprudence resulting in homicide was filed against the petitioner before the Regional Trial Court (RTC) of Bulacan, Branch 18.[4] The case was docketed as Criminal Case No. 2235-M-94.[5] Trial on the merits ensued and on August 19, 1998, the trial court convicted

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[2] Penned by Associate Justice Conchita Carpio Morales (now an Associate Justice of this Court), with Associate Justices Candido V. Rivera and Rebecca de Guia-Salvador concurring; *rollo*, pp. 23-31.

[3] The indictment reads:

That on or about the 16th day of January 1994, in the Municipality of Bocaue, Province of Bulacan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, being then the driver and person-in-charge of German Espiritu Bus bearing plate no. PHZ-542, did then and there willfully, unlawfully and feloniously drive and operate the same along the highway in the said municipality, in a negligent, careless and imprudent manner, without due regard to the traffic laws, rules and regulations and without taking the necessary precautions to prevent death or injuries to persons and damage to property, causing by such negligence, carelessness and imprudence, said German Espiritu Bus driven by him to hit and bump one Rodolfo Lopez *y* Amparado, thereby causing physical injuries to the latter which caused his death. (*Id*. at 23-24.)

[4] *Id*. at 26.

[5] *Id*. at 55.

the petitioner as charged.[6] In his appeal before the CA, the petitioner questioned, among others, for the first time, the trial court's jurisdiction.[7]

The appellate court, however, in the challenged decision, considered the petitioner to have actively participated in the trial and to have belatedly attacked the jurisdiction of the RTC; thus, he was already estopped by laches from asserting the trial court's lack of jurisdiction. Finding no other ground to reverse the trial court's decision, the CA affirmed the petitioner's conviction but modified the penalty imposed and the damages awarded.[8]

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[6] The dispositive portion of the trial court's decision reads:

WHEREFORE, in view of the foregoing, the Court finds the accused Vinancio Figueroa *y* Cervantes GUILTY beyond reasonable doubt of the crime of reckless imprudence resulting to (sic) homicide, as defined and penalized under Article 365 of the Revised Penal Code, sentencing him to suffer imprisonment of two (2) years, ten (10) months and twenty-one (21) days to four (4) years and two (2) months and to indemnify the heirs of the deceased in the amount of:

1. ₱50,000.00 indemnity;
2. ₱3,034,560.00 for loss of earning capacity;
3. ₱24,000 for cemetery lot;
4. ₱45,000 for funeral expenses;
5. ₱54,221.00 for wake expenses.

SO ORDERED.

(*Id*. at 24-25 and 56.)

[7] *Id*. at 25.

[8] The dispositive portion of the CA decision reads:

WHEREFORE, the appealed judgment is AFFIRMED with MODIFICATION. As modified, the judgment reads: Appellant Vinancio Figueroa is found guilty beyond reasonable doubt of Homicide Through Reckless Imprudence with violation of the Land Transportation and Traffic Code (formerly the Automobile Law) and is accordingly hereby sentenced to suffer an indeterminate penalty of One (1) Year, Four (4) Months and One (1) Day of *prision correccional* as minimum to Three (3) Years, Six (6) Months and Twenty (20) Days of *prision correccional* as maximum, and to pay the heirs of the victim the following:

1. ₱50,000.00 as civil indemnity;
2. ₱339,840.00 as damages for loss of earning capacity;
3. ₱45,000 for funeral expenses; and

Dissatisfied, the petitioner filed the instant petition for review on *certiorari* raising the following issues for our resolution:

a. Does the fact that the petitioner failed to raise the issue of jurisdiction during the trial of this case, which was initiated and filed by the public prosecutor before the wrong court, constitute laches in relation to the doctrine laid down in *Tijam v. Sibonghanoy*, notwithstanding the fact that said issue was immediately raised in petitioner's appeal to the Honorable Court of Appeals? Conversely, does the active participation of the petitioner in the trial of his case, which is initiated and filed not by him but by the public prosecutor, amount to estoppel?

b. Does the admission of the petitioner that it is difficult to ***immediately*** stop a bus while it is running at 40 kilometers per hour ***for the purpose of avoiding a person who unexpectedly crossed the road***, constitute enough incriminating evidence to warrant his conviction for the crime charged?

c. Is the Honorable Court of Appeals justified in considering the place of accident as falling within Item 4 of Section 35 (b) of the Land Transportation and Traffic Code, and subsequently ruling that the speed limit thereto is only 20 kilometers per hour, when no evidence whatsoever to that effect was ever presented by the prosecution during the trial of this case?

d. Is the Honorable Court of Appeals justified in convicting the petitioner for homicide through reckless imprudence (the legally correct designation is "reckless imprudence resulting to homicide") ***with violation of the Land Transportation and Traffic Code*** when the prosecution did not prove this during the trial and, more importantly, the information filed against the petitioner does not contain an allegation to that effect?

e. Does the uncontroverted testimony of the defense witness Leonardo Hernal that the victim unexpectedly crossed the road resulting in him getting hit by the bus driven by the petitioner not enough evidence to acquit him of the crime charged?[9]

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4. ₱24,000 for burial expenses

SO ORDERED. (*Id*. at 30.)

[9] *Id*. at 156-158.

Applied uniformly is the familiar rule that the jurisdiction of the court to hear and decide a case is conferred by the law in force at the time of the institution of the action, unless such statute provides for a retroactive application thereof.[10] In this case, at the time the criminal information for reckless imprudence resulting in homicide with violation of the Automobile Law (now Land Transportation and Traffic Code) was filed, Section 32(2) of *Batas Pambansa* (B.P.) *Blg.* 129[11] had already been amended by Republic Act No. 7691.[12] The said provision thus reads:

> Sec. 32. *Jurisdiction of Metropolitan Trial Courts, Municipal Trial Courts and Municipal Circuit Trial Courts in Criminal Cases*.—Except in cases falling within the exclusive original jurisdiction of Regional Trial Courts and the Sandiganbayan, the Metropolitan Trial Courts, Municipal Trial Courts, and Municipal Circuit Trial Courts shall exercise:
>
> x x x x x x x x x
>
> (2) Exclusive original jurisdiction over all offenses punishable with imprisonment not exceeding six (6) years irrespective of the amount of fine, and regardless of other imposable accessory or other penalties, including the civil liability arising from such offenses or predicated thereon, irrespective of kind, nature, value or amount thereof: *Provided, however,* That in offenses involving damage to property through criminal negligence, they shall have exclusive original jurisdiction thereof.

As the imposable penalty for the crime charged herein is *prision correccional* in its medium and maximum periods or imprisonment for 2 years, 4 months and 1 day to 6 years,[13]

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[10] *Alarilla v. Sandiganbayan*, 393 Phil. 143, 155 (2000); *Escobal v. Justice Garchitorena*, 466 Phil. 625, 635 (2004).

[11] Entitled "The Judiciary Reorganization Act of 1980," approved on August 14, 1981.

[12] Entitled "An Act Expanding the Jurisdiction of the Metropolitan Trial Courts, Municipal Trial Courts, and Muncipal Circuit Trial Courts, Amending for the Purpose Batas Pambansa Blg. 129, Otherwise Known as the 'Judiciary Reorganization Act of 1980,'" approved on March 25, 1994, and took effect on April 15, 1994, fifteen days after publication in the Malaya and in the Times Journal on March 30, 1994, pursuant to Section 8 thereof.

[13] Revised Penal Code, Art. 365.

jurisdiction to hear and try the same is conferred on the Municipal Trial Courts (MTCs). Clearly, therefore, the RTC of Bulacan does not have jurisdiction over Criminal Case No. 2235-M-94.

While both the appellate court and the Solicitor General acknowledge this fact, they nevertheless are of the position that the principle of estoppel by laches has already precluded the petitioner from questioning the jurisdiction of the RTC—the trial went on for 4 years with the petitioner actively participating therein and without him ever raising the jurisdictional infirmity. The petitioner, for his part, counters that the lack of jurisdiction of a court over the subject matter may be raised at any time even for the first time on appeal. As undue delay is further absent herein, the principle of laches will not be applicable.

To settle once and for all this problem of jurisdiction *vis-à-vis* estoppel by laches, which continuously confounds the bench and the bar, we shall analyze the various Court decisions on the matter.

As early as 1901, this Court has declared that *unless jurisdiction has been conferred by some legislative act, no court or tribunal can act on a matter submitted to it.*[14] We went on to state in *U.S. v. De La Santa*[15] that:

> It has been frequently held that a lack of jurisdiction over the subject-matter is fatal, and subject to objection at any stage of the proceedings, either in the court below or on appeal (Ency. of Pl. & Pr., vol. 12, p. 189, and large array of cases there cited), and indeed, **where the subject-matter is not within the jurisdiction, the court may dismiss the proceeding *ex mero motu***. (4 Ill., 133; 190 Ind., 79; *Chipman vs. Waterbury*, 59 Conn., 496.)
>
> Jurisdiction *over the subject-matter* in a judicial proceeding is conferred by the sovereign authority which organizes the court; it is given only by law and in the manner prescribed by law and an objection based on the lack of such jurisdiction **can not be waived by the parties**.
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> x x x x x x x x x[16]

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[14] *In Re: Calloway*, 1 Phil. 11, 12 (1901).

[15] 9 Phil. 22 (1907).

[16] *Id*. at 26. (Emphasis ours.)

Later, in *People v. Casiano*,[17] the Court explained:

4. ***The operation of the principle of estoppel on the question of jurisdiction seemingly depends upon whether the lower court actually had jurisdiction or not.*** **If it had *no* jurisdiction, but the case was tried and decided upon the theory that it *had* jurisdiction, the parties are not barred, on appeal, from assailing such jurisdiction, for the same "must exist *as a matter of law,* and *may not be conferred by consent of the parties or by estoppel*"** (5 C.J.S., 861-863). However, if the lower court *had* jurisdiction, and the case was heard and decided upon a given theory, such, for instance, as that the court had *no* jurisdiction, the party who induced it to adopt such theory will not be permitted, on appeal, to assume an inconsistent position—that the lower court *had* jurisdiction. Here, the principle of estoppel applies. The rule that jurisdiction is conferred by law, and does not depend upon the will of the parties, has *no* bearing thereon. Thus, Corpus Juris Secundum says:

Where accused has secured a decision that the indictment is void, or has been granted an instruction based on its defective character directing the jury to acquit, he is estopped, when subsequently indicted, to assert that the former indictment was valid. In such case, *there may be a new prosecution whether the indictment in the former prosecution was good or bad*. Similarly, *where, after the jury was impaneled and sworn, the court on accused's motion quashed the information on the erroneous assumption that the court had no jurisdiction, accused cannot successfully plead former jeopardy to a new information*. *x x x* (22 C.J.S., Sec. 252, pp. 388-389; italics ours.)

Where accused procured a prior conviction to be set aside on the ground that the court was *without* jurisdiction, *he is estopped* subsequently to assert, in support of a defense of previous jeopardy, that such court had jurisdiction." (22 C.J.S., p. 378.)[18]

But in *Pindañgan Agricultural Co., Inc. v. Dans*,[19] the Court, in not sustaining the plea of lack of jurisdiction by the plaintiff-appellee therein, made the following observations:

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[17] 111 Phil. 73 (1961).

[18] *Id*. at 93-94. (Emphasis ours).

[19] No. L-14591, September 26, 1962, 6 SCRA 14.

It is surprising why it is only now, after the decision has been rendered, that the plaintiff-appellee presents the question of this Court's jurisdiction over the case. Republic Act No. 2613 was enacted on August 1, 1959. This case was argued on January 29, 1960. Notwithstanding this fact, the jurisdiction of this Court was never impugned until the adverse decision of this Court was handed down. The conduct of counsel leads us to believe that they must have always been of the belief that notwithstanding said enactment of Republic Act 2613 this Court has jurisdiction of the case, such conduct being born out of a conviction that the actual real value of the properties in question actually exceeds the jurisdictional amount of this Court (over ₱200,000). Our minute resolution in G.R. No. L-10096, *Hyson Tan, et al. vs. Filipinas Compaña de Seguros, et al.,* of March 23, 1956, a parallel case, is applicable to the conduct of plaintiff-appellee in this case, thus:

> x x x that an appellant who files his brief and submits his case to the Court of Appeals for decision, without questioning the latter's jurisdiction until decision is rendered therein, should be considered as having voluntarily waived so much of his claim as would exceed the jurisdiction of said Appellate Court; for the reason that a contrary rule would encourage the undesirable practice of appellants submitting their cases for decision to the Court of Appeals in expectation of favorable judgment, but with intent of attacking its jurisdiction should the decision be unfavorable: x x x[20]

Then came our ruling in *Tijam v. Sibonghanoy*[21] that a party may be barred by laches from invoking lack of jurisdiction at a late hour for the purpose of annulling everything done in the case with the active participation of said party invoking the plea. We expounded, thus:

A party may be estopped or barred from raising a question in different ways and for different reasons. Thus, we speak of estoppel *in pais*, of estoppel by deed or by record, and of estoppel by *laches*.

Laches, in a general sense, is failure or neglect, for an unreasonable and unexplained length of time, to do that which, by exercising due diligence, could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting

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[20] *Id*. at 16-17.

[21] 131 Phil. 556 (1968).

a presumption that the party entitled to assert it either has abandoned it or declined to assert it.

The doctrine of laches or of "stale demands" is based upon grounds of public policy which requires, for the peace of society, the discouragement of stale claims and, unlike the statute of limitations, is not a mere question of time but is principally a question of the inequity or unfairness of permitting a right or claim to be enforced or asserted.

It has been held that a party cannot invoke the jurisdiction of a court to secure affirmative relief against his opponent and, after obtaining or failing to obtain such relief, repudiate or question that same jurisdiction (*Dean vs. Dean*, 136 Or. 694, 86 A.L.R. 79). In the case just cited, by way of explaining the rule, it was further said that the question whether the court had jurisdiction either of the subject matter of the action or of the parties was not important in such cases because the party is barred from such conduct *not because the judgment or order of the court is valid and conclusive as an adjudication, but for the reason that such a practice cannot be tolerated—obviously for reasons of public policy*.

Furthermore, it has also been held 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 (*Pease vs. Rathbun-Jones etc*., 243 U.S. 273, 61 L. Ed. 715, 37 S.Ct. 283; *St. Louis etc. vs. McBride*, 141 U.S. 127, 35 L. Ed. 659). And in *Littleton vs. Burgess*, 16 Wyo. 58, the Court said that it is not right for a party who has affirmed and invoked the jurisdiction of a court in a particular matter to secure an affirmative relief, to afterwards deny that same jurisdiction to escape a penalty.

Upon this same principle is what We said in the three cases mentioned in the resolution of the Court of Appeals of May 20, 1963 (*supra*)—to the effect that we frown upon the "undesirable practice" of a party submitting his case for decision and then accepting the judgment, only if favorable, and attacking it for lack of jurisdiction, when adverse—as well as in *Pindañgan etc. vs. Dans et al*., G.R. L-14591, September 26, 1962; *Montelibano et al. vs. Bacolod-Murcia Milling Co., Inc.,* G.R. L-15092; *Young Men Labor Union etc. vs. The Court of Industrial Relations et al*., G.R. L-20307, Feb. 26, 1965, and *Mejia vs. Lucas*, 100 Phil. p. 277.

The facts of this case show that from the time the Surety became a quasi-party on July 31, 1948, it could have raised the question of the lack of jurisdiction of the Court of First Instance of Cebu to take cognizance of the present action by reason of the sum of money involved which, according to the law then in force, was within the original exclusive jurisdiction of inferior courts. It failed to do so. Instead, at several stages of the proceedings in the court *a quo,* as well as in the Court of Appeals, it invoked the jurisdiction of said courts to obtain affirmative relief and submitted its case for a final adjudication on the merits. It was only after an adverse decision was rendered by the Court of Appeals that it finally woke up to raise the question of jurisdiction. Were we to sanction such conduct on its part, We would in effect be declaring as useless all the proceedings had in the present case since it was commenced on July 19, 1948 and compel the judgment creditors to go up their Calvary once more. The inequity and unfairness of this is not only patent but revolting.[22]

For quite a time since we made this pronouncement in *Sibonghanoy*, courts and tribunals, in resolving issues that involve the belated invocation of lack of jurisdiction, have applied the principle of estoppel by laches. Thus, in *Calimlim v. Ramirez*,[23] we pointed out that *Sibonghanoy* was *developing into a general rule rather than the exception*:

A rule that had been settled by unquestioned acceptance and upheld in decisions so numerous to cite is that the jurisdiction of a court over the subject-matter of the action is a matter of law and may not be conferred by consent or agreement of the parties. The lack of jurisdiction of a court may be raised at any stage of the proceedings, even on appeal. This doctrine has been qualified by recent pronouncements which stemmed principally from the ruling in the cited case of *Sibonghanoy*. It is to be regretted, however, that the holding in said case had been applied to situations which were obviously not contemplated therein. The exceptional circumstance involved in *Sibonghanoy* which justified the departure from the accepted concept of non-waivability of objection to jurisdiction has been ignored and, instead a blanket doctrine had been repeatedly upheld that rendered the supposed ruling in *Sibonghanoy* not as the exception, but rather the general rule, virtually overthrowing altogether the time-honored

[22] *Id*. at 563-565.

[23] 204 Phil. 25 (1982).

principle that the issue of jurisdiction is not lost by waiver or by estoppel.

In *Sibonghanoy*, the defense of lack of jurisdiction of the court that rendered the questioned ruling was held to be barred by estoppel by laches. It was ruled that the lack of jurisdiction having been raised for the first time in a motion to dismiss filed almost fifteen (15) years after the questioned ruling had been rendered, such a plea may no longer be raised for being barred by laches. As defined in said case, laches is "failure or neglect, for an unreasonable and unexplained length of time, to do that which, by exercising due diligence, could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert has abandoned it or declined to assert it.[24]

In *Calimlim*, despite the fact that *the one who benefited from the plea of lack of jurisdiction was the one who invoked the court's jurisdiction*, and *who later obtained an adverse judgment therein*, we refused to apply the ruling in *Sibonghanoy*. **The Court accorded supremacy to the time-honored principle that the issue of jurisdiction is not lost by waiver or by estoppel**.

Yet, in subsequent cases decided after *Calimlim*, which by sheer volume are too plentiful to mention, the *Sibonghanoy* doctrine, as foretold in *Calimlim*, became the rule rather than the exception. As such, in *Soliven v. Fastforms Philippines, Inc.*,[25] the Court ruled:

While it is true that jurisdiction may be raised at any time, "this rule presupposes that estoppel has not supervened." In the instant case, respondent actively participated in all stages of the proceedings before the trial court and invoked its authority by asking for an affirmative relief. Clearly, respondent is estopped from challenging the trial court's jurisdiction, especially when an adverse judgment has been rendered. In *PNOC Shipping and Transport Corporation vs. Court of Appeals*, we held:

> Moreover, we note that petitioner did not question at all the jurisdiction of the lower court x x x in its answers to both

[24] *Id.* at 34-35.

[25] G.R. No. 139031, October 18, 2004, 440 SCRA 389.

> the amended complaint and the second amended complaint. It did so only in its motion for reconsideration of the decision of the lower court after it had received an adverse decision. As this Court held in *Pantranco North Express, Inc. vs. Court of Appeals* (G.R. No. 105180, July 5, 1993, 224 SCRA 477, 491), *participation in all stages of the case before the trial court, that included invoking its authority in asking for affirmative relief, effectively barred petitioner by estoppel from challenging the court's jurisdiction*. Notably, from the time it filed its answer to the second amended complaint on April 16, 1985, petitioner did not question the lower court's jurisdiction. It was only on December 29, 1989 when it filed its motion for reconsideration of the lower court's decision that petitioner raised the question of the lower court's lack of jurisdiction. *Petitioner thus foreclosed its right to raise the issue of jurisdiction by its own inaction*. (italics ours)

Similarly, in the subsequent case of *Sta. Lucia Realty and Development, Inc. vs. Cabrigas*, we ruled:

> In the case at bar, it was found by the trial court in its 30 September 1996 decision in LCR Case No. Q-60161(93) that private respondents (who filed the petition for reconstitution of titles) failed to comply with both Sections 12 and 13 of RA 26 and therefore, it had no jurisdiction over the subject matter of the case. However, private respondents never questioned the trial court's jurisdiction over its petition for reconstitution throughout the duration of LCR Case No. Q-60161(93). On the contrary, private respondents actively participated in the reconstitution proceedings by filing pleadings and presenting its evidence. They invoked the trial court's jurisdiction in order to obtain affirmative relief – the reconstitution of their titles. *Private respondents have thus foreclosed their right to raise the issue of jurisdiction by their own actions*.
>
> *The Court has constantly upheld the doctrine that while jurisdiction may be assailed at any stage, a litigant's participation in all stages of the case before the trial court, including the invocation of its authority in asking for affirmative relief, bars such party from challenging the court's jurisdiction* (*PNOC Shipping and Transport Corporation vs. Court of Appeals*, 297 SCRA 402 [1998]). *A party cannot invoke the jurisdiction of a court to secure affirmative relief against his opponent and after obtaining or failing to obtain such relief, repudiate or question that same jurisdiction* (*Asset*

> *Privatization Trust vs. Court of Appeals*, 300 SCRA 579 [1998]; *Province of Bulacan vs. Court of Appeals*, 299 SCRA 442 [1998]). *The Court frowns upon the undesirable practice of a party participating in the proceedings and submitting his case for decision and then accepting judgment, only if favorable, and attacking it for lack of jurisdiction, when adverse* (*Producers Bank of the Philippines vs. NLRC*, 298 SCRA 517 [1998], citing *Ilocos Sur Electric Cooperative, Inc. vs. NLRC*, 241 SCRA 36 [1995]). (italics ours)[26]

Noteworthy, however, is that, in the 2005 case of *Metromedia Times Corporation v. Pastorin*,[27] where the issue of lack of jurisdiction was raised only in the National Labor Relations Commission (NLRC) on appeal, we stated, after examining the doctrines of jurisdiction *vis-à-vis* estoppel, that the ruling in *Sibonghanoy* **stands as an exception, rather than the general rule**. Metromedia, thus, was not estopped from assailing the jurisdiction of the labor arbiter before the NLRC on appeal.[28]

Later, in *Francel Realty Corporation v. Sycip*,[29] the Court clarified that:

> Petitioner argues that the CA's affirmation of the trial court's dismissal of its case was erroneous, considering that a full-blown trial had already been conducted. In effect, it contends that lack of jurisdiction could no longer be used as a ground for dismissal after trial had ensued and ended.
>
> The above argument is anchored on estoppel by laches, which has been used quite successfully in a number of cases to thwart dismissals based on lack of jurisdiction. *Tijam v. Sibonghanoy*, in which this doctrine was espoused, held that a party may be barred from questioning a court's jurisdiction after being invoked to secure affirmative relief against its opponent. In fine, laches prevents the issue of lack of jurisdiction from being raised for the first time on appeal by a litigant whose purpose is to annul everything done in a trial in which it has actively participated.

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[26] *Id*. at 395-396.

[27] G.R. No. 154295, July 29, 2005, 465 SCRA 320.

[28] *Id*. at 337.

[29] G.R. No. 154684, September 8, 2005, 469 SCRA 424.

Laches is defined as the "failure or neglect for an unreasonable and unexplained length of time, to do that which, by exercising due diligence, could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it."

The ruling in *Sibonghanoy* on the matter of jurisdiction is, however, the exception rather than the rule. Estoppel by laches may be invoked to bar the issue of lack of jurisdiction only in cases in which the factual milieu is analogous to that in the cited case. In such controversies, laches should be clearly present; that is, lack of jurisdiction must have been raised so belatedly as to warrant the presumption that the party entitled to assert it had abandoned or declined to assert it. That *Sibonghanoy* applies only to exceptional circumstances is clarified in *Calimlim v. Ramirez*, which we quote:

> A rule that had been settled by unquestioned acceptance and upheld in decisions so numerous to cite is that the jurisdiction of a court over the subject-matter of the action is a matter of law and may not be conferred by consent or agreement of the parties. *The lack of jurisdiction of a court may be raised at any stage of the proceedings, even on appeal*. This doctrine has been qualified by recent pronouncements which stemmed principally from the ruling in the cited case of *Sibonghanoy*. *It is to be regretted, however, that the holding in said case had been applied to situations which were obviously not contemplated therein*. The exceptional circumstance involved in *Sibonghanoy* which justified the departure from the accepted concept of non-waivability of objection to jurisdiction has been ignored and, instead a blanket doctrine had been repeatedly upheld that rendered the supposed ruling in *Sibonghanoy* not as the exception, but rather the general rule, virtually overthrowing altogether the time-honored principle that the issue of jurisdiction is not lost by waiver or by *estoppel*.

Indeed, the general rule remains: a court's lack of jurisdiction may be raised at any stage of the proceedings, even on appeal. The reason is that jurisdiction is conferred by law, and lack of it affects the very authority of the court to take cognizance of and to render judgment on the action. Moreover, jurisdiction is determined by the averments of the complaint, not by the defenses contained in the answer.[30]

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[30] *Id*. at 429-431.

Also, in *Mangaliag v. Catubig-Pastoral*,[31] even if the pleader of lack of jurisdiction *actively took part in the trial proceedings by presenting a witness to seek exoneration*, the Court, reiterating the doctrine in *Calimlim*, said:

> Private respondent argues that the defense of lack of jurisdiction may be waived by estoppel through active participation in the trial. Such, however, is not the general rule but an exception, best characterized by the peculiar circumstances in *Tijam vs. Sibonghanoy*. In *Sibonghanoy*, the party invoking lack of jurisdiction did so only after fifteen years and at a stage when the proceedings had already been elevated to the CA. *Sibonghanoy* is an exceptional case because of the presence of laches, which was defined therein as failure or neglect for an unreasonable and unexplained length of time to do that which, by exercising due diligence, could or should have been done earlier; it is the negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert has abandoned it or declined to assert it.[32]

And in the more recent *Regalado v. Go*,[33] the Court again emphasized that *laches should be clearly present* for the *Sibonghanoy* doctrine to be applicable, thus:

> *Laches* is defined as the "failure or neglect for an unreasonable and unexplained length of time, to do that which, by exercising due diligence, could or should have been done earlier, it is negligence or omission to assert a right within a reasonable length of time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it."
>
> The ruling in *People v. Regalario* that was based on the landmark doctrine enunciated in *Tijam v. Sibonghanoy* on the matter of jurisdiction by *estoppel* is the exception rather than the rule. *Estoppel by laches may be invoked to bar the issue of lack of jurisdiction only in cases in which the factual milieu is analogous to that in the cited case.* In such controversies, *laches* should have been clearly present; that is, lack of jurisdiction must have been raised so belatedly as to warrant the presumption that the party entitled to assert it had abandoned or declined to assert it.

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[31] G.R. No. 143951, October 25, 2005, 474 SCRA 153.

[32] *Id.* at 162.

[33] G.R. No. 167988, February 6, 2007, 514 SCRA 616.

In *Sibonghanoy,* the defense of lack of jurisdiction was raised for the first time in a motion to dismiss filed by the Surety almost 15 years after the questioned ruling had been rendered. At several stages of the proceedings, in the court *a quo* as well as in the Court of Appeals, the Surety invoked the jurisdiction of the said courts to obtain affirmative relief and submitted its case for final adjudication on the merits. It was only when the adverse decision was rendered by the Court of Appeals that it finally woke up to raise the question of jurisdiction.

Clearly, the factual settings attendant in *Sibonghanoy* are not present in the case at bar. Petitioner Atty. Regalado, after the receipt of the Court of Appeals resolution finding her guilty of contempt, promptly filed a Motion for Reconsideration assailing the said court's jurisdiction based on procedural infirmity in initiating the action. Her compliance with the appellate court's directive to show cause why she should not be cited for contempt and filing a single piece of pleading to that effect could not be considered as an active participation in the judicial proceedings so as to take the case within the milieu of *Sibonghanoy*. Rather, it is the natural fear to disobey the mandate of the court that could lead to dire consequences that impelled her to comply.[34]

The Court, thus, wavered on when to apply the exceptional circumstance in *Sibonghanoy* and on when to apply the general rule enunciated as early as in *De La Santa* and expounded at length in *Calimlim*. The general rule should, however, be, as it has always been, that *the issue of jurisdiction may be raised at any stage of the proceedings, even on appeal, and is not lost by waiver or by estoppel. Estoppel by laches, to bar a litigant from asserting the court's absence or lack of jurisdiction, only supervenes in exceptional cases similar to the factual milieu of Tijam v. Sibonghanoy.* Indeed, the fact that a person attempts to invoke unauthorized jurisdiction of a court does not estop him from thereafter challenging its jurisdiction over the subject matter, since such jurisdiction must arise by law and not by mere consent of the parties. This is especially true where the person seeking to invoke unauthorized jurisdiction of the court does not thereby secure any advantage or the adverse party does not suffer any harm.[35]

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[34] *Id*. at 635-636. (Citations omitted.)

[35] *Jolley v. Martin Bros. Box Co.*, 109 N.E. 2d, 652, 661 (1952).

Applying the said doctrine to the instant case, the petitioner is in no way estopped by laches in assailing the jurisdiction of the RTC, considering that he raised the lack thereof in his appeal before the appellate court. At that time, no considerable period had yet elapsed for laches to attach. True, delay alone, though unreasonable, will not sustain the defense of "estoppel by laches" *unless it further appears that the party, knowing his rights, has not sought to enforce them until the condition of the party pleading laches has in good faith become so changed that he cannot be restored to his former state, if the rights be then enforced, due to loss of evidence, change of title, intervention of equities, and other causes*.[36] In applying the principle of estoppel by laches in the exceptional case of *Sibonghanoy*, the Court therein considered the patent and revolting inequity and unfairness of having the judgment creditors go up their Calvary once more after more or less 15 years.[37] The same, however, does not obtain in the instant case.

We note at this point that estoppel, being in the nature of a forfeiture, is not favored by law. It is to be applied rarely—only from necessity, and only in extraordinary circumstances. The doctrine must be applied with great care and the equity must be strong in its favor.[38] When misapplied, the doctrine of estoppel may be a most effective weapon for the accomplishment of injustice.[39] Moreover, a judgment rendered without jurisdiction over the subject matter is void.[40] Hence, the Revised Rules of Court provides for remedies in attacking judgments rendered by courts or tribunals that have no jurisdiction over the concerned cases. No laches will even attach when the judgment is null and void for want of

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[36] *Wisdom's Adm'r v. Sims*, 144 S.W. 2d 232, 235, 236, 284 Ky. 258.

[37] *Tijam v. Sibonghanoy*, *supra*, at 37.

[38] *C & S Fishfarm Corp. v. Court of Appeals*, 442 Phil. 279, 290-291 (2002).

[39] *Smith v. Smith*, 265 N.C. 18, 27; 143 S.E. 2d 300, 306 (1965).

[40] *Veneracion v. Mancilla*, G.R. No. 158238, July 20, 2006.

jurisdiction.[41] As we have stated in *Heirs of Julian Dela Cruz and Leonora Talaro v. Heirs of Alberto Cruz*,[42]

> It is axiomatic that the jurisdiction of a tribunal, including a quasi-judicial officer or government agency, over the nature and subject matter of a petition or complaint is determined by the material allegations therein and the character of the relief prayed for, irrespective of whether the petitioner or complainant is entitled to any or all such reliefs. *Jurisdiction over the nature and subject matter of an action is conferred by the Constitution and the law, and not by the consent or waiver of the parties where the court otherwise would have no jurisdiction over the nature or subject matter of the action. Nor can it be acquired through, or waived by, any act or omission of the parties. Moreover, estoppel does not apply to confer jurisdiction to a tribunal that has none over the cause of action.* x x x
>
> Indeed, the jurisdiction of the court or tribunal is not affected by the defenses or theories set up by the defendant or respondent in his answer or motion to dismiss. Jurisdiction should be determined by considering not only the status or the relationship of the parties but also the nature of the issues or questions that is the subject of the controversy. x x x *The proceedings before a court or tribunal without jurisdiction, including its decision, are null and void, hence, susceptible to direct and collateral attacks*.[43]

With the above considerations, we find it unnecessary to resolve the other issues raised in the petition.

WHEREFORE, premises considered, the petition for review on *certiorari* is *GRANTED*. Criminal Case No. 2235-M-94 is hereby *DISMISSED* without prejudice.

SO ORDERED.

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

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[41] *Arcelona v. Court of Appeals*, G.R. No. 102900, October 2, 1997, 280 SCRA 20, 53.

[42] G.R. No. 162890, November 22, 2005, 475 SCRA 743.

[43] *Id*. at 755-757. (Italics supplied.)

* In lieu of Associate Justice Minita V. Chico-Nazario per Special Order No. 508, dated June 25, 2008.

THIRD DIVISION

[G.R. No. 148226. July 14, 2008]

PEOPLE OF THE PHILIPPINES and SPOUSES MARILYN and FRANCISCO GARCIA, *petitioners, vs.* **JOSEPH TERRADO, and HONORABLE SALVADOR P. VEDAÑA, Presiding Judge, Regional Trial Court, Branch 68, Lingayen, Pangasinan,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; GRAVE ABUSE OF DISCRETION.— The special civil action for *certiorari* is intended for the correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. Its principal office is to keep the inferior court within the parameters of its jurisdiction or to prevent it from committing such a grave abuse of discretion amounting to lack or excess of jurisdiction. By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and 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 by or to act at all in contemplation of law.

2. ID.; ID.; ID.; ID.; ALLEGED DECISION BASED ON MISAPPREHENSION OF FACTS, NOT INCLUDED.— While petitioner alleges grave abuse of discretion amounting to lack or excess of jurisdiction, the imputation is premised on the averment that the trial court reached its conclusions based on speculation, surmises and conjectures. As alleged by the petitioners, the accused forcibly took the vehicle from the complainant's driver and the public respondent acquitted the accused for alleged failure to meet the element of intent to gain. Specifically, the allegations delve on the misapprehension of facts by the trial court. Petitioners were persistent that the records of the trial be reviewed, as they were not convinced by the validity of the trial court's factual conclusion. It should be remembered that, as a rule, factual

matters cannot be normally inquired into by the Supreme Court in a *certiorari* proceeding. As earlier stressed, the present recourse is a petition for *certiorari* under Rule 65. It is a fundamental aphorism in law that a review of facts and evidence is not the province of the extraordinary remedy of *certiorari*, which is *extra ordinem* – beyond the ambit of appeal. At least, the mistakes ascribed to the trial court are not errors of jurisdiction correctible by the special civil action for *certiorari*, but errors of judgment, which is correctible by a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court. The mere fact that a court erroneously decides a case does not necessarily deprive it of jurisdiction. Thus, assuming *arguendo* that the trial court committed a mistake in its judgment, the error does not vitiate the decision, considering that it has jurisdiction over the case. For this reason, the dismissal of the instant petition is called for.

3. ID.; ID.; ID.; ID.; ID.; CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY PREVAILS IN CASE AT BAR.— In our jurisdiction, availment of the remedy of *certiorari* to correct an erroneous acquittal may be allowed in cases where petitioner has clearly shown that the public respondent acted without jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction. However, and more serious than the procedural infraction, if the petition merely calls for an ordinary review of the findings of the court *a quo,* we would run afoul of the constitutional right against double jeopardy. Such recourse is tantamount to converting the petition for *certiorari* into an appeal, which is proscribed by the Constitution, the Rules of Court and prevailing jurisprudence on double jeopardy. Verdicts of acquittal are to be regarded as absolutely final and irreviewable. The fundamental philosophy behind the principle is to afford the defendant, who has been acquitted, final repose and to safeguard him from government oppression through the abuse of criminal processes.

APPEARANCES OF COUNSEL

Alexander G. Castro for petitioners.
Rufino A. Merrera for private respondent.

D E C I S I O N

NACHURA, *J.*:

The Case

Before the Court is a Petition for *Certiorari*[1] assailing the April 6, 2001 Decision[2] of Honorable Judge Salvador P. Vedaña of the Regional Trial Court (RTC), Branch 68, of Lingayen, Pangasinan in Criminal Case No. L-5813, *People v. Joseph Terrado, a.k.a.* "*Hapon*," finding the accused "Hapon" not guilty of Carnapping (punished under Republic Act 6538, otherwise known as the "Anti-Carnapping Act of 1972").

Accused Joseph Terrado was charged with Carnapping in the Information filed by 4th Assistant Prosecutor Abraham L. Ramos II, dated March 9, 1998, to wit:

> That on or about 8th day of August, 1997 in the afternoon, in barangay Malindong, Municipality of Binmaley, province of Pangasinan, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, armed with a fan knife (*balisong*), by means of force and intimidation, did then and there threaten with fan knife, Leoncio Dalmacio driver of motorized tricycle with Plate No. AE-8082 and thereafter with intent to gain, willfully, unlawfully and feloniously took and carted away said motorized tricycle without the consent and against the will of Leoncio Dalmacio and/or Marilyn Garcia.
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> Contrary to R.A. 6538 [sic], as amended.[3]

The case was originally raffled to Judge Nicodemo T. Ferrer of Branch 37, RTC. On May 14, 1998, the accused was arraigned and pleaded not guilty to the crime charged.

On July 22, 1998, the prosecution, through 3rd Asst. City Prosecutor Borromeo R. Bustamante, filed a Motion to Dismiss,[4]

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[1] *Rollo*, pp. 3-31.

[2] Annex "A" of the Petition, *id*. at 32-51.

[3] Records, p. 1.

[4] Annex "C" of the Petition, *id*. at 53-54.

and prayed for the provisional dismissal of the case. In an Affidavit of Desistance[5] executed by private complainant, Marilyn Garcia, the latter stated that they were leaving for the US and would not be able to pursue the case. The trial court granted the Motion in its Order[6] dated August 19, 1998.

On November 16, 1998, a Motion to Revive the Case[7] was filed by the private complainant through Prosecutor I Marlon Meneses, which was granted by the court in an Order[8] dated November 17, 1998. A Motion for Reconsideration and/or to Lift/Set Aside Order of Revival was filed by the accused. On January 14, 1999, the trial court denied the motion[9] for reconsideration and set the case for hearing on January 26, 1999. However, the accused sought the inhibition of Judge Nicodemo T. Ferrer from trying the case, which the latter granted. The case was re-raffled and was assigned to the sala of Judge Salvador Vedaña, Branch 68, RTC.

On March 5, 1999, the accused reiterated his Motion for Reconsideration and/or to Lift/Set Aside Order of Revival. Acting on the above motion, the court denied the same for lack of merit in its Resolution[10] dated March 9, 1999, and set the case for hearing on April 5, 1999.

The accused then filed a petition for *certiorari* with the CA assailing the orders of the trial court. Then, on April 5, 1999, he filed with the trial court a Motion to Archive the case. On April 12, 1999, the complainant through the private prosecutor, under the direct control and supervision of the public prosecutor, filed her Comment/Opposition to the motion. In a Resolution[11] dated June 30, 1999, the trial court denied the Motion to Archive

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[5] Annex "B" of the Petition, *id*. at 52.

[6] Annex "D" of the Petition, *id*. at 55.

[7] Annex "E" of the Petition, *id*. at 56-57.

[8] Annex "F" of the Petition, *id*. at 58.

[9] Order dated January 14, 1999, Annex "G", *rollo*, p. 59.

[10] Annex "I", *rollo,* pp. 62-65.

[11] Annex "J", *rollo*, pp. 68-69.

filed by the defense in order not to unduly delay the proceedings, considering that the petition for *certiorari* filed by the defense was not yet given due course by the Court of Appeals (CA).

On July 31, 2000, the trial court issued a warrant of arrest against the accused which was returned unserved because "accused person could not be located at his given address."[12]

On March 27, 2001, the trial court received from the CA the entry of judgment of the resolution dismissing the petition for *certiorari* filed by the accused.[13]

Trial of the case thereafter ensued.

For the prosecution, the following witnesses were presented: Leoncio Dalmacio, PO1 Mardy delos Santos, PO1 Ferdinand Ferrer, Marilyn Garcia and Marcelino Flores.

The version of the prosecution states that in the afternoon of August 8, 1997, while Leoncio Dalmacio (Dalmacio) was driving a tricycle owned by Spouses Marilyn and Francisco Garcia, the accused hailed him, boarded the tricycle, and then asked to be brought to Barangay Libsong, Lingayen, Pangasinan. When they reached the place, the accused alighted from the sidecar and suddenly picked up a stone and struck the tricycle.[14] Dalmacio dismounted from the tricycle and tried to pacify the accused but he noticed that Terrado was armed with a fan knife *(balisong)*. The accused then took the tricycle, drove away and left Dalmacio behind. Dalmacio reported the incident to the Binmaley Police Station and, subsequently, to the Lingayen Police Station. He then executed a Sworn Statement[15] before the municipal judge of the Binmaley Municipal Trial Court (MTC).

For the defense, the accused claimed that he was on his way to his parents-in-law at Libsong when he met Dalmacio and asked him if he could borrow the tricycle. Dalmacio answered

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[12] Records, pp. 375-377.

[13] Records, pp. 383-385.

[14] *Id*.

[15] Affidavit of Leoncio Dalmacio dated August 10, 1997, records, p. 14.

in the affirmative and even told him: "Please put some gasoline in it and I will go to my in-law."[16] One of the witnesses, Joseph Estrada, testified that on the day of the alleged incident, he saw the accused speaking with Dalmacio. Afterwards, he saw Dalmacio alight from the tricycle, then the accused took over the driver's seat and left in the direction of Lingayen. Dalmacio then boarded a jeepney bound for Dagupan. Estrada testified that during the conversation of the accused and Dalmacio, he heard no shouts or altercation between the two.[17] The defense claimed that the accused merely borrowed the tricycle from Dalmacio. However, when accused was about to return the same, he hit a stone, lost control of the tricycle and bumped a tree.[18] Three persons came and helped him bring the tricycle back to the roadside.[19] The accused returned the tricycle at around 11:00 pm of the same day to the Spouses Garcia. The defense did not deny that the tricycle, when returned, was damaged and, in fact, the accused voluntarily paid the amount of ₱8,000.00 as partial remuneration for the repair which was estimated to cost ₱25,000.00.[20]

In its Decision dated April 6, 2001, the trial court acquitted accused Joseph Terrado for failure of the prosecution to establish intent to take the tricycle and intent to gain from the same. Thus, the court held that the prosecution failed to prove the guilt of the accused beyond reasonable doubt. The dispositive portion of the trial court's decision reads:

> WHEREFORE, in view of the foregoing, the Court hereby renders judgment ACQUITTING the accused Joseph Terrado for violation of R.A. 6538 otherwise known as the "Anti-Carnapping Act of 1972."
>
> However, as regard the civil liability of accused Joseph Terrado, the [court] hereby orders him to pay the complainant Marilyn Garcia the following: 1) Actual damages amounting to ₱25,000.00 –

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[16] Petition for Review, p. 15, *rollo*, p. 17.

[17] RTC Decision, *rollo,* p. 47.

[18] Petition for Review, p. 15, *rollo,* p. 17.

[19] *Id*.

[20] Testimony of Marilyn Garcia, RTC Decision, *rollo,* p. 44.

₱8,000.00 = ₱17,000.00 and 2) Moral damages amounting to ₱20,000.00.

SO ORDERED.

The prosecution filed a Motion for Reconsideration[21] which the trial court denied in a Resolution[22] dated May 21, 2001.

Aggrieved, the complainants come to this Court *via* a Petition for *Certiorari* seeking to annul and set aside the Decision dated April 6, 2001.

The issues which the petitioners raise before the Court may be summarized as follows:

1. WHETHER THE ACCUSED IS GUILTY OF VIOLATION OF RA 6538 OTHERWISE KNOWN AS "ANTI-CARNAPPING ACT OF 1972;
2. WHETHER THE PUBLIC RESPONDENT IN RENDERING THE QUESTIONED DECISION ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF JURISDICTION.

The petitioners allege that there was misapprehension of facts, and that the trial court reached its conclusion based entirely on speculation, surmises and conjectures, and acted with grave abuse of discretion amounting to lack of jurisdiction as the judgment of acquittal was rendered on dubious factual and legal basis.

The trial court's decision is being questioned before us through a Petition for *Certiorari* under Rule 65 of the 1997 Rules of Court. It may be noted that the petition was filed by the private prosecutor and without the participation of the Office of the Solicitor General.

The special civil action for *certiorari* is intended for the correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. Its principal office is to keep the inferior court within the parameters of its jurisdiction or to prevent it from committing such a grave abuse of discretion amounting to lack or excess of jurisdiction.[23]

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[21] *Rollo*, pp. 99-105.

[22] *Id*. at 108-112.

[23] *People v. Court of Appeals*, 468 Phil. 1, 10 (2004).

By grave abuse of discretion is meant such capricious and whimsical exercise of judgment as is equivalent to lack of jurisdiction. The abuse of discretion must be grave as where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility and 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 by or to act at all in contemplation of law.[24]

While petitioner alleges grave abuse of discretion amounting to lack or excess of jurisdiction, the imputation is premised on the averment that the trial court reached its conclusions based on speculation, surmises and conjectures. As alleged by the petitioners, the accused forcibly took the vehicle from the complainant's driver and the public respondent acquitted the accused for alleged failure to meet the element of intent to gain.[25] Specifically, the allegations delve on the misapprehension of facts by the trial court. Petitioners were persistent that the records of the trial be reviewed, as they were not convinced by the validity of the trial court's factual conclusion.

It should be remembered that, as a rule, factual matters cannot be normally inquired into by the Supreme Court in a *certiorari* proceeding. As earlier stressed, the present recourse is a petition for *certiorari* under Rule 65. It is a fundamental aphorism in law that a review of facts and evidence is not the province of the extraordinary remedy of *certiorari*, which is *extra ordinem* – beyond the ambit of appeal.[26]

At least, the mistakes ascribed to the trial court are not errors of jurisdiction correctible by the special civil action for *certiorari*, but errors of judgment, which is correctible by a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court. The mere fact that a court erroneously decides a case does not necessarily deprive it of jurisdiction. Thus, assuming

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[24] *United Coconut Planters Bank v. Looyuko*, G.R. No. 156337, September 28, 2007, 534 SCRA 322, 331.

[25] Petition, *rollo,* pp. 19-20.

[26] *People v. Court of Appeals,* 368 Phil. 169, 182 (1999).

arguendo that the trial court committed a mistake in its judgment, the error does not vitiate the decision, considering that it has jurisdiction over the case.[27] For this reason, the dismissal of the instant petition is called for.

In our jurisdiction, availment of the remedy of *certiorari* to correct an erroneous acquittal may be allowed in cases where petitioner has clearly shown that the public respondent acted without jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction. However, and more serious than the procedural infraction, if the petition merely calls for an ordinary review of the findings of the court *a quo,* we would run afoul of the constitutional right against double jeopardy. Such recourse is tantamount to converting the petition for *certiorari* into an appeal, which is proscribed by the Constitution, the Rules of Court and prevailing jurisprudence on double jeopardy.[28] Verdicts of acquittal are to be regarded as absolutely final and irreviewable. The fundamental philosophy behind the principle is to afford the defendant, who has been acquitted, final repose and to safeguard him from government oppression through the abuse of criminal processes.[29]

This Court cannot rule any other way. Accused Joseph Terrado, after being acquitted of the crime charged, must be afforded the protection against repeated attempts for conviction, in faithful adherence to the constitutional rule against double jeopardy.

WHEREFORE, in view of the foregoing, the instant petition is *DISMISSED*.

SO ORDERED.

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

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[27] *Supra* note 23.

[28] *People v. Court of Appeals, supra* note 26.

[29] *People v. Court of Appeals, supra* note 23, at 13.

* In lieu of Associate Justice Minita V. Chico-Nazario per Special Order No. 508, dated June 25, 2008.

SECOND DIVISION

[G.R. No. 148415. July 14, 2008]

RICARDO G. PALOMA, *petitioner, vs.* **PHILIPPINE AIRLINES, INC. and THE NATIONAL LABOR RELATIONS COMMISSION,** *respondents.*

[G.R. No. 156764. July 14, 2008]

PHILIPPINE AIRLINES, INC., *petitioner, vs.* **RICARDO G. PALOMA,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; CIVIL SERVICE; PHILIPPINE AIRLINES, INC. (PAL) NEVER CEASED TO BE OPERATED AS A PRIVATE CORPORATION, AND WAS NOT SUBJECTED TO THE CIVIL SERVICE LAW.— The Court can allow that PAL, during the period material, was a government-controlled corporation in the sense that the GSIS owned a controlling interest over its stocks. One stubborn fact, however, remains: Through the years, PAL functioned as a private corporation and managed as such for profit. Their personnel were never considered government employees. It may perhaps not be amiss for the Court to take judicial notice of the fact that the civil service law and rules and regulations have not actually been made to apply to PAL and its employees. Of governing application to them was the Labor Code. Consider: (a) Even during the effectivity of the 1973 Constitution but prior to the promulgation on January 17, 1985 of the decision in No. 64313 entitled *National Housing Corporation v. Juco*, the Court no less recognized the applicability of the Labor Code to, and the authority of the NLRC to exercise jurisdiction over, disputes involving discipline, personnel movements, and dismissal in GOCCs, among them PAL; (b) Company policy and collective bargaining agreements (CBAs), instead of the civil service law and rules, govern the terms and conditions of employment in PAL. In fact, former Labor Secretary, Blas Ople rhetorically asked how PAL can be covered by the civil service law when, at one time, there were three (3) CBAs in PAL, one

for the ground crew, one for the flight attendants, and one for the pilots; and (c) When public sector unionism was just an abstract concept, labor unions in PAL with the right to engage in strike and other concerted activities were already active. Not to be overlooked of course is the 1964 case of *Phil. Air Lines Employees' Assn*., wherein the Court stated that "the Civil Service Law has not been actually applied to PAL."

2. ID.; ID.; ID.; EXECUTIVE ORDER (EO) 1077; NOT APPLICABLE TO PAL EMPLOYEE; CASE AT BAR.— Paloma cannot plausibly be accorded the benefits of EO 1077 which, to stress, was issued to narrow the gap between the leave privileges between the members of the judiciary, on one hand, and other government officers and employees in the **civil service**, on the other. That PAL and Paloma may have, at a time, come within the embrace of the civil service by virtue of the 1973 Constitution is of little moment at this juncture. As held in *National Service Corporation v. National Labor Relations Commission (NASECO)*, the issue of whether or not a given GOCC falls within the ambit of the civil service subject, *vis-à-vis* disputes respecting terms and conditions of employment, to the jurisdiction of the Civil Service Commission or the NLRC, as the case may be, resolves itself into the question of which between the 1973 Constitution, which does not distinguish between a GOCC with or without an original charter, and the 1987 Constitution, which does, is in place. To borrow from the 1988 *NASECO* ruling, it is the 1987 Constitution, which delimits the coverage of the civil service, that should govern this case because it is the Constitution in place at the time the case was decided, even if, incidentally, the cause of action accrued during the effectivity of the 1973 Constitution. This has been the consistent holding of the Court in subsequent cases involving GOCCs without original charters. It cannot be overemphasized that when Paloma filed his complaint for commutation of sick leave credits, private interests already controlled, if not owned, PAL. Be this as it may, Paloma, when he filed said complaint, cannot even assert being covered by the civil service and, hence, entitled to the benefits attached to civil service employment, such as the right under EO 1077 to accumulate and commute leave credits without limit. In all, then, Paloma, while with PAL, was never a government employee covered by the civil service law. As such, he did not acquire any vested rights on the retirement benefits accorded by

EO 1077. What governs Paloma's entitlement to sick leave benefits and the computation and commutation of creditable benefits is not EO 1077, as the labor arbiter and originally the NLRC correctly held, but PAL's company policy on the matter which took effect in 1990.

APPEARANCES OF COUNSEL

De la Cuesta De las alas & Tantuico for R.G. Paloma.
Bienvenido T. Jamoralin, Jr. for PAL, Inc.

D E C I S I O N

VELASCO, JR., *J.*:

The Case

Before us are these two consolidated petitions for review under Rule 45 separately interposed by Ricardo G. Paloma and Philippine Airlines, Inc. (PAL) to nullify and set aside the Amended Decision[1] dated May 31, 2001 of the Court of Appeals (CA) in CA-G.R. SP No. 56429, as effectively reiterated in its Resolution[2] of January 14, 2003.

The Facts

Paloma worked with PAL from September 1957, rising from the ranks to retire, after 35 years of continuous service, as senior vice president for finance. In March 1992, or some nine (9) months before Paloma retired on November 30, 1992, PAL was privatized.

By way of post-employment benefits, PAL paid Paloma the total amount of PhP 5,163,325.64 which represented his separation/retirement gratuity and accrued vacation leave pay. For the benefits thus received, Paloma signed a document denominated *Release and Quitclaim*[3] but inscribed the following

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[1] *Rollo* (G.R. No. 148415), pp. 55-65. Penned by Associate Justice Renato C. Dacudao (now retired) and concurred in by Associate Justices Bennie A. Adefuin-de la Cruz and Eliezer R. de los Santos.

[2] *Rollo* (G.R. No. 156764), pp. 56-57.

[3] *Id*. at 83.

reservation therein: "Without prejudice to my claim for further leave benefits embodied in my aide memoire transmitted to Mr. Roberto Anonas covered by my 27 Nov. 1992 letter x x x."

The leave benefits Paloma claimed being entitled to refer to his 450-day accrued sick leave credits which PAL allegedly only paid the equivalent of 18 days. He anchored his entitlement on Executive Order No. (EO) 1077[4] dated January 9, 1986, and his having accumulated a certain number of days of sick leave credits, as acknowledged in a letter of Alvia R. Leaño, then an administrative assistant in PAL. Leaño's letter dated November 12, 1992 pertinently reads:

> At your request, we are pleased to confirm herewith the balance of your sick leave credits as they appear in our records: 230 days.
>
> According to our existing policy, an employee is entitled to accumulate sick leave with pay only up to a maximum of 230 days.
>
> Had there been no ceiling as mandated by Company policy, your sick leave credits would have totaled 450 days to date.[5]

Answering Paloma's written demands for conversion to cash of his accrued sick leave credits, PAL asserted having paid all of Paloma's commutable sick leave credits due him pursuant to company policy made applicable to PAL officers starting 1990.

The company leave policy adverted to grants PAL's regular ground personnel a graduated sick leave benefits, those having rendered at least 25 years of service being entitled to 20 days of sick leave for every year of service. An employee, under the policy, may accumulate sick leaves with pay up to **230 days**. Subject to defined qualifications, sick leave credits in excess of 230 days shall be commutable to cash at the employee's option and shall be paid in lump sum on or before **May 31st** of the following year they were earned.[6] Per PAL's records, Paloma

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[4] "Revising the Computation of Creditable Vacation and Sick Leaves of Government Officers and Employees."

[5] *Rollo* (G.R. No. 148415), pp. 63-64.

[6] *Rollo* (G.R. No. 148415), pp. 45-46.

appears to have, for the period from 1990 to 1992, commuted 58 days of his sick leave credits, broken down as follows: 20 days each in 1990 and 1991 and 18 days in 1992.

Subsequently, Paloma filed before the Arbitration Branch of the National Labor Relations Commission (NLRC) a Complaint[7] for *Commutation of Accrued Sick Leaves Totaling 392 days.* In the complaint, docketed as NLRC-NCR-Case No. 00-08-05792-94, Paloma alleged having accrued sick leave credits of **450 days** commutable upon his retirement pursuant to EO 1077 which allows retiring government employees to commute, without limit, all his accrued vacation and sick leave credits. And of the 450-day credit, Paloma added, he had commuted only 58 days, leaving him a **balance of 392 days** of accrued sick leave credits for commutation.

Ruling of the Labor Arbiter

Issues having been joined with the filing by the parties of their respective position papers,[8] the labor arbiter rendered on June 30, 1995 a Decision[9] dispositively reading:

> WHEREFORE, premises considered, respondent PHILIPPINE AIRLINE[S], INC. is hereby ordered to pay within ten (10) days from receipt hereof herein complainant Ricardo G. Paloma, the sum of Six Hundred Seventy Five Thousand Pesos (₱675,000.00) representing his one Hundred sixty two days [162] accumulated sick leave credits, plus ten (10%) percent attorney's fees of ₱67,500.00, or a total sum of ₱742,500.00.
>
> SO ORDERED.

The labor arbiter held that PAL is not covered by the civil service system and, accordingly, its employees, like Paloma, cannot avail themselves of the beneficent provision of EO 1077. This executive issuance, per the labor arbiter's decision, applies

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[7] *Id*. at 59-60, dated August 5, 1994.

[8] *Rollo* (G.R. No. 156764), pp. 61-73, Position Paper for Complainant, dated September 28, 1994; *id*. at 74-82, Position Paper for Respondent, dated October 24, 1994.

[9] *Id*. at 67-75, per Labor Arbiter Felipe T. Garduque II.

only to government officers and employees covered by the civil service, exclusive of the members of the judiciary whose leave and retirement system is covered by a special law.

However, the labor arbiter ruled that Paloma is entitled to a commutation of his alternative claim for 202 accrued sick leave credits less 40 days for 1990 and 1991. Thus, the grant of commutation for 162 accrued leave credits.

Both parties appealed[10] the decision of the labor arbiter to the NLRC.

Ruling of the NLRC in NLRC NCR CA No. 009652-95 (NLRC-NCR-Case No. 00-08-05792-94)

On November 26, 1997, the First Division of the NLRC rendered a Decision affirming that of the labor arbiter, thus:

WHEREFORE, as recommended, both appeals are DISMISSED. The decision of Labor Arbiter Felipe T. Garduque II dated June 30, 1995 is AFFIRMED.

SO ORDERED.[11]

Both parties moved for reconsideration. In its Resolution of November 10, 1999, the NLRC, finding Paloma to have, upon his retirement, commutable accumulated sick leave credits of 230 days, modified its earlier decision, disposing as follows:

In view of all the foregoing, our decision dated November 26, 1997, be modified by increasing the sick leave benefits of complainant to be commuted to cash from 162 days to 230 days.

SO ORDERED.[12]

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[10] *Id*. at 102-115, PAL's Appeal to NLRC, dated August 15, 1995; *id*. at 123-137, Paloma's Memorandum on Appeal, dated August 16, 1995.

[11] *Id*. at 149-160. Penned by Commissioner Vicente S.E. Veloso and concurred in by Commissioner Alberto R. Quimpo.

[12] *Id*. at 88-94. Penned by Commissioner Alberto R. Quimpo and concurred in by then Presiding Commissioner Rogelio I. Rayala. Commissioner Vicente S.E. Veloso did not take part.

From the above modificatory resolution of the NLRC, PAL went to the CA on a petition for *certiorari* under Rule 65, the recourse docketed as CA-G.R. SP No. 56429.

Ruling of the CA in its April 28, 2000 Decision

By a Decision dated April 28, 2000, the CA found for PAL, thus:

WHEREFORE, the petition is granted. Public respondent's November 10, 1999 Resolution is set aside. And the complaint of Ricardo Paloma is hereby DISMISSED. Without costs.

SO ORDERED.[13]

In time, Paloma sought reconsideration.[14]

The May 31, 2001 Amended Decision

On May 31, 2001, the CA issued the assailed Amended Decision reversing its April 28, 2000 Decision. The *fallo* of the Amended Decision reads:

WHEREFORE, premises considered, our Judgment, dated 28 April 2000 is hereby vacated and, set aside, and another one entered reinstating the Resolution, dated 10 November 1999, issued by the public respondent National Labor Relations Commission in NLRC NCR Case No. 00-08-05792-94 [NLRC NCR CA No. 009652-95], entitled *Ricardo G. Paloma v. Philippine Airlines, Incorporated,* with the only modification that the total sums granted by Labor Arbiter Felipe T. Garduque II (₱742,500.00, inclusive of the ten percent (10%) attorney's fees), as affirmed by public respondent National Labor Relations Commission, First Division, in said NLRC Case No. 00-08-05792-94, shall earn legal interest from the date of the institution of the complaint until fully paid/discharged. (Art. 2212, New Civil Code).

SO ORDERED.[15]

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[13] *Id*. at 222-231. Penned by Associate Justice Renato C. Dacudao and concurred in by Associate Justices Quirino D. Abad Santos, Jr. and Bennie A. Adefuin-de la Cruz.

[14] *Id*. at 233-243, dated June 8, 2000.

[15] *Id*. at 64.

Justifying its amendatory action, the CA stated that EO 1077 applies to PAL and necessarily to Paloma on the following rationale: Section 2(1) of Article IX(B) of the 1987 Constitution applies prospectively and, thus, the expressed limitation therein on the applicability of the civil service law only to government-owned and controlled corporations (GOCCs) with original charters does not preclude the applicability of EO 1077 to PAL and its then employees. This conclusion, the CA added, becomes all the more pressing considering that PAL, at the time of the issuance of EO 1077, was still a GOCC and that Paloma had already 29 years of service at that time. The appellate court also stated that since PAL had then no existing retirement program, the provisions of EO 1077 shall serve as a retirement program for Paloma who had meanwhile acquired vested rights under the EO pursuant to Arts. 100[16] and 287[17] of the Labor Code.

Significantly, despite affirmatively positing the applicability of EO 1077, the Amended Decision still deferred to PAL's existing policy on the 230-day limit for accrued sick leave with pay that may be credited to its employees. Incongruously, while the CA reinstated the November 10, 1999 Resolution of the NLRC, it decreed the implementation of the labor arbiter's Decision dated June 30, 1995. As may be recalled, the NLRC, in its November 10, 1999 Resolution, allowed a 230-day sick leave commutation, up from the 162 days granted under the June 30, 1995 Decision of the labor arbiter.

Paloma immediately appealed the CA's Amended Decision via a Petition for Review on *Certiorari* under Rule 45, docketed as **G.R. No. 148415**. On the other hand, PAL first sought

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[16] Art. 100. *PROHIBITION AGAINST ELIMINATION OR DIMINUTION OF BENEFITS*. Nothing in this Book shall be construed to eliminate or in any way diminish supplements, or other employee benefits being enjoyed at the time of promulgation of this Code.

[17] Art. 287. *RETIREMENT*.

x x x x x x x x x

In case of retirement, the employee shall be entitled to receive such retirement benefits as he may have earned under existing laws and any collective bargaining or other agreements x x x.

reconsideration of the Amended Decision, coming to us after the CA, per its January 14, 2003 Resolution, denied the desired reconsideration. In net effect then, PAL's Petition for Review on *Certiorari*, docketed as **G.R. No. 156764**, assails both the Amended Decision and Resolution of the CA.

The Issues

In **G.R. No. 148415**, Paloma raises the sole issue of:

WHETHER OR NOT THE [CA], IN HOLDING THAT E.O. NO. 1077 IS APPLICABLE TO PETITIONER AND YET APPLYING COMPANY POLICY BY AWARDING THE CASH EQUIVALENT OF ONLY 162 DAYS SICK LEAVE CREDITS INSTEAD OF THE 450 DAYS SICK LEAVE CREDITS PETITIONER IS ENTITLED TO UNDER E.O. NO. 1077, DECIDED A QUESTION OF SUBSTANCE IN A MANNER CONTRARY TO LAW AND APPLICABLE JURISPRUDENCE.[18]

In **G.R. No. 156764**, PAL raises the following issues for our consideration:

1. May an employee of a non-government corporation [invoke EO] 1077 which the then President Ferdinand E. Marcos issued on January 9, 1986, solely for the benefit of government officers and employees covered by the civil service?

2. Can a judicial body modify or alter a company policy by ordering the commutation of sick leave credits which, under company policy is non-commutable?[19]

The issues submitted boil down to the question of whether or not EO 1077, before PAL's privatization, applies to its employees, and corollarily, whether or not Paloma is entitled to a commutation of his accrued sick leave credits. Subsumed to the main issue because EO 1077 applies only to government employees subject to civil service law is the question of whether or not PAL—which, as early as 1960 until its privatization, had been considered as a government-controlled corporation—is covered by and subject to the limitations peculiar under the civil service system.

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[18] *Rollo* (G.R. No. 148415), p. 236.

[19] *Rollo* (G.R. No. 156764), p. 13.

There can be no quibbling, as a preliminary consideration, about PAL having been incorporated as a private corporation whose controlling stocks were later acquired by the GSIS, which is wholly owned by the government. Through the years before GSIS divested itself of its controlling interests over the airline, PAL was considered a government-controlled corporation, as we said as much in *Phil. Air Lines Employees' Assn. v. Phil. Air Lines, Inc.*,[20] a case commenced in August 1958 and finally resolved by the Court in 1964. The late Blas Ople, former Labor Secretary and a member of the 1986 Constitutional Commission, described PAL and other like entities spun off from the GSIS as "second generation corporations functioning as private subsidiaries."[21] Before the coming into force of the 1973 Constitution, a subsidiary of a wholly government-owned corporation or a government corporation with original charter was covered by the Labor Code. Following the ratification of the 1973 Constitution, these subsidiaries theoretically came within the pale of the civil service on the strength of this provision: "[T]he civil service embraces every branch, agency, subdivision and instrumentality of the Government, including every [GOCC] x x x."[22] Then came the 1987 Constitution which contextually delimited the coverage of the civil service only to a GOCC "with original charter."[23]

The Court's Ruling

Considering the applicable law and jurisprudence in the light of the undisputed factual milieu of the instant case, the setting aside of the assailed amended decision and resolution of the CA is indicated.

Core Issue: Applicability of EO 1077

Insofar as relevant, EO 1077 dated January 9, 1986, entitled *Revising the Computation of Creditable Vacation and Sick Leaves of Government Officers and Employees*, provides:

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[20] No. L-18559, June 30, 1964, 11 SCRA 387.

[21] *National Service Corporation v. NLRC*, Nos. 69870 & 70295, November 29, 1988, 168 SCRA 122, 135.

[22] Art. II-B, Sec. I(1) of the 1973 Constitution.

[23] Art. IX-B, Sec. 2(1) of the 1987 Constitution.

WHEREAS, under existing law and civil service regulations, the number of days of vacation and sick leaves creditable to a government officer or employee is limited to 300 days;

WHEREAS, by special law, members of the judiciary are not subject to such restriction;

WHEREAS, it is the continuing policy of the government to institute to the extent possible a uniform and equitable system of compensation and benefits and to enhance the morale and performance in the civil service.

x x x x x x x x x

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order and direct the following:

Section 1. Any officer [or] employee of the government who retires or voluntary resigns or is separated from the service through no fault of his own and whose leave benefits are not covered by special law, shall be entitled to the commutation of all the accumulated vacation and/or sick leaves to his credit, exclusive of Saturdays, Sundays, and holidays, **without limitation as to the number of days of vacation and sick leaves that he may accumulate**. (Emphasis supplied.)

Paloma maintains that he comes within the coverage of EO 1077, the same having been issued in 1986, before he severed official relations with PAL, and at a time when the applicable constitutional provision on the coverage of the civil service made no distinction between GOCCs with original charters and those without, like PAL which was incorporated under the Corporation Code. Implicit in Paloma's contention is the submission that he earned the bulk of his sick leave credits under the aegis of the 1973 Constitution when PAL, being then a government-controlled corporation, was under civil service coverage.

The contention is without merit.

PAL never ceased to be operated as a private corporation, and was not subjected to the Civil Service Law

The Court can allow that PAL, during the period material, was a government-controlled corporation in the sense that the

GSIS owned a controlling interest over its stocks. One stubborn fact, however, remains: Through the years, PAL functioned as a private corporation and managed as such for profit. Their personnel were never considered government employees. It may perhaps not be amiss for the Court to take judicial notice of the fact that the civil service law and rules and regulations have not actually been made to apply to PAL and its employees. Of governing application to them was the Labor Code. Consider: (a) Even during the effectivity of the 1973 Constitution but prior to the promulgation on January 17, 1985 of the decision in No. 64313 entitled *National Housing Corporation v. Juco*,[24] the Court no less recognized the applicability of the Labor Code to, and the authority of the NLRC to exercise jurisdiction over, disputes involving discipline, personnel movements, and dismissal in GOCCs, among them PAL;[25] (b) Company policy and collective bargaining agreements (CBAs), instead of the civil service law and rules, govern the terms and conditions of employment in PAL. In fact, Ople rhetorically asked how PAL can be covered by the civil service law when, at one time, there were three (3) CBAs in PAL, one for the ground crew, one for the flight attendants, and one for the pilots;[26] and (c) When public sector unionism was just an abstract concept, labor unions in PAL with the right to engage in strike and other concerted activities were already active.[27]

Not to be overlooked of course is the 1964 case of *Phil. Air Lines Employees' Assn.*, wherein the Court stated that "the Civil Service Law has not been actually applied to PAL."[28]

Given the foregoing considerations, Paloma cannot plausibly be accorded the benefits of EO 1077 which, to stress, was

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[24] 134 SCRA 172.

[25] *National Service Corporation*, *supra* note 21, at 133; citing *Philippine Airlines, Inc. v. NLRC*, No. 62961, September 2, 1983, 124 SCRA 583.

[26] RECORD OF THE CONSTITUTIONAL COMMISSION, Vol. I, pp. 583-585; cited in *National Service Corporation*, *supra*.

[27] *Phil. Air Lines Employees' Assn.*, *supra* note 20.

[28] *Supra* at 397.

issued to narrow the gap between the leave privileges between the members of the judiciary, on one hand, and other government officers and employees in the **civil service**, on the other. That PAL and Paloma may have, at a time, come within the embrace of the civil service by virtue of the 1973 Constitution is of little moment at this juncture. As held in *National Service Corporation v. National Labor Relations Commission (NASECO)*,[29] the issue of whether or not a given GOCC falls within the ambit of the civil service subject, *vis-à-vis* disputes respecting terms and conditions of employment, to the jurisdiction of the Civil Service Commission or the NLRC, as the case may be, resolves itself into the question of which between the 1973 Constitution, which does not distinguish between a GOCC with or without an original charter, and the 1987 Constitution, which does, is in place. To borrow from the 1988 *NASECO* ruling, it is the 1987 Constitution, which delimits the coverage of the civil service, that should govern this case because it is the Constitution in place at the time the case was decided, even if, incidentally, the cause of action accrued during the effectivity of the 1973 Constitution. This has been the consistent holding of the Court in subsequent cases involving GOCCs without original charters.[30]

It cannot be overemphasized that when Paloma filed his complaint for commutation of sick leave credits, private interests already controlled, if not owned, PAL. Be this as it may, Paloma, when he filed said complaint, cannot even assert being covered by the civil service and, hence, entitled to the benefits attached to civil service employment, such as the right under EO 1077 to accumulate and commute leave credits without limit. In all, then, Paloma,

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[29] *Supra* note 21.

[30] See *Postigo v. Philippine Tuberculosis Society, Inc.*, G.R. No. 155146, January 24, 2006, 479 SCRA 628; *Juco v. NLRC*, G.R. No. 98107, August 18, 1997, 277 SCRA 528; *Davao City Water District v. Civil Service Commission*, G.R. Nos. 95237-38, September 13, 1991, 201 SCRA 593; *PNOC-Energy Development Corporation v. NLRC*, G.R. No. 79182, September 11, 1991, 201 SCRA 487; *PNOC-Energy Development Corporation v. Leogardo*, G.R. No. 58494, July 5, 1989, 175 SCRA 26; *Trade Union of the Philippines and Allied Services (TUPAS) v. National Housing Corporation*, G.R. No. 49677, May 4, 1989, 173 SCRA 33; *Lumanta v. NLRC*, G.R. No. 82819, February 8, 1989, 170 SCRA 79.

while with PAL, was never a government employee covered by the civil service law. As such, he did not acquire any vested rights on the retirement benefits accorded by EO 1077.

Paloma not entitled to the benefits granted in EO 1077; existing company policy on the matter applies

What governs Paloma's entitlement to sick leave benefits and the computation and commutation of creditable benefits is not EO 1077, as the labor arbiter and originally the NLRC correctly held, but PAL's company policy on the matter which, as found below, took effect in 1990. The text of the policy is reproduced in the CA's April 28, 2000 Decision and sets out the following pertinent rules:

POLICY

Regular employees shall be entitled to a yearly period of sick leave with pay, the exact number of days to be determined on the basis of the employee's category and length of service in the company.

RULES

A. For ground personnel

2. Sick leave shall be granted only upon certification by a company physician that an employee is incapable of discharging his duties due to illness or injury x x x.

x x x x x x x x x

3. Sick leave entitlement accrues from the date of an employee's regular employment x x x.

In case of direct conversion from temporary/daily/project/contract to regular status, regular employment shall be deemed to have begun on the date of the employee's conversion as a regular employee.

x x x x x x x x x

4. **An employee may accumulate sick leave with pay up to Two Hundred Thirty (230) days**;

An employee who has accumulated seventy-five (75) days sick leave credit at the end of each year may, at his option, commute

seventy-five percent (75%) of his current sick leave entitlement to cash and the other twenty-five percent (25%) to be added to his accrued sick leave credits up to two hundred thirty (230) calendar days.

The seventy-five percent (75%) commutable to cash as above provided, shall be paid up in lump sum on or before May 31st of the following year.

Sick leave credits in excess of two hundred thirty (230) days shall be commutable to cash at the employee's option, and shall be paid in lump sum on or before May 31st of the following year it was earned.[31] (Emphasis ours.)

As may be gathered from the records, accrued sick leave credits in excess of 230 days were not, if earned before 1990 when the above policy took effect, commutable to cash; they were simply forfeited. Those earned after 1990, but still subject to the 230-day threshold rule, were commutable to cash to the extent of 75% of the employee's current entitlement, and payable on or before May 31st of the following year, necessarily implying that the privilege to commute is time-bound.

It appears that Paloma had, as of 1990, more than 230 days of accrued sick leave credits. Following company policy, Paloma was deemed to have forfeited the monetary value of his leave credits in excess of the 230-day ceiling. Now, then, it is undisputed that he earned additional accrued sick leave credits of 20 days in 1990 and 1991 and 18 days in 1992, which he duly commuted pursuant to company policy and received with the corresponding cash value. Therefore, PAL is correct in contending that Paloma had received whatever was due on the commutation of his accrued sick leave credits in excess of the 230 days limit, specifically the 58 days commutation for 1990, 1991, and 1992.

No commutation of 230 days accrued sick leave credits

The query that comes next is how the 230 days accrued sick leave credits Paloma undoubtedly had when he retired are to be treated. Is this otherwise earned credits commutable to cash? These should be answered in the negative.

[31] *Rollo* (G.R. No. 148415), pp. 45-46.

The labor arbiter granted 162 days commutation, while the NLRC allowed the commutation of the maximum 230 days. The CA, while seemingly affirming the NLRC's grant of 230 days commutation, actually decreed a 162-day commutation. We cannot sustain any of the dispositions thus reached for lack of legal basis, for PAL's company policy upon which either disposition was predicated did not provide for a commutation of the first 230 days accrued sick leave credits employees may have upon their retirement. Hence, the NLRC and the CA, by their act of allowing commutation to cash, erred as they virtually read in the policy something not written or intended therein. Indeed, no law provides for commutation of unused or accrued sick leave credits in the private sector. Commutation is allowed by way of voluntary endowment by an employer through a company policy or by a CBA. None of such medium presently obtains and it would be incongruous if the Court fills up the vacuum.

Confronted with a similar situation as depicted above, the Court, in *Baltazar v. San Miguel Brewery, Inc*., declared as follows:

> In connection with the question of whether or not appellee is entitled to the cash value of six months accumulated sick leave, it appears that while under the last paragraph of Article 5 of appellant's Rules and Regulations of the Health, Welfare and Retirement Plan (Exhibit 3), unused sick leave may be accumulated up to a maximum of six months, the same is not commutable or payable in cash upon the employee's option.
>
> In our view, the only meaning and import of said rule and regulation is that if an employee does not choose to enjoy his yearly sick leave of thirty days, he may accumulate such sick leave up to a maximum of six months and enjoy this six months sick leave at the end of the sixth year but may not commute it to cash.[32]

In fine, absent any provision in the applicable company policy authorizing the commutation of the 230 days accrued sick leave credits existing upon retirement, Paloma may not, as a matter of enforceable right, insist on the commutation of his sick leave credits to cash.

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[32] No. L-23076, February 27, 1969, 27 SCRA 71, 74-75.

As PAL's senior vice-president for finance upon his retirement, Paloma knew or at least ought to have known the company policy on accrued sick leave credits and how it was being implemented. Had he acted on that knowledge in utmost good faith, these proceedings would have not come to pass.

WHEREFORE, the petition under *G.R. No. 148415* is hereby *DISMISSED* for lack of merit, while the petition under *G.R. No. 156764* is hereby *GIVEN DUE COURSE.* The Amended Decision dated May 31, 2001 of the CA in CA-G.R. SP No. 56429 and its Resolution of January 14, 2003 are hereby *ANNULLED* and *SET ASIDE*, and the CA Decision dated April 28, 2000 is accordingly *REINSTATED*.

Costs against Ricardo G. Paloma.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Tinga, and *Brion, JJ.,* concur.

THIRD DIVISION

[G.R. No. 148444. July 14, 2008]

ASSOCIATED BANK (now UNITED OVERSEAS BANK [PHILS.]), *petitioner, vs.* **SPOUSES RAFAEL and MONALIZA PRONSTROLLER,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEAL; FINDINGS OF TRIAL COURT AFFIRMED BY APPELLATE COURT, RESPECTED.— Well-settled is the rule that the findings of the RTC, as affirmed by the appellate court, are binding on this Court. In a petition for review on *certiorari* under Rule 45 of the Rules of Court, as in this case, this Court may not review the findings of fact all over again. It must be stressed that this Court is not a

trier of facts, and it is not its function to re-examine and weigh anew the respective evidence of the parties. The findings of the CA are conclusive on the parties and carry even more weight when these coincide with the factual findings of the trial court, unless the factual findings are not supported by the evidence on record. Petitioner failed to show why the above doctrine should not be applied to the instant case.

2. COMMERCIAL LAW; CORPORATIONS; BINDING A CORPORATION TO A CONTRACT; GENERAL RULE AND EXCEPTION.— The general rule is that, in the absence of authority from the board of directors, no person, not even its officers, can validly bind a corporation. The power and responsibility to decide whether the corporation should enter into a contract that will bind the corporation is lodged in the board of directors. However, just as a natural person may authorize another to do certain acts for and on his behalf, the board may validly delegate some of its functions and powers to officers, committees and agents. The authority of such individuals to bind the corporation is generally derived from law, corporate bylaws or authorization from the board, either expressly or impliedly by habit, custom, or acquiescence, in the general course of business.

3. ID.; ID.; ID.; ID.; DOCTRINE OF APPARENT AUTHORITY.— The authority of a corporate officer or agent in dealing with third persons may be actual or apparent. The doctrine of "apparent authority," with special reference to banks, had long been recognized in this jurisdiction. Apparent authority is derived not merely from practice. Its existence may be ascertained through 1) The general manner in which the corporation holds out an officer or agent as having the power to act, or in other words, the apparent authority to act in general, with which it clothes him; or 2) *The acquiescence in his acts of a particular nature, with actual or constructive knowledge thereof, within or beyond the scope of his ordinary powers.* Accordingly, the authority to act for and to bind a corporation may be presumed from acts of recognition in other instances, wherein the power was exercised without any objection from its board or shareholders. Undoubtedly, petitioner had previously allowed Atty. Soluta to enter into the first agreement without a board resolution expressly authorizing him; thus, it had clothed him with apparent authority to modify the same via the second

letter-agreement. It is not the quantity of similar acts which establishes apparent authority, but the vesting of a corporate officer with the power to bind the corporation. Naturally, the third person has little or no information as to what occurs in corporate meetings; and he must necessarily rely upon the external manifestations of corporate consent. The integrity of commercial transactions can only be maintained by holding the corporation strictly to the liability fixed upon it by its agents in accordance with law. What transpires in the corporate board room is entirely an internal matter. Hence, petitioner may not impute negligence on the part of the respondents in failing to find out the scope of Atty. Soluta's authority. Indeed, the public has the right to rely on the trustworthiness of bank officers and their acts. We would like to emphasize that if a corporation knowingly permits its officer, or any other agent, to perform acts within the scope of an apparent authority, holding him out to the public as possessing power to do those acts, the corporation will, as against any person who has dealt in good faith with the corporation through such agent, be estopped from denying such authority.

4. CIVIL LAW; OBLIGATIONS AND CONTRACTS; UNILATERAL RESCISSION OF CONTRACT; NOT PROPER IN CASE AT BAR.— Basic is the rule that a contract constitutes the law between the parties. Concededly, parties may validly stipulate the unilateral rescission of a contract. This is usually in the form of a stipulation granting the seller the right to forfeit installments or deposits made by the buyer in case of the latter's failure to make full payment on the stipulated date. While the petitioner in the instant case may have the right, under the March 18 agreement, to unilaterally rescind the contract in case of respondents' failure to comply with the terms of the contract, the execution of the July 14 Agreement prevented petitioner from exercising the right to rescind. This is so because there was in the first place, no breach of contract, as the date of full payment had already been modified by the later agreement.

5. ID.; ID.; MERE MAKING OF NEW OFFER IS NOT ABANDONMENT OF AGREEMENT IN CASE AT BAR.— Neither can the July 14, 1993 agreement be considered abandoned by respondents' act of making a new offer, which was unfortunately rejected by petitioner. A careful reading of the June 6, 1994 letter of respondents impels this Court to believe that such offer was

made only to demonstrate their capacity to purchase the subject property. Besides, even if it was a valid new offer, they did so only due to the fraudulent misrepresentation made by petitioner that their earlier contracts had already been rescinded. Considering respondents' capacity to pay and their continuing interest in the subject property, to abandon their right to the contract and to the property, absent any form of protection, is contrary to human nature. The presumption that a person takes ordinary care of his concerns applies and remains unrebutted. Obviously therefore, respondents made the new offer without abandoning the previous contract. Since there was never a perfected new contract, the July 14, 1993 agreement was still in effect and there was no abandonment to speak of.

6. REMEDIAL LAW; CIVIL PROCEDURE; *LIS PENDENS*; ELUCIDATED.— *Lis pendens,* which literally means pending suit, refers to the jurisdiction, power or control which a court acquires over property involved in a suit, pending the continuance of the action, and until final judgment. Founded upon public policy and necessity, *lis pendens* is intended to keep the properties in litigation within the power of the court until the litigation is terminated, and to prevent the defeat of the judgment or decree by subsequent alienation. Its notice is an announcement to the whole world that a particular property is in litigation and serves as a warning that one who acquires an interest over said property does so at his own risk or that he gambles on the result of the litigation over said property. The filing of a notice of *lis pendens* has a twofold effect: (1) to keep the subject matter of the litigation within the power of the court until the entry of the final judgment to prevent the defeat of the final judgment by successive alienations; and (2) to bind a purchaser, *bona fide* or not, of the land subject of the litigation to the judgment or decree that the court will promulgate subsequently. This registration, therefore, gives the court clear authority to cancel the title of the spouses Vaca, since the sale of the subject property was made after the notice of *lis pendens.* Settled is the rule that the notice is not considered a collateral attack on the title, for the indefeasibility of the title shall not be used to defraud another especially if the latter performs acts to protect his rights such as the timely registration of a notice of *lis pendens*.

7. CIVIL LAW; DAMAGES; MORAL DAMAGES; ATTORNEY'S FEES AND EXPENSES OF LITIGATION; PROPER IN CASE AT BAR.— Article 2220 of the New Civil Code allows

the recovery of moral damages in breaches of contract where the party acted fraudulently and in bad faith. As found by the CA, petitioner undoubtedly acted fraudulently and in bad faith in breaching the letter-agreements. Despite the pendency of the case in the RTC, it sold the subject property to the spouses Vaca and allowed the demolition of the house even if there was already a writ of preliminary injunction lawfully issued by the court. This is apart from its act of unilaterally rescinding the subject contract. Clearly, petitioner's acts are brazen attempts to frustrate the decision that the court may render in favor of respondents. It is, likewise, apparent that because of petitioner's acts, respondents were compelled to litigate justifying the award of attorney's fees and expenses of litigation.

APPEARANCES OF COUNSEL

Villanueva Caña & Associates Law Offices for petitioner.
Castillo Laman Pantaleon San Jose Law Offices for respondents.

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 filed by petitioner Associated Bank (now United Overseas Bank [Phils.]) assailing the Court of Appeals (CA) Decision[1] dated February 27, 2001, which in turn affirmed the Regional Trial Court[2] (RTC) Decision[3] dated November 14, 1997 in Civil Case No. 94-3298 for *Specific Performance*. Likewise assailed is the appellate court's Resolution[4] dated May 31, 2001 denying petitioner's motion for reconsideration.

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[1] Penned by Associate Justice Romeo J. Callejo, Sr. (now retired Supreme Court Justice), with Associate Justices Renato C. Dacudao and Josefina Guevara-Salonga, concurring; *rollo*, pp. 10-29.

[2] Branch 72, Antipolo, Rizal.

[3] Penned by Presiding Judge Rogelio L. Angeles; records, pp. 456-463.

[4] CA *rollo*, p. 742.

The facts of the case are as follows:

On April 21, 1988, the spouses Eduardo and Ma. Pilar Vaca (spouses Vaca) executed a Real Estate Mortgage (REM) in favor of the petitioner[5] over their parcel of residential land with an area of 953 sq. m. and the house constructed thereon, located at No. 18, Lovebird Street, Green Meadows Subdivision 1, Quezon City (herein referred to as the subject property). For failure of the spouses Vaca to pay their obligation, the subject property was sold at public auction with the petitioner as the highest bidder. Transfer Certificate of Title (TCT) No. 254504, in the name of spouses Vaca, was cancelled and a new one — TCT No. 52593— was issued in the name of the petitioner.[6]

The spouses Vaca, however, commenced an action for the nullification of the real estate mortgage and the foreclosure sale. Petitioner, on the other hand, filed a petition for the issuance of a writ of possession which was denied by the RTC. Petitioner, thereafter, obtained a favorable judgment when the CA granted its petition but the spouses Vaca questioned the CA decision before this Court in the case docketed as G.R. No. 109672.[7]

During the pendency of the aforesaid cases, petitioner advertised the subject property for sale to interested buyers for ₱9,700,000.00.[8] Respondents Rafael and Monaliza Pronstroller offered to purchase the property for ₱7,500,000.00. Said offer was made through Atty. Jose Soluta, Jr. (Atty. Soluta), petitioner's Vice-President, Corporate Secretary and a member of its Board of Directors.[9] Petitioner accepted respondents' offer of ₱7.5 million. Consequently, respondents paid petitioner ₱750,000.00, or 10% of the purchase price, as down payment.[10]

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[5] Associated Bank which eventually became "Westmont Bank" and now known as "United Overseas Bank."

[6] CA *rollo*, p. 600.

[7] The Court finally resolved the matter on July 14, 1994, 234 SCRA 146.

[8] Exhibit "A", folder of exhibits, p. 1.

[9] CA *rollo*, p. 601.

[10] Payment was made on March 8, 1993; Exhibit "D", folder of exhibits, p. 4.

On March 18, 1993, petitioner, through Atty. Soluta, and respondents, executed a Letter-Agreement setting forth therein the terms and conditions of the sale, to wit:

1. Selling price shall be at ₱7,500,000.00 payable as follows:

a. 10% deposit and balance of ₱6,750,000.00 to be deposited under escrow agreement. Said escrow deposit shall be applied as payment upon delivery of the aforesaid property to the buyers free from occupants.

b. The deposit shall be made within ninety (90) days from date hereof. Any interest earned on the aforesaid investment shall be for the buyer's account. However, the 10% deposit is non-interest earning.[11]

Prior to the expiration of the 90-day period within which to make the escrow deposit, in view of the pendency of the case between the spouses Vaca and petitioner involving the subject property,[12] respondents requested that the balance of the purchase price be made payable only upon service on them of a final decision or resolution of this Court affirming petitioner's right to possess the subject property. Atty. Soluta referred respondents' proposal to petitioner's Asset Recovery and Remedial Management Committee (ARRMC) but the latter deferred action thereon.[13]

On July 14, 1993, a month after they made the request and after the payment deadline had lapsed, respondents and Atty. Soluta, acting for the petitioner, executed another Letter-Agreement allowing the former to pay the balance of the purchase price upon receipt of a final order from this Court (in the *Vaca* case) and/or the delivery of the property to them free from occupants.[14]

Towards the end of 1993, or in early 1994, petitioner reorganized its management. Atty. Braulio Dayday (Atty. Dayday)

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[11] Exhibit "B", folder of exhibits, pp. 2-3.

[12] And, thus, petitioner will not be able to deliver the same free from any occupants.

[13] CA *rollo*, p. 602.

[14] Exhibit "E", folder of exhibits, p. 5.

became petitioner's Assistant Vice-President and Head of the Documentation Section, while Atty. Soluta was relieved of his responsibilities. Atty. Dayday reviewed petitioner's records of its outstanding accounts and discovered that respondents failed to deposit the balance of the purchase price of the subject property. He, likewise, found that respondents requested for an extension of time within which to pay. The matter was then resubmitted to the ARRMC during its meeting on March 4, 1994, and it was disapproved. ARRMC, thus, referred the matter to petitioner's Legal Department for rescission or cancellation of the contract due to respondents' breach thereof.[15]

On May 5, 1994, Atty. Dayday informed respondents that their request for extension was disapproved by ARRMC and, in view of their breach of the contract, petitioner was rescinding the same and forfeiting their deposit. Petitioner added that if respondents were still interested in buying the subject property, they had to submit their new proposal.[16] Respondents went to the petitioner's office, talked to Atty. Dayday and gave him the Letter-Agreement of July 14, 1993 to show that they were granted an extension. However, Atty. Dayday claimed that the letter was a mistake and that Atty. Soluta was not authorized to give such extension.[17]

On June 6, 1994, respondents proposed to pay the balance of the purchase price as follows: ₱3,000,000.00 upon the approval of their proposal and the balance after six (6) months.[18] However, the proposal was disapproved by the petitioner's President. In a letter dated June 9, 1994, petitioner advised respondents that the former would accept the latter's proposal only if they would pay interest at the rate of 24.5% per annum on the unpaid balance. Petitioner also allowed respondents a refund of their deposit of ₱750,000.00 if they would not agree to petitioner's new proposal.[19]

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[15] CA *rollo*, pp. 602-603.

[16] *Id*. at 603.

[17] *Id*. at 604.

[18] Exhibit "F", folder of exhibits, p. 6.

[19] Exhibit "G", folder of exhibits, p. 7.

For failure of the parties to reach an agreement, respondents, through their counsel, informed petitioner that they would be enforcing their agreement dated July 14, 1993.[20] Petitioner countered that it was not aware of the existence of the July 14 agreement and that Atty. Soluta was not authorized to sign for and on behalf of the bank. It, likewise, reiterated the rescission of their previous agreement because of the breach committed by respondents.[21]

On July 14, 1994, in the *Vaca* case, this Court upheld petitioner's right to possess the subject property.

On July 28, 1994, respondents commenced the instant suit by filing a Complaint for *Specific Performance* before the RTC of Antipolo, Rizal.[22] The case was raffled to Branch 72 and was docketed as Civil Case No. 94-3298. Respondents prayed that petitioner be ordered to sell the subject property to them in accordance with their letter-agreement of July 14, 1993. They, likewise, caused the annotation of a notice of *lis pendens* at the dorsal portion of TCT No. 52593.

For its part, petitioner contended that their contract had already been rescinded because of respondents' failure to deposit in escrow the balance of the purchase price within the stipulated period.[23]

During the pendency of the case, petitioner sold the subject property to the spouses Vaca, who eventually registered the sale; and on the basis thereof, TCT No. 52593 was cancelled and TCT No. 158082 was issued in their names.[24] As new owners, the spouses Vaca started demolishing the house on the subject property which, however, was not completed by virtue of the writ of preliminary injunction issued by the court.[25]

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[20] Exhibit "H", folder of exhibits, pp. 8-9.

[21] Exhibit "I", folder of exhibits, pp. 10-12.

[22] Records, pp. 1-5.

[23] *Id*. at 11-18.

[24] CA *rollo*, p. 606.

[25] *Id*.

On November 14, 1997, the trial court finally resolved the matter in favor of respondents, disposing, as follows:

> WHEREFORE, premises considered, the Court finds defendant's rescission of the Agreement to Sell to be null and void for being contrary to law and public policy.
>
> ACCORDINGLY, defendant bank is hereby ordered to accept plaintiffs' payment of the balance of the purchase price in the amount of Six Million Seven Hundred Fifty Thousand Pesos (₱6,750,000.00) and to deliver the title and possession to subject property, free from all liens and encumbrances upon receipt of said payment. Likewise, defendant bank is ordered to pay plaintiffs moral damages and attorney's fees in the amount of One Hundred Thirty Thousand Pesos (₱130,000.00) and expenses of litigation in the amount of Twenty Thousand Pesos (₱20,000.00).
>
> SO ORDERED.[26]

Applying the rule of "apparent authority,"[27] the court upheld the validity of the July 14, 1993 Letter-Agreement where the respondents were given an extension within which to make payment. Consequently, respondents did not incur in delay, and thus, the court concluded that the rescission of the contract was without basis and contrary to law.[28]

On appeal, the CA affirmed the RTC decision and upheld Atty. Soluta's authority to represent the petitioner. It further ruled that petitioner had no right to unilaterally rescind the contract; otherwise, it would give the bank officers license to continuously review and eventually rescind contracts entered into by previous officers. As to whether respondents were estopped from enforcing the July 14, 1993 Letter-Agreement, the appellate court ruled in the negative. It found, instead, that petitioners were estopped

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[26] Records, p. 463.

[27] The doctrine states that although an officer or agent acts without or in excess of his actual authority, if he acts within the scope of an apparent authority with which the corporation has clothed him by holding him out or permitting him to appear as having such authority, the corporation is bound thereby in favor of a person who deals with him in good faith.

[28] Records, pp. 461-462.

from questioning the efficacy of the July 14 agreement because of its failure to repudiate the same for a period of one year.[29] Thus, the court said in its decision:

1. The Appellant (Westmont Bank) is hereby ordered to execute a **"Deed of Absolute Sale"** in favor of the Appellees over the property covered by Transfer Certificate of Title No. 52593, including the improvement thereon, and secure, from the Register of Deeds, a Torrens Title over the said property free from all liens, claims or encumbrances upon the payment by the Appellees of the balance of the purchase price of the property in the amount of ₱6,750,000.00;

2. The Register of Deeds is hereby ordered to cancel Transfer Certificate of Title No. 158082 under the names of the Spouses Eduardo [and Ma. Pilar] Vaca and to issue another under the names of the Appellees as stated in the preceding paragraph;

3. The appellant is hereby ordered to pay to the appellee Rafael Pronstroller the amount of ₱100,000.00 as and by way of moral damages and to pay to the Appellees the amount of ₱30,000.00 as and by way of attorney's fees and the amount of ₱20,000.00 for litigation expense.

4. The counterclaims of the Appellant are dismissed.

SO ORDERED.[30]

Petitioner's motion for reconsideration was denied on May 31, 2001. Hence, the present petition raising the following issues:

I.

THE NARRATION OR STATEMENT OF THE FACTS OF THE CASE BY THE HONORABLE COURT OF APPEALS IS TOTALLY BEREFT OF EVIDENTIARY SUPPORT, CONTRARY TO THE EVIDENCE ON RECORD AND PURELY BASED ON ERRONEOUS ASSUMPTIONS, PRESUMPTIONS, SURMISES, AND CONJECTURES.

II.

THE HONORABLE COURT OF APPEALS GROSSLY ERRED IN MERELY RELYING UPON THE MANIFESTLY ERRONEOUS

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[29] CA *rollo*, pp. 608-617.

[30] *Id*. at 618.

FINDING OF THE HONORABLE TRIAL COURT ON THE ALLEGED APPARENT AUTHORITY OF ATTY. JOSE SOLUTA, JR. IN THAT THE LATTER'S FINDING IS CONTRARY TO THE UNDISPUTED FACTS AND THE EVIDENCE ON RECORD.

III.

THE HONORABLE COURT OF APPEALS' OWN FINDING THAT ATTY. JOSE SOLUTA, JR. HAD AUTHORITY TO SELL THE SUBJECT PROPERTY ON HIS OWN (EVEN WITHOUT THE COMMITTEE'S APPROVAL) IS LIKEWISE GROSSLY ERRONEOUS, FINDS NO EVIDENTIARY SUPPORT AND IS EVEN CONTRARY TO THE EVIDENCE ON RECORD IN THAT –

A.) AT NO TIME DID PETITIONER ADMIT THAT ATTY. JOSE SOLUTA, JR. IS AUTHORIZED TO SELL THE SUBJECT PROPERTY ON HIS OWN;

B.) THE AUTHORITY OF ATTY. JOSE SOLUTA, JR. CANNOT BE PRESUMED FROM HIS DESIGNATIONS OR TITLES; AND

C.) RESPONDENTS FULLY KNEW OR HAD KNOWLEDGE OF THE LACK OF AUTHORITY OF ATTY. JOSE SOLUTA, JR. TO SELL THE SUBJECT PROPERTY ON HIS OWN.

IV.

THE HONORABLE TRIAL COURT AND THE HONORABLE COURT OF APPEALS GROSSLY MISAPPLIED THE DOCTRINE OF APPARENT AUTHORITY IN THE PRESENT CASE.

V.

THE HONORABLE TRIAL COURT AND THE HONORABLE COURT OF APPEALS GROSSLY ERRED IN NOT HOLDING THAT THE CONTRACT TO SELL CONTAINED IN THE MARCH 18, 1993 LETTER WAS VALIDLY RESCINDED BY PETITIONER.

VI.

THE HONORABLE COURT OF APPEALS GROSSLY ERRED IN NOT HOLDING RESPONDENTS ESTOPPED FROM DENYING THE VALIDITY OF THE RESCISSION OF THE CONTRACT TO SELL AS EMBODIED IN THE MARCH 18, 1993 LETTER AND THE LACK OF AUTHORITY OF ATTY. SOLUTA, JR. TO GRANT THE

EXTENSION AS CONTAINED IN HIS LETTER OF JULY 14, 1993 AFTER THEY VOLUNTARILY SUBMITTED WITH FULL KNOWLEDGE OF ITS IMPORT AND IMPLICATION A NEW OFFER TO PURCHASE THE SUBJECT PROPERTY CONTAINED IN THEIR LETTER DATED JUNE 6, 1994.

VII.

IN ANY EVENT, THE HONORABLE COURT OF APPEALS ERRED IN NOT HOLDING THAT THE CONTRACT TO SELL UNDER THE LETTER OF MARCH 18, 1993 AND THE LETTER OF JULY 14, 1993 HAD BEEN VACATED WHEN RESPONDENTS VOLUNTARILY SUBMITTED WITH FULL KNOWLEDGE OF ITS IMPORT AND IMPLICATION THEIR NEW OFFER CONTAINED IN THEIR LETTER OF JUNE 6, 1994 WITHOUT ANY CONDITION OR RESERVATION WHATSOEVER.

VIII.

THE HONORABLE COURT OF APPEALS ERRED IN HOLDING PETITIONER ESTOPPED FROM QUESTIONING THE VALIDITY OF THE JULY 14, 1993 LETTER SIGNED BY ATTY. JOSE SOLUTA, JR.

IX.

THE HONORABLE COURT OF APPEALS GROSSLY ERRED IN HOLDING THAT PETITIONER ALLEGEDLY ACTED FRAUDULENTLY AND IN BAD FAITH IN ITS DEALINGS WITH RESPONDENTS.

X.

THE ORDER OF THE HONORABLE COURT OF APPEALS TO CANCEL TCT NO. 158082 UNDER THE NAMES OF SPS. VACA IS A COLLATERAL ATTACK AGAINST THE SAID CERTIFICATE OF TITLE WHICH IS PROSCRIBED BY SECTION 48 OF P.D. 1529.

XI.

THE HONORABLE COURT OF APPEALS ERRED IN AWARDING MORAL DAMAGES, ATTORNEY'S FEES, AND EXPENSES OF LITIGATION IN FAVOR OF RESPONDENTS.[31]

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[31] *Rollo*, pp. 54-56.

Reduced to bare essentials, the decision on the instant petition hinges on the resolution of the following specific questions: 1) Is the petitioner bound by the July 14, 1993 Letter-Agreement signed by Atty. Soluta under the doctrine of apparent authority? 2) Was there a valid rescission of the March 18, 1993 and/or July 14, 1993 Letter-Agreement? 3) Are the respondents estopped from enforcing the July 14 Letter-Agreement because of their June 6, 1994 "new" proposal? 4) Is the petitioner estopped from questioning the validity of the July 14 letter because of its failure to repudiate the same and 5) Is the instant case a collateral attack on TCT No. 158082 in the name of the spouses Vaca?

The petition is unmeritorious.

Well-settled is the rule that the findings of the RTC, as affirmed by the appellate court, are binding on this Court. In a petition for review on *certiorari* under Rule 45 of the Rules of Court, as in this case, this Court may not review the findings of fact all over again. It must be stressed that this Court is not a trier of facts, and it is not its function to re-examine and weigh anew the respective evidence of the parties.[32] The findings of the CA are conclusive on the parties and carry even more weight when these coincide with the factual findings of the trial court, unless the factual findings are not supported by the evidence on record.[33] Petitioner failed to show why the above doctrine should not be applied to the instant case.

Contrary to petitioner's contention that the CA's factual findings are not supported by the evidence on record, the assailed decision clearly shows that the appellate court not only relied on the RTC's findings but made its own analysis of the record of the case. The CA decision contains specific details drawn from the contents of the pleadings filed by both parties, from the testimonies of the witnesses and from the documentary evidence submitted. It was from all these that the appellate court drew its own

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[32] *Valdez v. Reyes*, G.R. No. 152251, August 17, 2006, 499 SCRA 212, 214-215, citing *Pleyto v. Lomboy*, 432 SCRA 329, 336 (2004).

[33] *Valdez v. Reyes*, *supra*; *Mindanao State University v. Roblett Industrial and Construction Corp.*, G.R. No. 138700, June 9, 2004, 431 SCRA 458, 466.

conclusion using applicable legal principles and jurisprudential rules.

The Court notes that the March 18, 1993 Letter-Agreement was written on a paper with petitioner's letterhead. It was signed by Atty. Soluta with the conformity of respondents. The authority of Atty. Soluta to act for and on behalf of petitioner was not reflected in said letter or on a separate paper attached to it. Yet, petitioner recognized Atty. Soluta's authority to sign the same and, thus, acknowledged its binding effect. On the other hand, the July 14, 1993 letter was written on the same type of paper with the same letterhead and of the same form as the earlier letter. It was also signed by the same person with the conformity of the same respondents. Again, nowhere in said letter did petitioner specifically authorize Atty. Soluta to sign it for and on its behalf. This time, however, petitioner questioned the validity and binding effect of the agreement, arguing that Atty. Soluta was not authorized to modify the earlier terms of the contract and could not in any way bind the petitioner.

We beg to differ.

The general rule is that, in the absence of authority from the board of directors, no person, not even its officers, can validly bind a corporation. The power and responsibility to decide whether the corporation should enter into a contract that will bind the corporation is lodged in the board of directors. However, just as a natural person may authorize another to do certain acts for and on his behalf, the board may validly delegate some of its functions and powers to officers, committees and agents. The authority of such individuals to bind the corporation is generally derived from law, corporate bylaws or authorization from the board, either expressly or impliedly, by habit, custom, or acquiescence, in the general course of business.[34]

The authority of a corporate officer or agent in dealing with third persons may be actual or apparent. The doctrine of "apparent

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[34] *Inter-Asia Investments Ind., Inc. v. Court of Appeals*, 451 Phil. 554, 559-560 (2003), citing *People's Aircargo and Warehousing Co., Inc. v. CA*, 357 Phil. 850 (1998); *Lipat v. Pacific Banking Corp.*, 450 Phil. 401, 414 (2003).

authority," with special reference to banks, had long been recognized in this jurisdiction.[35] Apparent authority is derived not merely from practice. Its existence may be ascertained through 1) the general manner in which the corporation holds out an officer or agent as having the power to act, or in other words, the apparent authority to act in general, with which it clothes him; or 2) *the acquiescence in his acts of a particular nature, with actual or constructive knowledge thereof, within or beyond the scope of his ordinary powers*.[36]

Accordingly, the authority to act for and to bind a corporation may be presumed from acts of recognition in other instances, wherein the power was exercised without any objection from its board or shareholders. Undoubtedly, petitioner had previously allowed Atty. Soluta to enter into the first agreement without a board resolution expressly authorizing him; thus, it had clothed him with apparent authority to modify the same via the second letter-agreement. It is not the quantity of similar acts which establishes apparent authority, but the vesting of a corporate officer with the power to bind the corporation.[37]

Naturally, the third person has little or no information as to what occurs in corporate meetings; and he must necessarily rely upon the external manifestations of corporate consent. The integrity of commercial transactions can only be maintained by holding the corporation strictly to the liability fixed upon it by its agents in accordance with law.[38] What transpires in the corporate board room is entirely an internal matter. Hence, petitioner may not impute negligence on the part of the respondents in failing to find out the scope of Atty. Soluta's authority. Indeed, the

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[35] *First Philippine International Bank v. CA*, 322 Phil. 280, 319-320 (1996).

[36] Emphasis supplied.

[37] *Inter-Asia Investments Ind., Inc. v. Court of Appeals*, *supra* note 34, at 560, citing *People's Aircargo and Warehousing Co., Inc. v. CA*, 357 Phil. 850 (1998); *Lipat v. Pacific Banking Corp.*, *supra* note 34.

[38] *BPI Family Savings Bank, Inc. v. First Metro Investment Corporation*, G.R. No. 132390, May 21, 2004, 429 SCRA 30, 38; *Rural Bank of Milaor (Camarines Sur) v. Ocfemia*, 381 Phil. 911, 925 (2000).

public has the right to rely on the trustworthiness of bank officers and their acts.[39]

As early as June 1993, or prior to the 90-day period within which to make the full payment, respondents already requested a modification of the earlier agreement such that the full payment should be made upon receipt of this Court's decision confirming petitioner's right to the subject property. The matter was brought to the petitioner's attention and was in fact discussed by the members of the Board. Instead of acting on said request (considering that the 90-day period was about to expire), the board deferred action on the request. It was only after one year and after the bank's reorganization that the board rejected respondents' request. We cannot therefore blame the respondents in relying on the July 14, 1993 Letter-Agreement. Petitioner's inaction, coupled with the apparent authority of Atty. Soluta to act on behalf of the corporation, validates the July 14 agreement and thus binds the corporation. All these taken together, lead to no other conclusion than that the petitioner attempted to defraud the respondents. This is bolstered by the fact that it forged another contract involving the same property, with another buyer, the spouses Vaca, notwithstanding the pendency of the instant case.

We would like to emphasize that if a corporation knowingly permits its officer, or any other agent, to perform acts within the scope of an apparent authority, holding him out to the public as possessing power to do those acts, the corporation will, as against any person who has dealt in good faith with the corporation through such agent, be estopped from denying such authority.[40]

Petitioner further insists that specific performance is not available to respondents because the Letter-Agreements had

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[39] *BPI Family Savings Bank, Inc. v. First Metro Investment Corporation*, *supra*, at 38.

[40] *BPI Family Savings Bank, Inc. v. First Metro Investment Corporation*, *supra* note 38, at 37; *Lipat v. Pacific Banking Corp.*, *supra* note 34, at 415; *Rural Bank of Milaor (Camarines Sur) v. Ocfemia*, *supra* note 38; *People's Aircargo and Warehousing Co., Inc. v. CA*, *supra* note 34, at 865.

already been rescinded — the March 18 agreement because of the breach committed by the respondents; and the July 14 letter because of the new offer of the respondents which was not approved by petitioner.

Again, the argument is misplaced.

Basic is the rule that a contract constitutes the law between the parties. Concededly, parties may validly stipulate the unilateral rescission of a contract.[41] This is usually in the form of a stipulation granting the seller the right to forfeit installments or deposits made by the buyer in case of the latter's failure to make full payment on the stipulated date. While the petitioner in the instant case may have the right, under the March 18 agreement, to unilaterally rescind the contract in case of respondents' failure to comply with the terms of the contract,[42] the execution of the July 14 Agreement prevented petitioner from exercising the right to rescind. This is so because there was in the first place, no breach of contract, as the date of full payment had already been modified by the later agreement.

Neither can the July 14, 1993 agreement be considered abandoned by respondents' act of making a new offer, which was unfortunately rejected by petitioner. A careful reading of the June 6, 1994 letter of respondents impels this Court to believe that such offer was made only to demonstrate their capacity to purchase the subject property.[43] Besides, even if it was a valid new offer, they did so only due to the fraudulent misrepresentation made by petitioner that their earlier contracts had already been rescinded. Considering

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[41] See *Go v. Pura V. Kalaw, Inc.*, G.R. No. 131408, July 31, 2006, 497 SCRA 154; see also *Multinational Village Homeowners Association, Inc. v. Ara Security & Surveillance Agency, Inc.*, G.R. No. 154852, October 21, 2004, 441 SCRA 126.

[42] The March 18 Letter-Agreement reads:

We are pleased to inform you that your offer to purchase our property x x x has been accepted by the Bank under the following terms and conditions:

x x x x x x x x x

4. Forfeiture of deposit in case of your default in complying with the terms and conditions herein set forth. (Exhibit "B", folder of exhibits, p. 2.)

[43] *Rollo*, p. 558.

respondents' capacity to pay and their continuing interest in the subject property,[44] to abandon their right to the contract and to the property, absent any form of protection, is contrary to human nature. The presumption that a person takes ordinary care of his concerns applies and remains unrebutted.[45] Obviously therefore, respondents made the new offer without abandoning the previous contract. Since there was never a perfected new contract, the July 14, 1993 agreement was still in effect and there was no abandonment to speak of.

In its final attempt to prevent respondents from attaining a favorable result, petitioner argues that the instant case should not prosper because the cancellation of TCT No. 158082 is a collateral attack on the title which is proscribed by law.

Such contention is baseless.

Admittedly, during the pendency of the case, respondents timely registered a notice of *lis pendens* to warn the whole world that the property was the subject of a pending litigation.

Lis pendens, which literally means pending suit, refers to the jurisdiction, power or control which a court acquires over property involved in a suit, pending the continuance of the action, and until final judgment. Founded upon public policy and necessity, *lis pendens* is intended to keep the properties in litigation within the power of the court until the litigation is terminated, and to prevent the defeat of the judgment or decree by subsequent alienation. Its notice is an announcement to the whole world that a particular property is in litigation and serves as a warning that one who acquires an interest over said property does so at his own risk or that he gambles on the result of the litigation over said property.[46]

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[44] As they never slept on their rights showed by their repeated follow up of the results of the pending case involving the subject matter and negotiation with the petitioner through its officers, for the payment and delivery of the property.

[45] Revised Rules on Evidence, Rule 131, Sec. 3(d).

[46] *Romero v. Court of Appeals*, G.R. No. 142406, May 16, 2005, 458 SCRA 483, 492.

The filing of a notice of *lis pendens* has a twofold effect: (1) to keep the subject matter of the litigation within the power of the court until the entry of the final judgment to prevent the defeat of the final judgment by successive alienations; and (2) to bind a purchaser, *bona fide* or not, of the land subject of the litigation to the judgment or decree that the court will promulgate subsequently.[47]

This registration, therefore, gives the court clear authority to cancel the title of the spouses Vaca, since the sale of the subject property was made after the notice of *lis pendens*. Settled is the rule that the notice is not considered a collateral attack on the title,[48] for the indefeasibility of the title shall not be used to defraud another especially if the latter performs acts to protect his rights such as the timely registration of a notice of *lis pendens*.

As to the liability for moral damages, attorney's fees and expenses of litigation, we affirm *in toto* the appellate court's conclusion. Article 2220[49] of the New Civil Code allows the recovery of moral damages in breaches of contract where the party acted fraudulently and in bad faith. As found by the CA, petitioner undoubtedly acted fraudulently and in bad faith in breaching the letter-agreements. Despite the pendency of the case in the RTC, it sold the subject property to the spouses Vaca and allowed the demolition of the house even if there was already a writ of preliminary injunction lawfully issued by the court. This is apart from its act of unilaterally rescinding the subject contract. Clearly, petitioner's acts are brazen attempts to frustrate the decision that the court may render in favor of respondents.[50] It is, likewise, apparent that because of petitioner's acts, respondents were compelled to litigate justifying the award of attorney's fees and expenses of litigation.

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[47] *Id*. at 492-493; *Heirs of Eugenio Lopez, Sr. v. Enriquez*, G.R. No. 146262, January 21, 2005, 449 SCRA 173, 186.

[48] *Id*. at 495; *Spouses Lim v. Vera Cruz*, 408 Phil. 503, 509 (2001).

[49] Article 2220. Willful injury to property may be a legal ground for awarding moral damages if the court should find that, under the circumstances, such damages are justly due. The same rule applies to breaches of contract where the defendant acted fraudulently or in bad faith.

[50] *Rollo*, p. 27.

WHEREFORE, premises considered, the petition is *DENIED*. The Decision of the Court of Appeals dated February 27, 2001 and its Resolution dated May 31, 2001 in CA-G.R. CV No. 60315 are *AFFIRMED*.

SO ORDERED.

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

THIRD DIVISION

[G.R. No. 151227. July 14, 2008]

GREGORIO S. SABEROLA, *petitioner, vs.* **RONALD SUAREZ and RAYMUNDO LIRASAN, JR.,** *respondents.*

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; PROJECT EMPLOYEES; CONSTRUED; CASE AT BAR.— Petitioner's business, specializing in installing electrical devices, needs electricians only when there are electrical devices to be installed in subdivision homes or buildings covered by an appropriate contract. Petitioner, as an electrical contractor, depends for his business on the contracts that he is able to obtain from real estate developers and builders of buildings. Thus, the work provided by petitioner depends on the availability of such contracts or projects. The duration of the employment of his work force is not permanent but coterminous with the projects to which the workers are assigned. Viewed in this context, the respondents are considered as project employees of petitioner. Indeed, the status of respondents as project employees was upheld by the Court of Appeals based on the findings of facts of the Labor Arbiter and the NLRC. A project employee is one whose "employment has been fixed

for a specific project or undertaking, the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season."

2. ID.; ID.; ID.; SECURITY OF TENURE GUARANTEED BY THE CONSTITUTION APPLIES; TERMINATION ONLY FOR JUST CAUSE AND DUE PROCESS, COMPLIED WITH.— Respondents, even if working as project employees, enjoy security of tenure. Section 3, Article XIII, of the Constitution guarantees the right of workers to security of tenure, and because of this, an employee may only be terminated for just or authorized causes that must comply with the due process requirements mandated by law. In *Archbuild Masters and Construction, Inc. v. NLRC*, we held that the employment of a project worker hired for a specific phase of a construction project is understood to be coterminous with the completion of such phase and not upon the accomplishment of the whole project. A worker hired for a particular phase of a construction project can be dismissed upon the completion of such phase. Project workers in the construction industry may also be terminated as the phase of a construction project draws nearer to completion when their services are no longer needed, provided they are not replaced. Nonetheless, when a project employee is dismissed, such dismissal must still comply with the substantive and procedural requirements of due process. Termination of his employment must be for a lawful cause and must be done in a manner which affords him the proper notice and hearing.

3. ID.; ID.; ID.; ID.; ID.; NOT PRESENT IN CASE AT BAR.— Respondent Suarez was illegally terminated by petitioner. A project employee must be furnished a written notice of his impending dismissal and must be given the opportunity to dispute the legality of his removal. In termination cases, the burden of proof rests on the employer to show that the dismissal was for a just or authorized cause. Employers who hire project employees are mandated to state and prove the actual basis for the employee's dismissal once its veracity is challenged. Petitioner failed to present any evidence to disprove the claim of illegal dismissal. It was uncontested that the last work of the respondents with petitioner's company was the electrical

installation in some housing units at the Ciudad Esperanza Housing Project. No evidence was presented by petitioner to show the termination of the project which would justify the cessation of the work of respondents. Neither was there proof that petitioner complied with the substantive and procedural requirements of due process.

4. ID.; ID.; ILLEGAL DISMISSAL; MONETARY CLAIMS; BURDEN OF PROOF RESTS ON THE EMPLOYER.— As employer, the petitioner has the burden of proving that the rate of pay given to the respondents is in accordance with the minimum fixed by the law and that he paid thirteenth month pay, service incentive leave pay and other monetary claims. We have consistently held that as a rule, one who pleads payment has the burden of proving it. Even when the plaintiff alleges non-payment, still the general rule is that the burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. The debtor has the burden of showing with legal certainty that the obligation has been discharged by payment. When the existence of a debt is fully established by the evidence contained in the record, the burden of proving that it has been extinguished by payment devolves upon the debtor who invokes such a defense against the claim of the creditor. When the debtor introduces some evidence of payment, the burden of going forward with the evidence — as distinct from the general burden of proof — shifts to the creditor, who is then under a duty of producing some evidence to show non-payment. In the instant case, the burden of proving payment of the monetary claims rests on petitioner, being the employer of respondents. This is because the pertinent personnel files, payrolls, records, remittances and other similar documents that would show that the claims have been paid are not in the possession of the worker but in the custody and absolute control of the employer.

APPEARANCES OF COUNSEL

J.V. Yap Law Office for petitioner.
David C. Jacob 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 Decision[1] dated March 30, 2001 and the Resolution[2] dated November 23, 2001 of the Court of Appeals (CA) in CA-G.R. SP No. 56503.

The Facts

The case stemmed from a Complaint[3] for illegal dismissal with money claims filed on November 10, 1997 by respondents against petitioner before the Regional Arbitration Branch of Davao City. Petitioner is the owner and manager of G.S. Saberola Electrical Services, a firm engaged in the construction business specializing in installing electrical devices in subdivision homes and in commercial and non-commercial buildings. Respondents were employed by petitioner as electricians. They worked from Monday to Saturday and, occasionally, on Sundays, with a daily wage of ₱110.00.

Respondent Ronald Suarez (Suarez) was employed by petitioner from February 1995 until October 1997; while respondent Raymundo Lirasan, Jr. (Lirasan) worked from February 1995 until September 1997.[4] Respondent Lirasan alleged that he was dismissed without cause and due process. He was merely informed by petitioner that his services were no longer needed without any explanation why he was terminated. Both respondents claimed that they received compensation below the minimum wage. They were given a fixed rate of ₱110.00 while the mandated minimum wage was ₱135.00, per Wage Order No. 5 issued by the Regional Tripartite and Productivity Board of Region XI. They also alleged that they did not receive 13th month pay for the entire period

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[1] Penned by Associate Justice Elvi John S. Asuncion, with Associate Justices Cancio C. Garcia and Oswaldo D. Agcaoili, concurring; *rollo*, pp. 51-56.

[2] *Rollo,* p. 61.

[3] *Id*. at 69.

[4] NLRC Resolution dated July 9, 1999; *rollo*, p. 78.

of their employment.[5] Both likewise claimed payment of overtime and service incentive leave.

In his defense, petitioner averred that respondents were part-time project employees and were employed only when there were electrical jobs to be done in a particular housing unit contracted by petitioner. He maintained that the services of respondents as project employees were coterminous with each project. As project employees, the time of rendition of their services was not fixed. Thus, there was no practical way of determining the appropriate compensation of the value of respondents' accomplishment, as their work assignment varied depending on the needs of a specific project.[6]

On September 24, 1998, the Labor Arbiter rendered a Decision[7] dismissing the complaint for lack of merit. The Labor Arbiter ruled that respondents were project employees and were not entitled to their monetary claims.

On appeal, the National Labor Relations Commission (NLRC) affirmed with modification the findings of the Labor Arbiter in a Resolution[8] dated July 9, 1999. It maintained that respondents were project employees of petitioner. However, it declared that respondent Suarez was illegally dismissed from employment. It also awarded the monetary claims of respondents. The dispositive portion of the Resolution reads:

WHEREFORE, foregoing considered, the decision on appeal is hereby MODIFIED declaring complainant RONALD SUAREZ illegally dismissed and directing respondent to pay the following

A. RONALD SUAREZ

1. Separation Pay
2. Wage Differential
3. 13th Month pay
4. Service Incentive Leave Pay

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[5] CA Decision dated March 30, 2001; *id*. at 91.

[6] *Id*.

[7] Penned by Labor Arbiter Amado M. Solamo; *id*. at 70-74.

[8] Penned by Commissioner Oscar Y. Abella, with Presiding Commissioner Salic B. Dumarpa and Commissioner Leon G. Gonzaga, Jr., concurring; *rollo*, pp. 75-79.

B. RAYMUNDO LIRASAN, JR.

1. Wage Differential

2. 13th Month Pay

3. Service Incentive Leave Pay

C. Attorney's fees equivalent to 10% of the total award.

SO ORDERED.[9]

Petitioner filed a motion for reconsideration. On October 29, 1999, the NLRC issued a Resolution[10] denying the same. A detailed computation of the money claims awarded to respondents was incorporated in the Resolution, summarized as follows:

1) Ronald Suarez:		
1. Separation pay	=	₱10, 530.00
2. Wage Differential	=	₱ 8, 268.00
3. 13th Month Pay	=	₱ 8, 790.16
4. SILP	=	₱ 1, 350.00
TOTAL	=	₱28, 938.16
2) Raymundo Lirasan, Jr.		
1. Wage Differential	=	₱ 7, 878.00
2. 13th Month Pay	=	₱ 8, 497.66
3. SILP	=	₱ 1, 350.00
4. TOTAL	=	₱17, 725.66
Attorney's fees	=	₱ 4, 666.38[11]

Petitioner filed a petition for *certiorari* under Rule 65 of the Rules of Court before the CA. Petitioner asserted that the NLRC committed grave abuse of discretion when it declared him guilty

[9] *Id*. at 79.

[10] *Id*. at 85-88.

[11] *Id*. at 88.

of illegally terminating respondent Suarez and in awarding both respondents their monetary claims.

On March 30, 2001, the CA rendered a Decision[12] dismissing the petition for lack of merit. Petitioner filed a motion for reconsideration which, however, was denied in a Resolution[13] dated November 23, 2001. Hence, this petition.

The Issues

Petitioner submits the following issues for resolution: (1) whether respondent Suarez was illegally terminated, and (2) whether respondents are entitled to their monetary claims.

The Ruling of the Court

Petitioner's business, specializing in installing electrical devices, needs electricians only when there are electrical devices to be installed in subdivision homes or buildings covered by an appropriate contract. Petitioner, as an electrical contractor, depends for his business on the contracts that he is able to obtain from real estate developers and builders of buildings. Thus, the work provided by petitioner depends on the availability of such contracts or projects. The duration of the employment of his work force is not permanent but coterminous with the projects to which the workers are assigned. Viewed in this context, the respondents are considered as project employees of petitioner. Indeed, the status of respondents as project employees was upheld by the Court of Appeals based on the findings of facts of the Labor Arbiter and the NLRC.

A project employee is one whose "employment has been fixed for a specific project or undertaking, the completion or termination of which has been determined at the time of the engagement of the employee or where the work or service to be performed is seasonal in nature and the employment is for the duration of the season."[14]

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[12] *Id*. at 51-56.

[13] *Id*. at 100.

[14] Article 280, Labor Code; *Olongapo Maintenance Services, Inc. v. Chantengco*, G.R. No. 156146, June 21, 2007; *Fabela v. San Miguel*

However, respondents, even if working as project employees, enjoy security of tenure. Section 3, Article XIII, of the Constitution guarantees the right of workers to security of tenure, and because of this, an employee may only be terminated for just[15] or authorized[16]

Corporation, G.R. No. 150658, February 9, 2007; *Liganza v. RBL Shipyard Corporation*, G.R. No. 159862, October 17, 2006.

[15] ART. 282. TERMINATION BY EMPLOYER

An employer may terminate an employment for any of the following causes:

(a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;

(b) Gross and habitual neglect by the employee of his duties;

(c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;

(d) Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and

(e) Other causes analogous to the foregoing.

[16] ART. 283. CLOSURE OF ESTABLISHMENT AND REDUCTION OF PERSONNEL

The employer may also terminate the employment of any employee due to the installation of labor-saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the worker and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered as one (1) whole year.

ART. 284. *DISEASE AS GROUND FOR TERMINATION*

An employer may terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees: *Provided,* That he is paid separation pay equivalent to at least one (1) month salary or to one-half (1/2) month salary for every year of

causes that must comply with the due process requirements[17] mandated by law.

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service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.

ART. 287. *RETIREMENT*

Any employee may be retired upon reaching the retirement age established in the collective bargaining agreement or other applicable employment contract.

In case of retirement, the employee shall be entitled to receive such retirement benefits as he may have earned under existing laws and any collective bargaining agreement and other agreements: *Provided, however,* that an employee's retirement benefits under any collective bargaining and other agreements shall not be less than those provided herein.

In the absence of a retirement plan or agreement providing for retirement benefits of employees in the establishment, an employee upon reaching the age of sixty (60) years or more, but not beyond sixty-five (65) years which is hereby declared the compulsory retirement age, who has served at least five (5) years in the said establishment, may retire and shall be entitled to retirement pay equivalent to at least one-half (1/2) month salary for every year of service, a fraction of at least six (6) months being considered as one whole year.

Unless the parties provide for broader inclusions, the term "one-half (1/2) month salary" shall mean fifteen (15) days plus one-twelfth (1/12) of the 13th-month pay and the cash equivalent of not more than five (5) days of service incentive leaves.

An underground mining employee upon reaching the age of fifty (50) years or more, but not beyond sixty (60) years which is hereby declared the compulsory retirement age for underground mine workers, who has served at least five (5) years as underground mine worker, may retire and shall be entitled to all the retirement benefits provided for in this Article. (R.A. No. 8558, approved on February 26, 1998.)

Retail, service and agricultural establishments or operations employing not more than ten (10) employees or workers are exempted from the coverage of this provision.

Violation of this provision is hereby declared unlawful and subject to the penal provisions provided under Article 288 of this Code.

[17] ART. 277. *MISCELLANEOUS PROVISIONS*

x x x x x x x x x

(b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized

In *Archbuild Masters and Construction, Inc. v. NLRC*,[18] we held that the employment of a project worker hired for a specific phase of a construction project is understood to be coterminous with the completion of such phase and not upon the accomplishment of the whole project. A worker hired for a particular phase of a construction project can be dismissed upon the completion of such phase. Project workers in the construction industry may also be terminated as the phase of a construction project draws nearer to completion when their services are no longer needed, provided they are not replaced.[19]

Nonetheless, when a project employee is dismissed, such dismissal must still comply with the substantive and procedural requirements of due process. Termination of his employment must be for a lawful cause and must be done in a manner which affords him the proper notice and hearing.[20]

In this regard, we hold that respondent Suarez was illegally terminated by petitioner. A project employee must be furnished a written notice of his impending dismissal and must be given the opportunity to dispute the legality of his removal.[21] In

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cause and without prejudice to the requirement of notice under Article 283 of this Code, the employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the workers to contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer.

The Secretary of the Department of Labor and Employment may suspend the effects of the termination pending resolution of the dispute in the event of a *prima facie* finding by the appropriate official of the Department of Labor and Employment before whom such dispute is pending that the termination may cause a serious labor dispute or is in implementation of a mass layoff.

[18] *Supra* note 11.

[19] *Id*. at 876.

[20] *Id*. at 877.

[21] *Archbuild Masters and Construction, Inc. v. NLRC*, 321 Phil. 869, 877 (1995).

termination cases, the burden of proof rests on the employer to show that the dismissal was for a just or authorized cause. Employers who hire project employees are mandated to state and prove the actual basis for the employee's dismissal once its veracity is challenged.[22]

Petitioner failed to present any evidence to disprove the claim of illegal dismissal. It was uncontested that the last work of the respondents with petitioner's company was the electrical installation in some housing units at the Ciudad Esperanza Housing Project. No evidence was presented by petitioner to show the termination of the project which would justify the cessation of the work of respondents. Neither was there proof that petitioner complied with the substantive and procedural requirements of due process.

As to respondents' monetary claims, we uphold the findings of the NLRC. As employer, the petitioner has the burden of proving that the rate of pay given to the respondents is in accordance with the minimum fixed by the law and that he paid thirteenth month pay, service incentive leave pay and other monetary claims.

We have consistently held that as a rule, one who pleads payment has the burden of proving it. Even when the plaintiff alleges non-payment, still the general rule is that the burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. The debtor has the burden of showing with legal certainty that the obligation has been discharged by payment. When the existence of a debt is fully established by the evidence contained in the record, the burden of proving that it has been extinguished by payment devolves upon the debtor who invokes such a defense against the claim of the creditor. When the debtor introduces some evidence of payment, the burden of going forward with the evidence — as distinct from the general burden of proof — shifts to the creditor, who is then under a duty of producing some evidence to show non-payment.[23]

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[22] *Liganza v. RBL Shipyard Corporation*, G.R. No. 159862, October 17, 2006, 504 SCRA 678, 687.

[23] *Villar v. NLRC*, 387 Phil. 706, 716 (2000); *National Semiconductor, (HK) Distribution, Ltd. v. NLRC*, 353 Phil. 551, 557 (1998); *Jimenez v. NLRC*, 326 Phil. 89, 95 (1996).

In the instant case, the burden of proving payment of the monetary claims rests on petitioner, being the employer of respondents. This is because the pertinent personnel files, payrolls, records, remittances and other similar documents that would show that the claims have been paid are not in the possession of the worker but in the custody and absolute control of the employer.[24] Sadly, the petitioner failed to do so.

WHEREFORE, in lieu of the foregoing, the instant petition is *DENIED*. The assailed Decision and Resolution of the Court of Appeals in CA-G.R. SP No. 56503 are hereby *AFFIRMED*.

SO ORDERED.

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

SECOND DIVISION

[G.R. No. 155844. July 14, 2008]

NATIONWIDE SECURITY AND ALLIED SERVICES, INC., *petitioner, vs.* **THE COURT OF APPEALS, NATIONAL LABOR RELATIONS COMMISSION and JOSEPH DIMPAZ, HIPOLITO LOPEZ, EDWARD ODATO, FELICISIMO PABON and JOHNNY AGBAY,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; NOT PROPER IN THE PRESENCE OF APPEAL AS A PROPER REMEDY.— The petition for *certiorari* filed with the Court by petitioner under Rule 65 of the Rules of Court is inappropriate. The proper remedy is a petition for review

[24] *Id*.

* In lieu of Associate Justice Minita V. Chico-Nazario per Special Order No. 508, dated June 25, 2008.

under Rule 45 purely on questions of law. There being a remedy of appeal via petition for review under Rule 45 of the Rules of Court available to the petitioner, the filing of a petition for *certiorari* under Rule 65 is improper.

2. ID.; ID.; ID.; GRAVE ABUSE OF DISCRETION; NOT PRESENT IN CASE AT BAR.— We do not find any grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of the Court of Appeals when it dismissed the petition of the security agency. We must stress that under Rule 65, the abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or personal hostility.

3. LABOR AND SOCIAL LEGISLATION; NATIONAL LABOR RELATIONS COMMISSION; RULES OF PROCEDURE; PERIOD OF APPEAL.— The Labor Code provides as follows: **ART. 223. Appeal.** – Decisions, awards, or orders of the Labor Arbiter are final and executory unless appealed to the Commission by any or both parties within ten (10) calendar days from receipt of such decisions, awards, or orders. Such appeal may be entertained only on any of the following grounds: (a) If there is ***prima facie*** evidence of abuse of discretion on the part of the Labor Arbiter; (b) If the decision, order or award was secured through fraud or coercion, including graft and corruption; (c) If made purely on questions of law, and (d) If serious errors in the findings of facts are raised which would cause grave or irreparable damage or injury to the appellant. In case of a judgment involving a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Commission in the amount equivalent to the monetary award in the judgment appealed from. x x x x The New Rules of Procedure of the NLRC states: **Section 1. Periods of appeal.** – Decisions, resolutions or orders of the Labor Arbiter shall be final and executory unless appealed to the Commission by any or both parties within ten (10) calendar days from receipt thereof; and in case of decisions, resolutions or orders of the Regional Director of the Department of Labor and Employment pursuant to Article 129 of the Labor Code, within five (5) calendar days from receipt thereof. If the 10th or 5th day, as the case may be, falls on a Saturday, Sunday or holiday, the last day to perfect

the appeal shall be the first working day following such Saturday, Sunday or holiday. No motion or request for extension of the period within which to perfect an appeal shall be allowed.

4. ID.; ID.; ID.; ID.; COMPLIANCE THEREOF MUST BE ADHERED TO.— Failure to perfect an appeal renders the decision final and executory. The right to appeal is a statutory right and one who seeks to avail of the right must comply with the statute or the rules. The rules, particularly the requirements for perfecting an appeal within the reglementary period specified in the law, must be strictly followed as they are considered indispensable interdictions against needless delays and for the orderly discharge of judicial business. It is only in highly meritorious cases that this Court will opt not to strictly apply the rules and thus prevent a grave injustice from being done. The exception does not obtain here.

APPEARANCES OF COUNSEL

Quirino M. Sagario for petitioner.
Giovani Ferdinand A. Leynes, Marion Shane T. Madeja and Cherry P. Sarmiento for public respondent.

R E S O L U T I O N

QUISUMBING, *J.*:

This petition for *certiorari* seeks the reversal and setting aside of the Decision[1] dated January 31, 2002 and the Resolution[2] dated September 12, 2002 of the Court of Appeals in CA-G.R. SP No. 65465. The appellate court had affirmed the January 30, 2001[3] and April 20, 2001 Resolutions of the National Labor Relations Commission (NLRC).

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[1] *Rollo*, pp. 133-142. Penned by Associate Justice Bienvenido L. Reyes, with Presiding Justice Ma. Alicia Austria-Martinez (now a member of this Court) and Associate Justice Roberto A. Barrios concurring.

[2] *Id*. at 165-166. Penned by Associate Justice Bienvenido L. Reyes, with Associate Justices Roberto A. Barrios and Renato C. Dacudao concurring.

[3] Records, pp. 448-459.

The factual antecedents of this case are as follows.

Labor Arbiter Manuel M. Manansala found petitioner Nationwide Security and Allied Services, Inc., a security agency, not liable for illegal dismissal in NLRC NCR 00-01-00833-96 and 00-02-01129-96 involving eight security guards who were employees of the petitioner. However, the Labor Arbiter directed the petitioner to pay the aforementioned security guards ₱81,750.00 in separation pay, ₱8,700.00 in unpaid salaries, ₱93,795.68 for underpayment and 10% attorney's fees based on the total monetary award.[4]

Dissatisfied with the decision, petitioner appealed to the NLRC which dismissed its appeal for two reasons — first, for having been filed beyond the reglementary period within which to perfect the appeal and second, for filing an insufficient appeal bond. It disposed as follows:

WHEREFORE, in the light of the foregoing, it is hereby ordered that:

1. the instant appeal be considered DISMISSED; and,

2. the Decision appealed from be deemed FINAL and EXECUTORY.

SO ORDERED.[5]

Its motion for reconsideration having been denied, petitioner then appealed to the Court of Appeals to have the appeal resolved on the merits rather than on pure technicalities in the interest of due process.

The Court of Appeals dismissed the case, holding that in a special action for *certiorari*, the burden is on petitioner to prove not merely reversible error, but grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of public respondent NLRC. The dispositive portion of its decision states:

WHEREFORE, in view of the foregoing, the petition is hereby DISMISSED. The questioned Resolutions dated 30 January 2001 and 20 April 2001 of the National Labor Relations Commission are accordingly AFFIRMED.

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[4] *Id*. at 449-453.

[5] *Rollo*, p. 85.

SO ORDERED.[6]

The Court of Appeals likewise denied the petitioner's motion for reconsideration.[7] Hence, this petition which raises the following issues:

I.

WHETHER OR NOT TECHNICALITIES IN LABOR CASES MUST PREVAIL OVER THE SPIRIT AND INTENTION OF THE LABOR CODE UNDER ARTICLE 221 THEREOF WHICH STATES:

"In any proceeding before the Commission or any of the Labor Arbiters, the rules of evidence prevailing in courts of Law or equity shall not be controlling and **it is the spirit and [i]ntention of this Code that the Commission and its members and Labor Arbiters shall use every and all reasonable means to ascertain the facts in each case speedily and objectively and without [regard] to technicalities of law or procedure, all [i]n the interest of due process**." Emphasis added.

II.

WHETHER OR NOT THE DOCTRINE IN THE CASE OF *STAR ANGEL HANDICRAFT vs. NLRC, et al.,* 236 SCRA 580 AND *ROSEWOOD PROCESSING, INC. VS. NLRC*, G.R. [No.] 116476, May 21, 1998 FINDS APPLICATION IN THE INSTANT CASE [;]

III.

WHETHER OR NOT SEPARATION PAY IS JUSTIFIED AS AWARD IN CASES WHERE THE EMPLOYEE IS TERMINATED DUE TO CONTRACT EXPIRATION AS IN THE INSTANT CASE; AND

IV.

WHETHER OR NOT THE REQUIREMENT ON CERTIFICATION AGAINST FORUM SHOPPING WHICH WAS RAISED BEFORE THE NLRC IS ENFORCEABLE IN THE INSTANT CASE.[8]

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[6] *Id.* at 141-142.

[7] *Id.* at 166.

[8] *Id.* at 255-256.

Petitioner contends that the Court of Appeals erred when it dismissed its case based on technicalities while the private respondents contend that the appeal to the NLRC had not been perfected, since the appeal was filed outside the reglementary period, and the bond was insufficient.[9]

After considering all the circumstances in this case and the submission by the parties, we are in agreement that the petition lacks merit.

At the outset it must be pointed out here that the petition for *certiorari* filed with the Court by petitioner under Rule 65 of the Rules of Court is inappropriate. The proper remedy is a petition for review under Rule 45 purely on questions of law. There being a remedy of appeal via petition for review under Rule 45 of the Rules of Court available to the petitioner, the filing of a petition for *certiorari* under Rule 65 is improper.

But even if we bend our Rules to allow the present petition for *certiorari*, still it will not prosper because we do not find any grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of the Court of Appeals when it dismissed the petition of the security agency. We must stress that under Rule 65, the abuse of discretion must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law, as where the power is exercised in an arbitrary and despotic manner by reason of passion or personal hostility.[10] No such abuse of discretion happened here. The assailed decision by the Court of Appeals was certainly not capricious nor arbitrary, nor was it a whimsical exercise of judgment amounting to a lack of jurisdiction.[11]

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[9] *Id*. at 290-292.

[10] *Intestate Estate of Carmen de Luna v. IAC,* G.R. No. 72424, February 13, 1989*,* 170 SCRA 246, 254. See also *Soriano v. Atienza*, G.R. No. 68619, March 16, 1989*,* 171 SCRA 284, 290.

[11] The prerogative writ of *certiorari* was not designed to correct procedural errors or the court's erroneous findings and conclusions (*Carandang v. Cabatuando,* No. L-25384, October 26, 1973, 53 SCRA 383, 390). If every error committed by the trial court were to be a proper object of review by

The Labor Code provides as follows:

ART. 223. Appeal. – Decisions, awards, or orders of the Labor Arbiter are final and executory unless appealed to the Commission by any or both parties within ten (10) calendar days from receipt of such decisions, awards, or orders. Such appeal may be entertained only on any of the following grounds:

(a) If there is *prima facie* evidence of abuse of discretion on the part of the Labor Arbiter;

(b) If the decision, order or award was secured through fraud or coercion, including graft and corruption;

(c) If made purely on questions of law, and

(d) If serious errors in the findings of facts are raised which would cause grave or irreparable damage or injury to the appellant.

In case of a judgment involving a monetary award, an appeal by the employer may be perfected only upon the posting of a cash or surety bond issued by a reputable bonding company duly accredited by the Commission in the amount equivalent to the monetary award in the judgment appealed from.

x x x x x x x x x

The New Rules of Procedure of the NLRC states:

Section 1. Periods of appeal. – Decisions, resolutions or orders of the Labor Arbiter shall be final and executory unless appealed to the Commission by any or both parties within ten (10) calendar days from receipt thereof; and in case of decisions, resolutions or orders of the Regional Director of the Department of Labor and Employment pursuant to Article 129 of the Labor Code, within five (5) calendar days from receipt thereof. If the 10th or 5th day, as the case may be, falls on a Saturday, Sunday or holiday, the last day to perfect the appeal shall be the first working day following such Saturday, Sunday or holiday.

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certiorari, the trial would never come to an end and the appellate courts' dockets would be clogged *ad infinitum* with the aggrieved parties-litigants filing petition after petition for writs of *certiorari* against every interlocutory order of the trial court (*De Castro v. Delta Motor Sales Corp.*, No. L-34971, May 31, 1974, 57 SCRA 344, 346-347). The writ of *certiorari* issues for the

No motion or request for extension of the period within which to perfect an appeal shall be allowed.

In the instant case, both the NLRC and the Court of Appeals found that petitioner received the decision of the Labor Arbiter on July 16, 1999. This factual finding is supported by sufficient evidence,[12] and we take it as binding on us. Petitioner then simultaneously filed its "Appeal Memorandum", "Notice of Appeal" and "Motion to Reduce Bond", by registered mail on July 29, 1999, under Registry Receipt No. 003098.[13] These were received by the NLRC on July 30, 1999.[14] The appeal to the NLRC should have been perfected, as provided by its Rules, within a period of 10 days from receipt by petitioner of the decision on July 16, 1999. Clearly, the filing of the appeal—three days after July 26, 1999—was already beyond the reglementary period and in violation of the NLRC Rules and the pertinent Article on Appeal in the Labor Code.

Failure to perfect an appeal renders the decision final and executory.[15] The right to appeal is a statutory right and one who seeks to avail of the right must comply with the statute or the rules. The rules, particularly the requirements for perfecting an appeal within the reglementary period specified in the law, must be strictly followed as they are considered indispensable interdictions against needless delays and for the orderly discharge

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correction of errors of jurisdiction only or grave abuse of discretion amounting to lack or excess of jurisdiction. The writ of *certiorari* cannot legally be used for any other purpose. In terms of its function, the writ of *certiorari* serves to keep an inferior court within the bounds of its jurisdiction or to prevent it from committing such a grave abuse of discretion amounting to excess of jurisdiction or to relieve parties from arbitrary acts of courts – acts which courts have no power or authority in law to perform (*Silverio v. Court of Appeals*, No. L-39861, March 17, 1986, 141 SCRA 527, 538-539).

[12] Records, p. 238 (Registry return card showing the date of receipt as July 16, 1999).

[13] *Rollo*, pp. 80, 104.

[14] *Id*. at 96, 139.

[15] *Lamzon v. National Labor Relations Commission,* G.R. No. 113600, May 28, 1999, 307 SCRA 665, 669.

of judicial business.[16] It is only in highly meritorious cases that this Court will opt not to strictly apply the rules and thus prevent a grave injustice from being done.[17] The exception does not obtain here. Thus, we are in agreement that the decision of the Labor Arbiter already became final and executory because petitioner failed to file the appeal within 10 calendar days from receipt of the decision.

Clearly, the NLRC committed no grave abuse of discretion in dismissing the appeal before it. It follows that the Court of Appeals, too, did not err, nor gravely abuse its discretion, in sustaining the NLRC Order, by dismissing the petition for *certiorari* before it. Hence, with the primordial issue resolved, we find no need to tarry on the other issues raised by petitioner.

WHEREFORE, the Decision dated January 31, 2002 and the Resolution dated September 12, 2002 of the Court of Appeals in CA- G.R. SP No. 65465 are *AFFIRMED*. Costs against petitioner.

SO ORDERED.

Carpio Morales, Tinga, Velasco, Jr., and *Brion, JJ.,* concur.

THIRD DIVISION

[G.R. No. 162028. July 14, 2008]

DR. LORNA VILLA, *petitioner, vs.* **HEIRS OF ENRIQUE ALTAVAS, namely: Enrique Altavas II, Erlinda Liboro and Maria A. de Jesus,** *respondents.*

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[16] *Ginete v. Court of Appeals,* G.R. No. 127596, September 24, 1998, 296 SCRA 38, 46.

[17] *Sublay v. National Labor Relations Commission,* G.R. No. 130104, January 31, 2000, 324 SCRA 188, 194.

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; PROCEDURE IN THE REGIONAL TRIAL COURT; COMPLIANCE THEREWITH, REQUIRED.— Section 7(b), Rule 40 of the Rules of Court provides: Sec. 7. *Procedure in the Regional Trial Court*. - x x x (b) Within fifteen (15) days from such notice, it shall be the duty of the appellant to submit a memorandum which shall briefly discuss the errors imputed to the lower court, a copy of which shall be furnished by him to the adverse party. Within fifteen (15) days from receipt of the appellant's memorandum, the appellee may file his memorandum. **Failure of the appellant to file a memorandum shall be a ground for dismissal of the appeal.** Rules of procedure do not exist for the convenience of the litigants. These rules are established to provide order to and enhance the efficiency of our judicial system. They are not to be trifled with lightly or overlooked by the mere expedience of invoking "substantial justice." In a long line of decisions, this Court has repeatedly held that, while the rules of procedure are liberally construed, the provisions on reglementary periods are strictly applied, indispensable as they are to the prevention of needless delays, and are necessary to the orderly and speedy discharge of judicial business. The same is true with respect to the rules on the manner of and periods for perfecting appeals.

2. LEGAL ETHICS; ATTORNEYS; SIMPLE NEGLIGENCE; BINDING TO THE CLIENT.— Petitioner's counsel is guilty of simple negligence. Settled is the rule that the negligence of counsel binds the client. This is based on the rule that any act performed by a lawyer within the scope of his general or implied authority is regarded as an act of his client. Consequently, the mistake or negligence of petitioners' counsel may result in the rendition of an unfavorable judgment against them. It is true that there are recognized exceptions to this rule, as in cases where reckless or gross negligence of counsel deprives the client of due process of law, or when its application results in the outright deprivation of one's property through a technicality. However, none of these exceptions have been shown to be present in the instant case. Hence, the negligence of her counsel binds petitioner, and she cannot insist that the principle of liberal interpretation of the rules of procedure be applied to her case.

3. REMEDIAL LAW; APPEALS; FACTUAL FINDINGS OF TRIAL COURT, RESPECTED; EXCEPTIONS.— Settled is the rule that the trial court's findings of fact, especially when affirmed by the CA, are generally binding and conclusive upon this Court. There are recognized exceptions to this rule, among which are: (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (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) there is no citation of specific evidence on which the factual findings are based; (7) the finding of absence of facts is contradicted by the presence of evidence on record; (8) the findings of the CA are contrary to the findings of the trial court; (9) the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the CA are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties. However, petitioner failed to show that any of the exceptions is present in the instant case to warrant a review of the findings of fact of the lower courts.

APPEARANCES OF COUNSEL

Orlanda Bigcas-Lumawag for petitioner.
Stephen C. Arceño for respondents.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.*:

Assailed in the present Petition for Review on *Certiorari* under Rule 45 of the Rules of Court is the Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 63123 promulgated on January 31, 2003 which affirmed the Orders dated December 13, 2000[2] and January 19, 2001[3] of the Regional Trial Court (RTC)

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[1] Penned by Justice Edgardo P. Cruz with the concurrence of Justices Salvador J. Valdez, Jr. and Mario L. Guariña III, *rollo*, pp. 29-35.

[2] Annex "A", Petition for *Certiorari*, CA *rollo*, p. 29.

[3] Annex "B", *id*. at 31.

of Roxas City, Branch 16; and the CA Resolution[4] of January 14, 2004, denying herein petitioner's Motion for Reconsideration.

The facts of the case are as follows:

On November 26, 1997, Enrique Altavas II, Erlinda Liboro and Maria de Jesus (respondents), in their capacity as heirs of Enrique Altavas (Enrique), filed a Complaint[5] for ejectment with the 2nd Municipal Circuit Trial Court (MCTC) of Pontevedra-Panay in the Province of Capiz against Dr. Lorna Villa (petitioner) together with Virginia Bermejo (Virginia) and Rolito Roxas (Roxas), alleging that respondents are heirs of the deceased Enrique, the registered owner of two parcels of fishpond designated as Lot No. 2816 and Lot No. 2817, who have been in actual possession through their administrator, overseer and representative, the late councilor Mussolini C. Bermejo, the husband of Virgina; that on January 31, 1994, after the death of Mussolini, Virgina took over the possession of the premises in question without the consent or permission of respondents; that Virginia leased in favor of petitioner a portion of about five hectares of Lot No. 2816, without any right whatsoever to do so; that on October 21, 1997, respondents through counsel formally sent demand letters to Virginia and petitioner to vacate the respective portions occupied by them; and that despite said demands, they persisted in continuing their illegal possession of the premises.

Petitioner and Virginia filed their respective Answers to the Complaint.

On her part, petitioner contended that: she is in lawful possession of the area possessed and developed by her as lessee; she is a possessor in good faith; the subject lot was leased to her by a person who was in actual possession thereof, and who represented herself as the owner of the said lot; and respondents have no cause of action against her, as they (respondents) are no longer the owners of the said lots, it appearing that the same were already conveyed by the original owners during their lifetime;

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[4] *Id*. at 256.

[5] Annex "C", CA *rollo*, p. 32.

and the complaint was premature, as there was still a pending case in court involving the ownership of the properties in question.[6]

After preliminary conference and submission by the parties of their respective affidavits, evidence and position papers, the MCTC rendered a Decision with the following dispositive portion:

> WHEREFORE, in the light of the foregoing circumstances, judgment is hereby rendered in favor of plaintiffs [respondents], declaring them as rightful owners and legal possessors of Lot Nos. 2816 and 2817 portion of which are possessed by defendants [petitioner and Virginia], ordering the following:
>
> 1. a) To defendant Virginia Bermejo to vacate the premises of portion of Lot No. 2817 presently occupied by her, surrendering peacefully its possession to plaintiffs;
>
> b) Payment of Ten Thousand (₱10,000.00) Pesos per hectare a year as compensation to plaintiff's deprivation of possession of the property reckoned from October 21, 1997 until possession is returned;
>
> c) The payment of attorney's fees in the amount of Fifty Thousand (₱50,000.00) Pesos and costs of suit.
>
> 2. To defendant Lorna Villa to vacate the premises over portion of Lot No. 2817 she occupies with an area of five (5) hectares and to peacefully return its possession to plaintiffs, as well as pay the amount of Ten Thousand (10,000.00) Pesos per hectare a year reckoned from the date of demand until possession is returned to plaintiffs;
>
> x x x x x x x x x
>
> c) Payment of attorney's fees in the amount of Fifty Thousand (₱50,000.00) Pesos and costs of suit.
>
> SO DECIDED.[7]

Aggrieved by the Decision of the MCTC, petitioner and Virginia filed an appeal with the RTC of Roxas City.

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[6] Annex "D", *id*. at 38-43.

[7] Annex "G", *id*. at 69.

However, in its Order dated December 13, 2000, the RTC dismissed the appeal of petitioner pursuant to Section 7, Rule 40 of the Rules of Court for her failure to file her appeal memorandum. Virginia's appeal, on the other hand, was dismissed because of her withdrawal of her appeal.

Petitioner filed a Motion for Reconsideration but the same was denied by the RTC in its Order of January 19, 2001.

Petitioner then filed a special civil action for *certiorari* with the CA contending that the RTC committed grave abuse of discretion in dismissing her appeal on technical ground.

On January 31, 2003, the CA promulgated its presently assailed Decision dismissing the petition for *certiorari* and affirming the December 13, 2000 and January 19, 2001 Orders of the RTC.

Petitioner moved for reconsideration but her motion was denied by the CA in its Resolution dated January 14, 2004.

Hence, the present petition raising the following issues:

I

WHETHER OR NOT THE SUBMISSION OF POSITION PAPER WILL SUFFICE TO SUPPORT A DECISION IN FAVOR OF RESPONDENTS IN THE EJECTMENT CASE?

II

WHETHER OR NOT RESPONDENTS WHO DID NOT HAVE ACTUAL, PHYSICAL POSSESSION OF THE LOT IN QUESTION FOR YEARS RECOVER POSSESSION THEREOF THROUGH THE SUMMARY REMEDY OF EJECTMENT? WILL AN ACTION FOR EJECTMENT LIE AGAINST PETITIONER?

III

WHETHER OR NOT THE AWARD OF ATTORNEY'S FEES EXCEEDING THE AMOUNT OF ₱20,000.00 LEGAL?

IV

WHETHER OR NOT THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE RTC, BR. 16.[8]

[8] *Rollo*, pp. 186-187.

Petitioner contends that respondents failed to comply with the provisions of Section 10, Rule 70 of the Rules of Court requiring the submission of affidavits of witnesses and other evidence on the factual issues of the case; that the complaint, the exhibits marked by respondents and their position paper do not constitute preponderance of evidence in their favor, especially in view of the fact that the allegations in respondents' complaint were controverted by petitioner; and that since there is no sufficient evidence to support respondents' complaint, the MCTC committed error when it rendered judgment in favor of respondents.

Petitioner also avers that respondents failed to establish that they are in actual possession of the lots in question; that, in fact, they have not proven that they are the owners of the said properties; and that petitioner has a valid contract of lease with Virginia which entitles her to the possession of Lot No. 2817.

Petitioner argues that respondents have no cause of action against her as they are not lessors, vendors or persons with whom petitioner has a contract, express or implied and that respondents failed to aver facts constitutive of either forcible entry or unlawful detainer. As such, the MCTC did not acquire jurisdiction over the case.

Petitioner further contends that the MCTC erred in awarding attorney's fees exceeding the amount of ₱20,000.00 because the Rules on Summary Procedure clearly provide that in ejectment cases, irrespective of the amount of damages or unpaid rentals sought to be recovered, the attorney's fees to be awarded should not exceed ₱20,000.00.

Lastly, petitioner avers that the CA erred in ruling that the RTC did not commit grave abuse of discretion in denying petitioner's appeal considering that the latter's failure to submit her appeal memorandum on time was due to a fortuitous event. Petitioner cites jurisprudence holding that technical rules should be liberally construed in favor of the parties so as not to frustrate substantial justice or bar vindication of a legitimate grievance.

Respondents counter that the Decision of the MCTC is based on the titles over the disputed lots which they presented in evidence; and that the award of damages is supported by the stipulations in the Lease Contract entered into between petitioner and Virginia.

Respondents assert that the findings of fact by lower courts are not subject to review by this Court. Moreover, the findings of fact by the MCTC and the CA are based on stipulations of facts made by the parties as contained in the Pre-Trial Order of the MCTC dated September 10, 1999 and on the parties' admissions in their respective pleadings.

The petition is unmeritorious.

However, certain clarification must first be made. While respondents in their Complaint filed with the RTC refer to Lot No. 2816, which is allegedly occupied by herein petitioner, the MCTC and the CA, in their respective Decisions, found that the disputed property occupied by petitioner is Lot No. 2817. Respondents never questioned this finding in any of their pleadings in the present petition. Hence, insofar as the Court is concerned, the subject property is Lot No. 2817.

The Court will resolve the last issue ahead of the first three issues. The Court finds that the CA did not err in ruling that the RTC did not commit grave abuse of discretion when it denied petitioner's appeal for her failure to timely file her appeal memorandum.

Section 7(b), Rule 40 of the Rules of Court provides:

Sec. 7. *Procedure in the Regional Trial Court*. - x x x

(b) Within fifteen (15) days from such notice, it shall be the duty of the appellant to submit a memorandum which shall briefly discuss the errors imputed to the lower court, a copy of which shall be furnished by him to the adverse party. Within fifteen (15) days from receipt of the appellant's memorandum, the appellee may file his memorandum. **Failure of the appellant to file a memorandum shall be a ground for dismissal of the appeal.** (Emphasis supplied)

Rules of procedure do not exist for the convenience of the litigants.[9] These rules are established to provide order to and enhance the efficiency of our judicial system.[10] They are not to be trifled with lightly or overlooked by the mere expedience of invoking "substantial justice."[11] In a long line of decisions, this Court has repeatedly held that, while the rules of procedure are liberally construed, the provisions on reglementary periods are strictly applied, indispensable as they are to the prevention of needless delays, and are necessary to the orderly and speedy discharge of judicial business.[12] The same is true with respect to the rules on the manner of and periods for perfecting appeals.[13]

In *Enriquez v. Court of Appeals*,[14] the Court further elucidated on the meaning and consequence of the provisions of Section 7(b), Rule 40 of the Rules of Court, to wit:

> Rule 40, Section 7 (b) provides that, "it shall be the duty of the appellant to submit a memorandum" and failure to do so "shall be a ground for dismissal of the appeal." The use of the word "shall" in a statute or rule expresses what is mandatory and compulsory. Further, the Rule imposes upon an appellant the "duty" to submit his memorandum. A duty is a "legal or moral obligation, mandatory act, responsibility, charge, requirement, trust, chore, function, commission, debt, liability, assignment, role, pledge, dictate, office, (and) engagement." Thus, under the express mandate of said Rule, the appellant is duty-bound to submit his memorandum on appeal. Such submission is not a matter of discretion on his part. His failure to comply with this mandate or to perform said duty will compel the RTC to dismiss his appeal.

In rules of procedure, an act which is jurisdictional, or of the essence of the proceedings, or is prescribed for the protection or

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[9] *Ko v. Philippine National Bank*, G.R. Nos. 169131-32, January 20, 2006, 479 SCRA 298, 303.

[10] *Id*. at 303-304.

[11] *Id*. at 304.

[12] *Moneytrend Lending Corporation v. Court of Appeals*, G.R. No. 165580, February 20, 2006, 482 SCRA 705, 714.

[13] *Id*.

[14] 444 Phil. 419 (2003).

benefit of the party affected is mandatory. As private respondent points out, in appeals from inferior courts to the RTC, the appellant's brief is mandatory for the assignment of errors is vital to the decision of the appeal on the merits. This is because on appeal only errors specifically assigned and properly argued in the brief or memorandum will be considered, except those affecting jurisdiction over the subject matter as well as plain and clerical errors. Otherwise stated, an appellate court has no power to resolve an unassigned error, which does not affect the court's jurisdiction over the subject matter, save for a plain or clerical error.

It is true that the Rules should be interpreted so as to give litigants ample opportunity to prove their respective claims and that a possible denial of substantial justice due to legal technicalities should be avoided. But it is equally true that an appeal being a purely statutory right, an appealing party must strictly comply with the requisites laid down in the Rules of Court. In other words, he who seeks to avail of the right to appeal must play by the rules. This the petitioner failed to do when she did not submit her memorandum of appeal in Civil Case No. 12044 as required by Rule 40, Section 7 of the 1997 Rules of Civil Procedure. That she lost her case is not the trial court's fault but her own.[15]

The aforequoted ruling of the Court was reiterated in the more recent case of *Gonzales v. Gonzales*.[16]

In the instant case, upon motion of petitioner, she was granted by the RTC an additional 45 days, within which to file the appeal memorandum, with a warning that the period is non-extendible. The last day for filing the memorandum is December 8, 2000. The Court is not persuaded by petitioner's contention that because of a typhoon that hit Roxas City, her counsel was not able to go to work on December 7, 2000 and finish the preparation of her memorandum. In the first place, the 45-day extension given to petitioner was an ample period for her counsel to prepare the required memorandum, such that the failure of the latter to go to work on December 7, 2000 was not a sufficient justification for the RTC to grant another extension, especially in light of the warning that the 45-day period is non-extendible.

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[15] *Id*. at 428-429.

[16] G.R. No. 151376, February 22, 2006, 483 SCRA 57, 66-69.

Secondly, petitioner's counsel was already able to go to work on December 8, 2000 and, instead of filing a motion for extension, she should have finished the preparation of the memorandum. She had until the closing of government offices on that day to finish and file the said memorandum. Yet, she failed to do so.

The Court is also not persuaded by petitioner's contention that her failure to submit her appeal memorandum was because her counsel also had to prepare a memorandum required by this Court in another case which was due for submission on December 10, 2000. Petitioner's counsel should have prioritized the preparation of the memorandum required by the RTC because of its earlier deadline.

Clearly, petitioner's counsel is guilty of simple negligence. Settled is the rule that the negligence of counsel binds the client.[17] This is based on the rule that any act performed by a lawyer within the scope of his general or implied authority is regarded as an act of his client.[18] Consequently, the mistake or negligence of petitioners' counsel may result in the rendition of an unfavorable judgment against them.[19] It is true that there are recognized exceptions to this rule, as in cases where reckless or gross negligence of counsel deprives the client of due process of law, or when its application results in the outright deprivation of one's property through a technicality.[20] However, none of these exceptions have been shown to be present in the instant case. Hence, the negligence of her counsel binds petitioner, and she cannot insist that the principle of liberal interpretation of the rules of procedure be applied to her case.

In any event, petitioner's claim over the subject property has no leg to stand on.

With respect to the first and second issues, the CA sustained the following findings of the MCTC, to wit: that respondents'

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[17] *Maquilan v. Maquilan*, G.R. No. 155409, June 8, 2007, 524 SCRA 166, 179.

[18] *Id*. at 179-180.

[19] *Id*. at 180.

[20] *Id*.

predecessor, Enrique Altavas, was not divested of his ownership of the subject lots; that the titles over the subject properties remain in his name; that, not being the owner or administrator of the said lots, Virginia has no right to enter into any contract for the lease of the said properties; and that petitioner's possession of portions of the disputed properties is merely upon tolerance of respondents.

Settled is the rule that the trial court's findings of fact, especially when affirmed by the CA, are generally binding and conclusive upon this Court.[21] There are recognized exceptions to this rule, among which are: (1) the conclusion is grounded on speculations, surmises or conjectures; (2) the inference is manifestly mistaken, absurd or impossible; (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) there is no citation of specific evidence on which the factual findings are based; (7) the finding of absence of facts is contradicted by the presence of evidence on record; (8) the findings of the CA are contrary to the findings of the trial court; (9) the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion; (10) the findings of the CA are beyond the issues of the case; and (11) such findings are contrary to the admissions of both parties.[22] However, petitioner failed to show that any of the exceptions is present in the instant case to warrant a review of the findings of fact of the lower courts.

As to respondents' ownership and right of possession of the subject properties, records show that the MCTC based its Decision not only on the Position Paper of respondents but also on the pieces of evidence submitted by them. Respondents attached, as annexes to their Complaint, the Original Certificates of Title Nos. RO-4326 and RO-4327 in the name of Enrique, covering Lot Nos. 2816 and 2817, respectively, as evidence of their ownership and right to possess the disputed properties.

Moreover, being a mere lessee, petitioner steps into the shoes of her lessor, Virginia. However, Virginia's claim of ownership

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[21] *Sandejas v. Ignacio, Jr.*, G.R. No. 155033, December 19, 2007, 541 SCRA 61, 74.

[22] *Id*. at 74-75.

was not sustained by the MCTC, which instead found that she was not the owner of and had no right to possess the disputed property or to transfer possession of the same, through lease, in favor of another person. Virginia later withdrew her appeal filed with the RTC. By reason of such withdrawal, she is bound by the findings of the MCTC.

The third issue raised by petitioner is misplaced. Only Roxas and Virginia, co-defendants of petitioner, were ordered by the MCTC to pay attorney's fees in the amount of ₱50,000.00. Both appealed the MCTC Decision. However, their respective appeals were dismissed by the RTC – Roxas's, for failure to file his appeal memorandum; and Virginia's, because of her subsequent withdrawal of her appeal.

WHEREFORE, the petition is *DENIED*. The Decision of the Court of Appeals dated January 31, 2003 and its Resolution of January 14, 2004 in CA-G.R. SP No. 63123 are *AFFIRMED*.

Double costs against petitioner.

SO ORDERED.

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

THIRD DIVISION

[G.R. No. 162868. July 14, 2008]

RODOLFO D. GARCIA, *petitioner, vs.* **PHILIPPINE AIRLINES and/or CRISTINA W. TRINIDAD, Manager, Catering Operations,** *respondents.*

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* In lieu of Justice Minita V. Chico-Nazario, per Special Order No. 508 dated June 25, 2008.

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; TIME EXTENDED TO FILE PETITION; ONE DAY DELAY OVERLOOKED IN THE INTEREST OF JUSTICE.— The instant petition was filed beyond the requested extension period. Petitioner received a copy of the CA March 17, 2004 Resolution on March 26, 2004. He had until April 10, 2004 to file this petition. He asked the Court that he be allowed until April 25, 2004 to file the same, but failed to comply when he filed the petition only on April 26, 2004. Nevertheless, inasmuch as the delay is not substantial, the greater interest of justice would be served if this petition is adjudicated on its merits. Sound policy dictates that it is far better to dispose of cases on the merits, rather than on a technicality as the latter approach may result in injustice.

2. ID.; ID.; ID.; NLRC RULING NOT SEASONABLY APPEALED ATTAINED FINALITY; RULING IS *RES JUDICATA* ON THE SAME ISSUE IN CASE AT BAR.— The issue on the existence of an employer-employee relationship between petitioner and PAL has long been resolved in the case entitled *Stellar Employees Association v. Philippine Airlines and Stellar Industrial Services, Inc*. In that case, petitioner joined other Stellar employees in filing complaints for regularization, money claims and damages against PAL before the NLRC. The NLRC declared, on September 25, 1996, that no employer-employee relationship exists between PAL and the Stellar employees. Due to the failure to seasonably appeal or question the NLRC ruling, its factual and legal findings have attained finality. Consequently, the holding that PAL is not petitioner's employer constitutes *res judicata* on the same issue in this petition.

3. ID.; ID.; EFFECTS OF JUDGMENT; *RES JUDICATA*.— *Res judicata* literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment." *Res judicata* is, in fine, a rule of preclusion to the end that facts or issues settled by final judgment should not be tried anew. The principle of *res judicata* in actions *in personam* is found in Section 49(b) and (c), Rule 39 of the Rules of Court which provides: Sec. 49. *Effects of judgments*. – The effect of a judgment or final order rendered by a court or judge of the Philippines, having jurisdiction to pronounce the judgment

or order, may be as follows: x x x x (b) In other cases, the judgment or order is, with respect to the matter directly adjudged or as to any other matter that could have been raised in relation thereto, conclusive between the parties and their successors-in-interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity; (c) In any other litigation between the same parties or their successors-in-interest, that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

4. ID.; ID.; ID.; ID.; CONCEPTS; ELUCIDATED.— *Res judicata* has two (2) concepts. The first is "bar by prior judgment" under Rule 39, Section 47(b). This rule dictates that the judgment or decree of a court of competent jurisdiction on the merits concludes the parties and their privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. Stated otherwise, the judgment rendered in the first case is an absolute bar to the subsequent action since said judgment is conclusive not only as to the matters offered and received to sustain that judgment but also as to any other matter which might have been offered for that purpose and which could have been adjudged therein. The second rule of *res judicata* is embodied in Rule 39, Section 47(c), and is known as "conclusiveness of judgment." It provides that any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same. It refers to a situation where the judgment in the prior action operates as an estoppel only as to the matters actually determined or which were necessarily included therein. The other elements being virtually the same, the fundamental difference between the rule of *res judicata* as a bar by former judgment and as merely a rule on the conclusiveness of judgment is that, in the first, there is an identity in the cause of action in both cases involved whereas, in the second, the cause of

action in the first case is different from that in the second case.

5. ID.; ID.; ID.; ID.; ID.; CONCEPT OF CONCLUSIVENESS OF JUDGMENT; APPLICATION IN CASE AT BAR.— In this petition, *res judicata* in the concept of conclusiveness of judgment obtains. The concept is applicable here as there is identity of parties and subject matter but not of causes of action. **First,** there is identity of parties between the two (2) cases. Petitioner was one of complainants in the consolidated regularization cases and he is also the same party who initiated this action. His denial of participation in the regularization cases is negated by the records, as he was awarded wage differentials and CBA benefits by the Labor Arbiter in said cases. In fact, records show that petitioner was awarded the amount of ₱34,886.00. **Second,** there is identity of subject matter, defined as the matter or thing with respect to which the controversy has arisen, concerning which a wrong has been done. It is quite clear that the issue and subject matter resolved in the consolidated regularization cases is the existence of an employer-employee relationship between petitioner and PAL. It is also the primordial issue for resolution in the instant petition. However, identity of causes of action is absent between the two (2) cases. Under the rules, a cause of action is defined as an act or omission by which a party violates a right of another. In the regularization cases, the cause of action is the deprivation of the status of a regular employee, while in this petition, the cause of action is the dismissal of an employee without just cause under our labor laws. Applying the rule on conclusiveness of judgment to this case, the parties are now precluded from relitigating the same issue of the existence of an employment relationship between PAL and petitioner. Although it does not have the same effect as bar by prior judgment which precludes subsequent actions, conclusiveness of judgment operates as estoppel with respect to matters in issue or points controverted, on the determination of which the finding or judgment was anchored. Where material facts or questions, which were in issue in a former action, were judicially determined, such facts are *res judicata*. *Res judicata* requires that stability be accorded to judgments. Controversies once decided on the merits shall remain in repose for there should be an end to litigation which, without the doctrine, would be endless. The regularization cases initiated and participated in by petitioner are now final and

executory, and the issues resolved in that case should no longer be disturbed. Nothing is more settled in law than that when a judgment becomes final and executory it becomes immutable and unalterable. The same may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and whether made by the highest court of the land. The reason is grounded on the fundamental considerations of public policy and sound practice that, at the risk of occasional error, the judgments or orders of courts must be final at some definite date fixed by law.

6. ID.; APPEALS; FINDINGS OF THE NLRC AFFIRMED BY THE COURT OF APPEALS, RESPECTED.— Well-settled is the rule that conclusions and findings of fact by the lower courts or administrative bodies are entitled to great weight on appeal and will not be disturbed except for strong and cogent reasons. The findings of the CA by itself, which are supported by substantial evidence, are almost beyond the power of review by the Supreme Court. We find no cogent reason to disturb the NLRC and the CA findings as these are supported by substantial evidence.

APPEARANCES OF COUNSEL

Jose C. Evangelista for petitioner.
Bienvenido T. Jamoralin Jr. for PAL.

D E C I S I O N

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

WHO is the employer of petitioner – respondent Philippine Airlines or the latter's contractor, Stellar Industrial Services, Inc.?

The question has been adjudged previously and is now barred from being relitigated under the doctrine of *res judicata*, a rule which pervades every well-regulated system of jurisprudence. It is founded upon two (2) grounds, namely: (1) public policy and necessity which makes it to the interest of the State that there should be an end to litigation, *interest reipublicae ut sit*

finis litumi (***sa kapakanan ng Estado ay kailangang magkaroon ng wakas ang kaso***); and (2) the hardship on the individual that he should be vexed twice for the same cause, *memo debet bis vexari et eadem causa* (***sinuman ay di dapat bagabagin ng makalawa sa iisang dahilan***).[1]

The doctrine finds application in this petition for review on *certiorari* of the Decision[2] and Resolution[3] of the Court of Appeals (CA), absolving private respondent Philippine Airlines (PAL) of any liability for petitioner Rodolfo D. Garcia's dismissal.

The Facts

Stellar Industrial Services, Inc. (Stellar) had a standing agreement to supply PAL with workers for janitorial and sanitation functions. On August 2, 1976, petitioner was assigned by Stellar to PAL, where he was tasked to perform janitorial services at the company's in-flight kitchen until January 24, 1990.

During the course of his employment, petitioner received a warning from Stellar for absences incurred. The Memorandum, dated April 28, 1987, pertinently reads:

TO	:	GARCIA, Rodolfo NUEDA, Ferdinand
FROM	:	Vice President Comptroller
SUBJECT	:	LAST WARNING
DATED	:	28 April 1987

Our attention was called by our client Philippine Airlines – Inflight Kitchen regarding your failure to report for work last April 17, 1987.

Your absences has (*sic*) caused inconvenience in the operation of our client. Let this serve as our last warning, any repetition or violation

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[1] *Malayang Samahan ng Manggagawa sa Balanced Food v. Pinakamasarap Corporation,* G.R. No. 139068, January 16, 2004, 420 SCRA 84, citing *Arenas v. Court of Appeals,* G.R. No. 126640, November 23, 2000, 345 SCRA 617.

[2] *Rollo,* pp. 23-33. Penned by Associate Justice Andres B. Reyes, Jr., with Associate Justices Delilah Vidallon-Magtolis and Regalado E. Maambong, concurring. Dated December 23, 2002.

[3] *Id*. at 22. Dated March 17, 2004.

of any company rules and regulations will constrain us to terminate your services with us.

(SGD.) CARLOS P. CALLANGA[4]

On January 25, 1990, petitioner was transferred to PAL's Catering Operations as a kitchen busboy in the sanitizing section.

In a Memorandum dated March 21, 1990, PAL, through Cristina W. Trinidad, then Manager of PAL's Catering Operations, requested Stellar for a replacement for petitioner.

TO : Mr. Oscar Lluz
Operations Manager Stellar Industrial Services
FROM : Manager-Catering Operations
SUBJECT : MR. RODOLFO GARCIA

We would like to request for the immediate replacement of Mr. Rodolfo Garcia.

He has failed to meet the performance requirement of a helper at Catering Operations.

Hereunder are the observations of his superiors from January 8 to the present.

01. Always late in completing assigned tasks.
02. Must be consistently prodded to meet deadlines.
03. Unable to identify and carry out work priorities and needs assistance from co-workers.

Worst of all, he was caught selling cigarettes while on duty.

We hope you will act on our request immediately.

(SGD.) CRISTINA W. TRINIDAD[5]

Consequently, in a letter dated March 28, 1990, Carlos P. Callanga, VP-Operations/Comptroller of Stellar, demanded from

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[4] *Id*. at 49.

[5] *Id*. at 24.

petitioner a written explanation why no disciplinary action should be taken against him, in view of the following charges: (1) poor performance/negligence of duty; and (2) selling of cigarettes while on duty.[6]

Petitioner, in a letter-reply dated April 2, 1990, rendered an explanation in the following tenor:

April 2, 1990

Mr. Cesar Lluz
Operation Manager
Stellar Industrial Services
Cibeles Bldg., Ayala
Makati, Metro Manila

Dear Sir:

These are my answers to the charges against me as inscribed in a letter of MS. Cristina W. Trinidad dated March 21, 1990.

As to the allegation that I was always late in completing assigned task, this was not true because works in the Catering Service has (*sic*) no ending due to the nature of PAL's business.

As to the allegation that I must constantly (be) prodded to meet deadlines, (this) was not correct because of the above reasons.

As to the allegation that I was not able to identify and carry out work priorities and needs assistance from co-workers was not also (*sic*) correct because I always have a companion in the performance of my job because the nature of the work calls for it.

And as to the last allegation that I was caught selling cigarettes while on duty was not also tru (*sic*) because how can I sell cigarettes when I was surrounded by heavy works and the mess in my hands while on duty will make them spoiled. The cigarettes inside my pocket was (*sic*) only for my personal consumptions (*sic*).

I hope these answers will enlighten my case and I am looking forward that I will be given merit considering that I am connected

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[6] *Id*. at 51.

with the service for a period of fourteen (14) years without being apprehended/complained of misconduct unbecoming.

Yours truly,

(Sgd.)
RODOLFO GARCIA[7]

Dissatisfied with petitioner's explanation, Stellar subsequently terminated his employment.

In 1992, petitioner filed a complaint for illegal dismissal against Stellar and Lluz, as well as PAL and Trinidad. The case, docketed as NLRC Case No. 00-11-06556-92, was assigned to Labor Arbiter Emerson C. Tumanon.

It appears that sometime in 1988, Stellar employees assigned at PAL filed complaints for regularization against the air carrier. One of the complainants against PAL was petitioner. These complaints, docketed as National Labor Relations Commission (NLRC) NCR Case Nos. 00-11-04628-88, 00-12-05004-88, 00-01-00465-88, and 00-02-00828-89, were consolidated and assigned to Labor Arbiter Jose De Vera of the NLRC.[8]

On March 31, 1992, Labor Arbiter De Vera rendered judgment[9] in favor of complainants, declaring the existence of an employer-employee relationship between the Stellar employees and PAL. On appeal, the NLRC affirmed *in toto* the findings of the Labor Arbiter.

PAL moved for reconsideration of the April 27, 1995 NLRC Decision. Acting on PAL's motion, the NLRC, on September 25, 1996, reversed and set aside its own earlier findings, and declared complainants employees of Stellar, not of PAL.[10]

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[7] *Id*. at 52.

[8] *Id*. at 119.

[9] CA *rollo,* pp. 82-117; Annex "1".

[10] *Id*. at 118-127; *rollo,* pp. 133-142; Annex "1".

On February 6, 1998, the aggrieved complainants lodged an appeal with this Court. However, via its Resolutions dated March 2, 1998[11] and April 22, 1998,[12] this Court denied the same.

NLRC Ruling

On November 29, 1995, Labor Arbiter Tumanon rendered a decision[13] in the illegal dismissal case in favor of petitioner, stating thus:

> WHEREFORE, premises considered, judgment is hereby rendered declaring the dismissal of complainant herein to be illegal and unauthorized; consequently, ordering herein respondents jointly and severally without loss of seniority rights and privileges and with full backwages counted from the date of his dismissal until actual reinstatement which up to the date of the promulgation of this Decision has already amounted to TWO HUNDRED FORTY THOUSAND FOUR HUNDRED SEVENTY-FIVE and 21/100 (₱240,475.21) pesos, broken down as follows:
>
> Backwages in the sum of ₱218,810.02;
>
> 13th Month pay in the sum of ₱18,234.16;
>
> Service Incentive Leave pay in the sum of ₱3,431.03;
>
> subject to adjustment if payroll or physical reinstatement is denied.
>
> It appearing that complainant has been represented by counsel in the litigation of this case, said counsel is hereby awarded the sum of ten (10%) percent of the total award as and for attorney's fees in the amount of TWENTY-FOUR THOUSAND FORTY-SEVEN and 52/100 (₱24,047.52) pesos, subject also for adjustment.
>
> SO ORDERED.[14]

However, on appeal, the Third Division of the NLRC reversed Labor Arbiter Tumanon, holding that petitioner was "guilty of

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[11] *Id*. at 143-144; Annex "2".

[12] *Id*. at 145; Annex "3".

[13] *Id*. at 73-82; Annex "E".

[14] *Id*. at 81-82.

gross and habitual neglect and was consequently terminated for cause and with due process."[15] The NLRC declared that:

> x x x respondent Stellar appears to be an independent job contractor and not merely a labor only contractor. Apart from the fact that it has sufficient capitalization to the tune of more than a million pesos, its workers perform work that are not necessary and desirable to the business of PAL. Simply stated, it is a job contractor for PAL's messengerial and janitorial needs no more no less. Hence, its employees are not of PAL.
>
> ACCORDINGLY, premises considered, the decision appealed from is hereby SET ASIDE and this case DISMISSED for lack of merits (*sic*).
>
> SO ORDERED.[16]

Petitioner's motion for reconsideration was denied by the NLRC in its October 8, 2004 Resolution.[17]

CA Disposition

On *certiorari*, the CA "modified" both the NLRC and the Labor Arbiter rulings, thus:

> WHEREFORE, premises considered, the Petition is GRANTED and the assailed 27 August 2001 Resolution of respondent Commission in NLRC NCR CA No. 010218-96 and the 29 November 1995 Decision of Labor Arbiter Emerson C. Tumanon in NLRC NCR No. 00-11-06556-92 are hereby MODIFIED insofar as the pecuniary awards declared in the Labor Arbiter's Decision are the sole responsibility of private respondent Stellar, petitioner's direct employer.
>
> SO ORDERED.[18]

In reality, however, the CA merely sustained the NLRC ruling that Stellar is an independent contractor. The CA observed:

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[15] *Id*. at 88.

[16] *Id*. at 88-89.

[17] *Id*. at 100; Annex "J".

[18] *Id*. at 23-33.

However, it is only private respondent Stellar who is responsible to petitioner as the former is an independent contractor. The issue whether or not Stellar is an independent contractor or merely engaged in labor-only contracting was already addressed and settled by the Highest Magistrate in a related case entitled *Phil. Airlines vs. NLRC*, 298 SCRA 430 [2000], to wit:

> "Aside from these stipulations in the service agreement, other pieces of evidence support the conclusion that STELLAR, not PAL, was the employer of the individual private respondents. A contract of employment existed between STELLAR and the individual private respondents, proving that it was said corporation which hired them. It was also STELLAR which dismissed them, as evidenced by Complainant Parenas' termination letter, which was signed by Carlos P. Callanga, vice president for operations and comptroller of STELLAR. Likewise, they worked under STELLAR's own supervisors, Rodel Pagsulingan, Napoleon Parungao, and Renato Topacio. STELLAR even had its own collective bargaining agreement with its employees, including the individual private respondents. Moreover, PAL had no power of control and dismissal power them (*sic*)."[19]

Petitioner moved for partial reconsideration asking that PAL be made solidarily liable with Stellar. However, the CA denied his motion in its Resolution dated March 17, 2004. Hence, this petition.

Issues

Petitioner submits the following assignment:

I.

THE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN ABSOLVING PAL FROM LIABILITY CONSIDERING THAT IT IS THE EMPLOYER OF PETITIONER BECAUSE THE LATTER PERFORMED FUNCTIONS, DUTIES AND RESPONSIBILITIES NECESSARY AND DESIRABLE TO ITS BUSINESS OPERATIONS.

II.

THE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF

[19] *Id*. at 22.

JURISDICTION IN ABSOLVING PAL FROM LIABILITY CONSIDERING THAT IT IS THE EMPLOYER OF PETITIONER BECAUSE IT IS PAL WHICH EXERCISED CONTROL OVER THE MEANS AND METHODS (BY WHICH) PETITIONER PERFORMED HIS JOB AT ITS CATERING DEPARTMENT.

III.

THE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN ABSOLVING PAL FROM LIABILITY CONSIDERING THAT IT IS THE EMPLOYER OF PETITIONER BECAUSE IT IS PAL WHICH ADOPTED RULES, REGULATIONS AND POLICIES REGARDING DISCIPLINE TO BE FOLLOWED BY ITS EMPLOYEES AT ITS CATERING DEPARTMENT.[20] (Underscoring supplied)

Simply stated, the essential issue is whether PAL is petitioner's employer and solidarily liable with Stellar for illegal dismissal.

Our Ruling

Preliminarily, We note that the instant petition was filed beyond the requested extension period. Petitioner received a copy of the CA March 17, 2004 Resolution on March 26, 2004. He had until April 10, 2004 to file this petition. He asked the Court that he be allowed until April 25, 2004 to file the same,[21] but failed to comply when he filed the petition only on April 26, 2004. Nevertheless, inasmuch as the delay is not substantial, the greater interest of justice would be served if this petition is adjudicated on its merits. Sound policy dictates that it is far better to dispose of cases on the merits, rather than on a technicality as the latter approach may result in injustice.[22]

On its merits, however, We resolve to deny the petition.

The CA correctly found that PAL is not petitioner's employer and cannot thus be held solidarily liable with Stellar for illegal dismissal.

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[20] *Id.* at 16.

[21] *Id.* at 3-6.

[22] *Asia Traders Insurance Corporation v. Court of Appeals,* G.R. No. 152537, February 16, 2004, 423 SCRA 114.

The issue on the existence of an employer-employee relationship between petitioner and PAL has long been resolved in the case entitled *Stellar Employees Association v. Philippine Airlines and Stellar Industrial Services, Inc*.[23] In that case, petitioner joined other Stellar employees in filing complaints for regularization, money claims and damages against PAL before the NLRC. The NLRC declared, on September 25, 1996, that no employer-employee relationship exists between PAL and the Stellar employees, finding that:

> We have re-examined the record of this case and have found that SISI assigned supervisors and timekeepers at PAL's premises where SEA's members performed their work. On the issue of SISI's capitalization, it cannot be denied that, per its Amended Articles of Incorporation, it has an authorized capital stock of ₱1,000,000.00. SISI has a collective bargaining agreement (CBA) with its employees, including SEA's members, under which complainants obtained substantial benefits.
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> x x x x x x x x x
>
> We must remember that this case is principally for regularization and relies primarily on the premise that SISI is a "labor-only" contractor of PAL. With respect to the issue of whether or not SISI is a legitimate independent contractor, SEA admits that SISI provides its employees with "soap, cleansers, mops, lawn mowers, brooms, dust pans," *etc*. More telling is SEA's admission that SISI has several clients other than PAL. SEA tries to avoid the application of *Neri, et al. vs. NRLC,* (sic) *et al.*, 224 SCRA 717 (July 23, 1993), by distinguishing SISI's janitorial operations from the other types of employees, like the station loaders.
>
> This argument, however, falls flat on its face considering that SISI has substantial authorized capital in the amount of ₱1.0 Million, since this not limited to its janitorial department. This is evidenced by SISI's Amended Articles of Incorporation which is a public document under the possession, supervision and control of the Securities and Exchange Commission and We can even take judicial notice of this fact, despite SEA's declaration to the contrary.
>
> We are aware of the standards used to determine a "labor-only" contractor. As SEA itself has pointed out, one such gauge is the

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[23] NLRC NCR Case Nos. 00-11-04628-88, 12-5005-88, 00-11-04628-88, and 02-0828-89 were subsequently consolidated.

absence of substantial capital, citing Art. 106 of the Labor Code and Sec. 9, Rule VIII of its Implementing Rules. In view of SISI's possession of substantial capital, it cannot be considered a "labor-only" contractor.

On the other hand, is SISI an independent contractor? We resolve this is in the affirmative after re-thinking our earlier Resolution. Aside from its capital, it also maintains an independent business as admittedly shown by its diversified clientele and the supervision and control as to the means of work as provided by its own timekeepers, foremen, *etc*.

We cannot subscribe to the position by SEA that the absence of premises, tools, equipment, *etc*. is anachronistic to SISI's being an independent contractor. There is nothing novel about this since this has been succinctly ruled upon by the Supreme Court in its *Neri* decision, *supra*. There, the High Court refined the definition of an independent contractor in the sense that it need not possess both tools and equipment, on one hand, and substantial capitalization, on the other hand. Otherwise, as observed by the Court, the legislator ought to have used the conjunctive "and," instead of "or."

Neither is the contention concerning the direct relation of complainants' services to PAL's operations relevant to the ultimate determination of this case. In *Neri*, the Supreme Court cited the "general practice," even of government institutions, of contracting out certain services, and, with the finding that BCC, the contractor there, was an independent one, also said –

> x x x There is even no need for it to refute petitioner's contention that the activities are directly related to the principal business of respondent bank.
>
> x x x x x x x x x

Viewed from a different standpoint, the workers have no contractual tie to PAL because SISI, as a legitimate independent contractor, is their true employer. They applied and executed employment contracts with SISI, not PAL, although SEA argues that its members were made to sign the application forms and employment contracts. What cannot be denied, however, is the brazen and undisputed fact that SISI has a CBA with its employees, including SEA's members. SISI's employees derived benefits under said CBA for the number of years it had been in force. The CBA is a clear admission of an employment

relationship with SISI. It is now too late in the day for them to deny such relationship.

x x x x x x x x x

Because of the absence of a juridical tie with them, PAL's instructions cannot be considered control under the four-fold test of employment relationship. Going back to the *Neri* case, "x x x in legal contemplation, such instructions carry no more weight than mere requests x x x."

x x x x x x x x x

All told, We hereby rule that SISI is a legitimate independent contractor and is the true employer of the individual complainants, not PAL.[24] (Underscoring supplied)

Due to the failure to seasonably appeal or question the NLRC ruling,[25] its factual and legal findings have attained finality. Consequently, the holding that PAL is not petitioner's employer constitutes *res judicata* on the same issue in this petition.

Res judicata literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment."[26] *Res judicata* is, in fine, a rule of preclusion to the end that facts or issues settled by final judgment should not be tried anew.[27]

The principle of *res judicata* in actions *in personam* is found in Section 49(b) and (c), Rule 39 of the Rules of Court which provides:

Sec. 49. *Effects of judgments*. – The effect of a judgment or final order rendered by a court or judge of the Philippines, having jurisdiction to pronounce the judgment or order, may be as follows:

x x x x x x x x x

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[24] *Rollo,* p. 186; Annex "1".

[25] *Id*.

[26] *Williams v. Court of Appeals,* G.R. No. 166177, December 18, 2006, 511 SCRA 152.

[27] *Tengco, Jr. v. Marcelo,* G.R. No. 159877, June 26, 2007.

(b) In other cases, the judgment or order is, with respect to the matter directly adjudged or as to any other matter that could have been raised in relation thereto, conclusive between the parties and their successors-in-interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing and under the same title and in the same capacity;

(c) In any other litigation between the same parties or their successors-in-interest, that only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.

Res judicata has two (2) concepts. The first is "bar by prior judgment" under Rule 39, Section 47(b). This rule dictates that the judgment or decree of a court of competent jurisdiction on the merits concludes the parties and their privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal.[28] Stated otherwise, the judgment rendered in the first case is an absolute bar to the subsequent action since said judgment is conclusive not only as to the matters offered and received to sustain that judgment but also as to any other matter which might have been offered for that purpose and which could have been adjudged therein.[29]

The second rule of *res judicata* is embodied in Rule 39, Section 47(c), and is known as "conclusiveness of judgment." It provides that any right, fact, or matter in issue directly adjudicated or necessarily involved in the determination of an action before a competent court in which a judgment or decree is rendered on the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties and their privies whether or not the claim or demand, purpose, or subject matter of the two suits is the same. It refers to a situation where the judgment in the prior action operates as an estoppel only as to the matters actually determined or which were necessarily included therein.[30]

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[28] *Arcadio v. Carriaga, Jr.,* G.R. Nos. 75109-10, June 28, 1989, 174 SCRA 330.

[29] *Id*.

[30] *Del Rosario v. Far East Bank and Trust Company,* G.R. No. 150134, October 31, 2007.

The other elements being virtually the same, the fundamental difference between the rule of *res judicata* as a bar by former judgment and as merely a rule on the conclusiveness of judgment is that, in the first, there is an identity in the cause of action in both cases involved whereas, in the second, the cause of action in the first case is different from that in the second case.[31]

In this petition, *res judicata* in the concept of conclusiveness of judgment obtains. The concept is applicable here as there is identity of parties and subject matter but not of causes of action.

First, there is identity of parties between the two (2) cases. Petitioner was one of complainants in the consolidated regularization cases and he is also the same party who initiated this action. His denial of participation in the regularization cases[32] is negated by the records, as he was awarded wage differentials and CBA benefits by the Labor Arbiter in said cases.[33] In fact, records show that petitioner was awarded the amount of ₱34,886.00.[34]

Second, there is identity of subject matter, defined as the matter or thing with respect to which the controversy has arisen, concerning which a wrong has been done.[35] It is quite clear that the issue and subject matter resolved in the consolidated regularization cases is the existence of an employer-employee relationship between petitioner and PAL. It is also the primordial issue for resolution in the instant petition.

However, identity of causes of action is absent between the two (2) cases. Under the rules, a cause of action is defined as an act or omission by which a party violates a right of another.[36]

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[31] *Arcadio v. Carriaga, Jr., supra* note 28.

[32] *Rollo,* p. 153.

[33] *Id*.

[34] *Id*. at 174; Annex "1".

[35] *Taganas v. Emuslan,* G.R. No. 146980, September 2, 2003, 410 SCRA 237.

[36] RULES OF COURT, Rule 2, Sec. 2.

In the regularization cases, the cause of action is the deprivation of the status of a regular employee, while in this petition, the cause of action is the dismissal of an employee without just cause under our labor laws.

Applying the rule on conclusiveness of judgment to this case, the parties are now precluded from relitigating the same issue of the existence of an employment relationship between PAL and petitioner.

Although it does not have the same effect as bar by prior judgment which precludes subsequent actions, conclusiveness of judgment operates as estoppel with respect to matters in issue or points controverted, on the determination of which the finding or judgment was anchored.[37]

Where material facts or questions, which were in issue in a former action, were judicially determined, such facts are *res judicata*.[38] In *Stilianopulos v. City of Legaspi*,[39] the Court held that "(w)hen a right or fact has been judicially tried and determined by a court of competent jurisdiction or an opportunity for such trial has been given, the judgment of the court, as long as it remains unreversed, should be conclusive upon the parties and those in privity with them. Clearly, there should be an end to litigation by the same parties and their privies over a subject, once it is fully and fairly adjudicated."

Res judicata requires that stability be accorded to judgments. Controversies once decided on the merits shall remain in repose for there should be an end to litigation which, without the doctrine, would be endless.[40] As We declared in *Camara v. Court of Appeals,*[41] both concepts of *res judicata* are:

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[37] *Camara v. Court of Appeals,* G.R. No. 100789, July 20, 1999, 310 SCRA 608.

[38] *Republic v. Court of Appeals,* G.R. No. 103412, February 3, 2000, 325 SCRA 560, citing *Carlet v. Court of Appeals,* 341 Phil. 99, 108 (1997).

[39] G.R. No. 133913, October 12, 1999, 316 SCRA 523.

[40] *Nacuray v. National Labor Relations Commission,* G.R. Nos. 114924-27, March 18, 1997, 270 SCRA 9.

[41] *Supra* note 37.

x x x founded on the principle of estoppel, and are based on the salutary policy against unnecessary multiplicity of suits. Like the splitting of causes of action, *res judicata* is in pursuance of such policy. Matters settled by a Court's final judgment should not be litigated upon or invoked again. Relitigation of issues already settled merely burdens the Courts and the taxpayers, creates uneasiness and confusion, and wastes valuable time and energy that could be devoted to worthier causes. As the Roman maxim goes, *Non bis in edem*.[42]

The regularization cases initiated and participated in by petitioner are now final and executory, and the issues resolved in that case should no longer be disturbed. Nothing is more settled in law than that when a judgment becomes final and executory it becomes immutable and unalterable. The same may no longer be modified in any respect, even if the modification is meant to correct what is perceived to be an erroneous conclusion of fact or law, and whether made by the highest court of the land. The reason is grounded on the fundamental considerations of public policy and sound practice that, at the risk of occasional error, the judgments or orders of courts must be final at some definite date fixed by law.[43]

Verily, *res judicata* now bars petitioner from reopening, by way of this petition, the issue of the existence of an employer-employee relationship between him and PAL. Otherwise, there will never be an end to litigation on the issue.

Nevertheless, petitioner insists that We again resolve the issue by looking at "evidentiary facts of employer-employee relationship."[44] At the same time, he maintains that he raises questions of law.[45]

Evidently, the issues raised by the petitioner pertain to factual matters. If We were to determine these factual issues, We shall have to examine the documentary and testimonial evidence, as

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[42] *Camara v. Court of Appeals, id*. at 163-164.

[43] *Id*.

[44] *Rollo,* p. 155.

[45] *Id*. at 154.

well as the factual allegations in the pleadings. In doing so, We shall have to consider the following elements to determine the existence of an employment relationship: (a) the selection and engagement of the employee; (b) the payment of wages; (c) the power of dismissal; and (d) the employer's power to control the employee with respect to the means and methods by which the work is to be accomplished. Of these elements, the so-called "control test" is the most important.[46]

Obviously, an evaluation of the above-mentioned factual matters is embraced by the proscription found in Rule 45, Section 1 of the Rules of Court, which states that an appeal by *certiorari* to the Supreme Court "shall raise only questions of law which must be distinctly set forth."

Petitioner asks Us to exempt him from the proscription considering the contrasting findings of the Labor Arbiter, on one hand, and the NLRC and the CA on the other.

However, well-settled is the rule that conclusions and findings of fact by the lower courts or administrative bodies are entitled to great weight on appeal and will not be disturbed except for strong and cogent reasons. The findings of the CA by itself, which are supported by substantial evidence, are almost beyond the power of review by the Supreme Court.[47]

We find no cogent reason to disturb the NLRC and the CA findings as these are supported by substantial evidence. On the other hand, We cannot rely on the findings of the Labor Arbiter about the existence of an employer-employee relationship. His decision[48] fails to shed light on what specific findings of fact convinced him that Stellar is a labor-only contractor, and that PAL is an employer of petitioner.

Moreover, even if We relax the rule, We notice an abject failure of the petitioner to attach to the petition and subsequent

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[46] *Brotherhood Labor Unity Movement of the Philippines v. Zamora,* G.R. No. L-48656, January 7, 1987, 147 SCRA 49.

[47] *Pimentel v. Court of Appeals,* G.R. No. 117422, May 12, 1999, 307 SCRA 38.

[48] *Id*.

pleadings, proof of these alleged facts of employment relationship. There is a patent dearth of evidence in the records to convince Us that the following material allegations exist, namely: that petitioner's duties were necessary and desirable to the business of PAL; that PAL exercised control over the means and methods of his performance at the in-flight kitchen; and that it was PAL's responsibility to issue rules and regulations regarding discipline to be followed by petitioner at that department.

Instead, petitioner merely offered factual assertions which are unfortunately not supported by proof, documentary or otherwise. We cannot accept this as substantial evidence that is necessary to make a finding of an employer-employee relationship. It is elementary that he who alleges a fact must prove it, and a mere allegation is not evidence.[49]

On the basis of the pleadings and evidence before Us, We cannot accept the claim that petitioner was PAL's employee. Petitioner does not deny that he was selected and engaged by Stellar when he was assigned to PAL.[50] Moreover, while petitioner claims that the funds for his salary came from PAL, he did not adduce proof to support his allegation. In any event, he admits that it was Stellar that paid his wages.[51] The evidence further shows that it was Stellar, not PAL, that disciplined petitioner. It was Stellar that issued to petitioner various memoranda asking for an explanation about his infractions,[52] and petitioner explained himself to that company, not PAL.[53] In fine, petitioner recognized the disciplinary authority of Stellar over him, and not that of the air carrier.

WHEREFORE, the petition is *DENIED* for lack of merit.

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[49] *P.T. Cerna Corporation v. Court of Appeals,* G.R. No. 91622, April 6, 1993, 221 SCRA 19, cited in *Pimentel v. Court of Appeals, supra* note 47.

[50] *Rollo,* p. 205.

[51] *Id.* at 100.

[52] *Id.*

[53] *Id.*

SO ORDERED.

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

SECOND DIVISION

[G.R. No. 163607. July 14, 2008]

CENTRAL PHILIPPINES BANDAG RETREADERS, INC., *petitioner, vs.* **PRUDENCIO J. DIASNES,** *respondent.*

SYLLABUS

LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; SEPARATION PAY; WHEN PROPER AND WHEN NOT PROPER.— *Gabuay v. Oversea Paper Supply* defines separation pay as the amount that an employee receives at the time of his severance and is designed to provide the employee with the wherewithal during the period he is looking for another employment. In *San Miguel Corporation v. Lao,* the Court held that the award of separation pay is authorized in the situations dealt with in Article 283 and Art. 284 of the Labor Code, but not in terminations of employment based on instances enumerated in Art. 282. In *Eastern Paper Mills, Inc. vs. NLRC*, this Court held that: The only cases when separation pay shall be paid, although the employee was lawfully dismissed, are when the cause of termination was not attributable to the employee's fault but due to: (1) the installation of labor saving devices, (2) redundancy, (3) retrenchment, (4) cessation of employer's business, or (5) when the employee is suffering from a disease and his continued employment is prohibited by law or is prejudicial to his health and to the health of his co-employees (Articles 283 and 284, Labor Code.) Other than these cases, an employee who is dismissed for a just and lawful

* Vice Associate Justice Minita V. Chico-Nazario. Justice Nazario is on official leave per Special Order No. 508 dated June 25, 2008.

cause is not entitled to separation pay even if the award were to be called by another name. Separation pay is likewise awarded in lieu of reinstatement if reinstatement is no longer feasible, as when the relationship between the employer and employee has become strained. Still, in some cases, separation pay or financial assistance may be extended as a measure of social justice. *PLDT v. NLRC* settled the matter on the award and amount of financial assistance or separation pay that may be awarded a legally separated employee based on social or compassionate justice. This Court held: There should be no question that where it comes to such valid but not iniquitous causes as failure to comply with work standards, the grant of separation pay to the dismissed employee may be both just and compassionate, particularly if he has worked for some time with the company. For example, a subordinate who has irreconcilable policy or personal differences with his employer may be validly dismissed for demonstrated loss of confidence, which is an allowable ground. A working mother who has to be frequently absent because she also has to take care of her child may also be removed because of her poor attendance, this being another authorized ground. x x x Under these and similar circumstances, however, the award to the employee of separation pay would be sustainable under the social justice policy even if the separation is for cause. But where the cause of the separation is more serious than mere inefficiency, the generosity of the law must be more discerning. There is no doubt it is compassionate to give separation pay to a salesman if he is dismissed for his inability to fill his quota but surely he does not deserve such generosity if his offense is misappropriation of the receipts of his sales. This is no longer mere incompetence but clear dishonesty. A security guard found sleeping on the job is doubtless subject to dismissal but may be allowed separation pay since his conduct, while inept, is not depraved. But if he was in fact not really sleeping but sleeping with a prostitute during his tour of duty and in the company premises, the situation is changed completely. This is not only inefficiency but immorality and the grant of separation pay would be entirely unjustified. We hold that henceforth separation pay shall be allowed as a measure of social justice only in those instances where the employee is validly dismissed for causes other than serious misconduct or those reflecting on his moral character. Where the reason for the valid dismissal is, for example, habitual intoxication or an offense involving moral turpitude, like theft or illicit sexual relations with a fellow worker, the employer may not be required

to give the dismissed employee separation pay, or financial assistance, or whatever other name it is called, on the ground of social justice. As may noted, *PLDT* declared that separation pay or financial assistance should be denied a legally separated employee when the cause for dismissal is for an act constituting serious misconduct or that reflects on the employee's moral character. *PLDT,* however, did not go further to state that the grant or award of separation pay or financial assistance is automatically awarded when the dismissal is for a cause other than that contemplated in said case. This *PLDT* doctrine was later expanded in *Toyota Motors Phils. Corp. Workers Association v. National Labor Relations Commission (Toyota)*, where we held that: In all of the foregoing situations, the Court declined to grant termination pay because the causes for dismissal recognized under Art. 282 of the Labor Code were serious or grave in nature and attended by willful or wrongful intent or they reflected adversely on the moral character of the employees. **We, therefore, find that in addition to serious misconduct, in dismissals based on other grounds under Art. 282, like willful disobedience, gross and habitual neglect of duty, fraud or willful breach of trust, and commission of a crime against the employer or his family, separation pay should not be conceded to the dismissed employee.** In analogous causes for termination, like inefficiency, drug use, and others, the NLRC or the courts may opt to grant separation pay anchored on social justice in consideration of length of service of the employee, the amount involved, whether the act is the first offense, the performance of the employee and the like, using guideposts enunciated in PLDT on the propriety of the award of separation pay.

APPEARANCES OF COUNSEL

Zosa & Quijano Law Offices for petitioner.
Arturo C. Mata for respondent.

D E C I S I O N

VELASCO, JR., *J.*:

Respondent Prudencio J. Diasnes was initially hired by petitioner Central Philippines Bandag Retreaders, Inc. (Bandag) as technical

service representative for the Visayas and Bicol areas. In the course of his employment with Bandag, Diasnes was able to show his strengths and received numerous awards and citations. In 1995, Diasnes received a promotional appointment as sales manager/officer-in-charge and was assigned to manage Eastern Visayas Retreaders, Inc. based in Tacloban City, with a service area covering the whole of Region VIII.

It was at this latest posting that Diasnes' work performance started to deteriorate. From July to September in 1995, six (6) company-issued checks were dishonored for causes attributable to Diasnes and for which he was suspended for six (6) days. It was also during this two-month stretch that his absences and tardiness became more frequent.

On January 2, 1996, Diasnes received a memorandum from his supervisor, Loreto C. Rico, relieving him from his duties as sales manager of Region VIII. Two days after, Diasnes received a notice to appear before the Employee Adjudication Committee on January 9, 1996 to resolve the matter of his relief. After the meeting, the committee issued the following report and recommendations:

> Therefore, the committee unanimously agreed that SM-OIC Prudencio Diasnes be: Relieved for three (3) months. This will give him enough time to help his wife's problem; After the period lapsed he may return to work, but with another position or function; if he desire[s] to retire from the company separation/retirement pay may be granted to him.[1]

Diasnes, however, did not avail himself of any of the options set forth in the committee's report and recommendations, but requested a Cebu City assignment which his employer granted. In Cebu City, Diasnes' performance as sales supervisor was far from encouraging. His attendance and punctuality were likewise very poor. To top it all, Diasnes did not at all report for work from October 12, 1996 to November 11, 1996.

Thereafter, on October 31, 1996, Bandag, through supervisor Rico, addressed a show-cause letter-memorandum to Diasnes, which reads as follows:

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[1] *Rollo*, p. 38.

SUBJECT: Habitual tardiness and Absenteeism

Your attendance records from Sept. 1 to Oct. 31, 1996, show that of the 50 working days, you report[ed for work] only for 25 days. Of the 25 days that you report[ed] for work, you never had any instance that you're on time – official reporting time is at 8:00 O'clock A.M.

During this period, you have not reported to work for 25 working days and these are all absences without official leave. This shows that your absences [amounted to] 50% [of the official work days] and [you were tardy] 100% [of the] period referred [to].

You have committed an act unbecoming of an officer and a breach of our policy on attendance. Habitual absenteeism and tardiness are cause for suspension and/or termination from employment.

You are therefore required to submit your written explanation within 48 hrs. from receipt of this memo and present yourself to the employees adjudication committee.

The Adjudication committee will convene immediately upon receipt of your reply. This consultation is of a substance to assure you that the management prerogative to discipline employees is not exercised in an arbitrary manner.

For your information and strict compliance.

L.C. RICO[2]

Apparently finding Diasnes' explanation to be insufficient, Bandag dismissed Diasnes from the service effective November 11, 1996 on the grounds stated in the termination letter which reads as follows:

TO : P.J. DIASNES
DATE : NOVEMBER 11, 1996
SUBJECT: TERMINATION OF EMPLOYMENT

You had been notified for gross and habitual neglect of your duty and had been given enough time to be heard by an employees adjudication committee[.] Again, you [had been apprised] that the consultation is of

[2] *Id*. at 147.

a substance to assure you that the management prerogative to discipline employees is not exercise[d] in [an] arbitrary manner.

A number of company representatives had been sent to your residence but all failed to see you in person. A verification with the company Doctor, yield[ed] negative report of any health related consultation. All those that has been done is indicative of the management's concern of employees.

The termination of your employment is base[d] on the following:

1. HABITUAL TARDINESS FROM SEPT. 1, 1996 TO OCT. 11, 1996.
2. ABSENCES WITHOUT OFFICIAL LEAVE DURING THE SAME PERIOD.
3. FAILURE TO REPORT FOR WORK FROM OCTOBER 12, 1996 TO NOVEMBER 11, 1996.

This is a willful breach of trust given to you as officer of the company and serious misconduct of an employee. And it is our belief, that you have put an end to the employer-employee relationship without serving any written notice to the company.

Therefore, your employment is terminated effective November 11, 1996. You are requested to return all company assets in your [possession] to the company representative who will be authorized to retrieve them.

(Sgd.) Loreto C. Rico
General Manager[3]

To contest his dismissal from the service, Diasnes filed a complaint with the Regional Arbitration Branch of the National Labor Relations Commission (NLRC) for illegal dismissal, non-payment of salaries and allowances, 13th month pay, and other benefits against Bandag, Sarmiento Management Group, and Rico, docketed as NLRC RAB VII-1492-96.

On October 15, 1997, Labor Arbiter Ernesto F. Carreon rendered a decision which, while holding Diasnes to have been legally dismissed from the service, directed payment of separation

[3] *Id*. at 148.

pay in the amount of PhP 278,965.50 and 13th month pay in the amount of PhP 14,652.74. Dispositively, the labor arbiter's decision reads as follows:

> WHEREFORE, premises considered, judgment is hereby rendered ordering the respondent Central Philippines Bandag Retreaders, Inc. to pay the complainant Prudencio J. Diasnes Separation Pay in the amount of ₱278,965.50 and proportionate 13th month pay in the amount of ₱14,652.74.
>
> The case against respondents Sarmiento Management Corporation and Loreto Rico and the other claims are dismissed for lack of merit.
>
> SO ORDERED.

Therefrom, both parties appealed to the NLRC, Diasnes assailing the labor arbiter's finding on the validity of his dismissal, while Bandag impugning the labor arbiter's decision insofar as the award of separation pay was concerned.

Thereafter, on January 12, 1999, the NLRC rendered a Decision,[4] dismissing the separate appeals of both parties and thus effectively affirming the decision of the labor arbiter.

Aggrieved, Bandag filed a motion to reconsider the decision of the NLRC.

By Resolution dated October 29, 1999, the NLRC partially granted reconsideration and deleted the award for separation pay, Diasnes having failed to establish that Bandag has an established policy of granting separation pay of one and a half (1 ½) month for every year of service to separated employees. The *fallo* of the NLRC's resolution reads:

> WHEREFORE, premises considered, the Motion for Reconsideration filed by respondent Central Philippines Bandag Retreaders, Inc., is PARTIALLY GRANTED. The Decision promulgated on 12 January 1999 is ABANDONED and a new one is entered ordering respondent Central Philippines Bandag Retreaders,

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[4] *Id*. at 142-150. Penned by Commissioner Amorito V. Cañete and concurred in by Commissioners Irenea R. Ceniza and Bernabe S. Batuhan.

Inc. to pay complainant Prudencio J. [Diasnes] the amount of ₱14,652.74 representing [his] proportionate 13th month pay.

SO ORDERED.

Unsatisfied with the turn of events, Diasnes filed with the Court of Appeals (CA) a petition for *certiorari* and prohibition with prayer for injunctive relief. Docketed as CA-G.R. SP No. 58916, the petition sought the reinstatement of the NLRC's Decision dated January 12, 1999.

On June 18, 2003, the CA issued a Decision[5] that granted the petition and effectively reinstated the NLRC's Decision of January 12, 1999, thus restoring the award of separation pay. The CA ratiocinated that separation pay is proper in view of the following main considerations: the Employee Adjudication Committee's recommendation, the imperatives of social justice, and Diasnes' exemplary performance for more than ten (10) years.

In time, Bandag filed a motion for reconsideration, but the CA, by Resolution[6] dated April 1, 2004, denied the motion.

Bandag now comes before this Court with the present petition under Rule 45 raising the sole issue for resolution, rephrased as follows:

WHETHER OR NOT A VALIDLY AND LEGALLY SEPARATED EMPLOYEE MAY BE ENTITLED TO SEPARATION PAY.

The Court's Ruling

The labor arbiter resolved the issue in the affirmative, basing his award of separation pay mainly on the recommendation of the Employee Adjudication Committee and on the finding that Diasnes' dismissal was for a cause not constituting serious misconduct or reflective of his moral character. This ruling, as

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[5] *Id*. at 36-42. Penned by Associate Justice Conrado M. Vasquez, Jr. and concurred in by Associate Justices Mercedes Gozo-Dadole and Rosmari D. Carandang.

[6] *Id*. at 44.

earlier recited, was eventually reversed by the NLRC, but was subsequently reinstated by the CA.

Bandag excepts, claiming that separation pay could not and should not be granted based solely on the recommendation made by its adjudication committee. As Bandag explains, the recommendation was merely an offer which Diasnes did not accept, much less avail himself of. Alternatively, Bandag argues that the formula used by the labor arbiter to compute the separation pay, *i.e.*, 1 ½ month's pay per year of service instead of only one month's pay per year of service, is wrong.

Diasnes, arguing for the propriety of the grant of separation pay, states that, given his exemplary service with the company for ten (10) years, the ends of social and compassionate justice would best be served if he is awarded separation pay or financial assistance. Diasnes further states that other legally separated employees were also granted separation pay at the rate of 1 ½ month's salary per year of service.

The petition has merit.

We agree with Bandag that the report of its Employee Adjudication Committee recommending the grant to Diasnes of separation pay in case he opts to retire or voluntarily leave the company was merely in the nature of an offer. Contrary to the perception of the labor arbiter and the CA, the offer was not an open-ended arrangement which Diasnes was free to accept or reject when convenient.

As may be recalled, sometime in January 1996, Diasnes was asked by his superior to appear before the Employee Adjudication Committee to assess his performance during his tenure as the sales manager of Region VIII. It was at this time that the committee came up with the following recommendations: *first*, that Diasnes be relieved from his post as sales manager for three months, after which he may return to work with another position or function; and *second*, that if Diasnes would want to retire instead of availing himself of the first option, he would be granted retirement or separation pay. None of these recommendations, however, was availed of by Diasnes, as he instead asked to be

transferred to Cebu City and was accommodated. It was some 11 months after the committee made its recommendation and Bandag acceded to the request for transfer that Diasnes was dismissed from the service. It is fairly obvious that the committee's recommendations were superseded by Bandag's approval of Diasnes' request for transfer. Just as it is fairly obvious that the tender of separation was conditional on Diasnes severing his official relationship with the company on voluntary basis. In fine, what amounted to Bandag's offer for Diasnes to resign with separation pay was no longer open and effective at the time of his dismissal from service. Thus, the labor arbiter erred in invoking the committee's recommendation as basis for an award of separation pay.

We also agree with the NLRC's October 29, 1999 Decision where it held that Diasnes failed to prove that Bandag regularly grants separation pay to dismissed employees, as a policy, and without regard as to the cause of dismissal. Absent substantial proof to the contrary, we refuse to disturb the factual findings of the NLRC.

The labor arbiter also erred in awarding separation pay based on social justice.

Gabuay v. Oversea Paper Supply[7] defines separation pay as the amount that an employee receives at the time of his severance and is designed to provide the employee with the wherewithal during the period he is looking for another employment. In *San Miguel Corporation v. Lao*,[8] the Court held that the award of separation pay is authorized in the situations dealt with in Article 283 and Art. 284 of the Labor Code, but not in terminations of employment based on instances enumerated in Art. 282.[9] In *Eastern Paper Mills, Inc. v. NLRC*, this Court held that:

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[7] G.R. No. 148837, August 13, 2004, 436 SCRA 514, 519-520.

[8] G.R. Nos. 143136-37, July 11, 2002, 384 SCRA 504, 509-510.

[9] (a) Serious misconduct or willful disobedience of the lawful orders of the employer in connection with the employee's work; (b) Gross and habitual neglect; (c) Fraud or willful breach; (d) Commission of a crime by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and (e) Other analogous cases.

The only cases when separation pay shall be paid, although the employee was lawfully dismissed, are when the cause of termination was not attributable to the employee's fault but due to: (1) the installation of labor saving devices, (2) redundancy, (3) retrenchment, (4) cessation of employer's business, or (5) when the employee is suffering from a disease and his continued employment is prohibited by law or is prejudicial to his health and to the health of his co-employees (Articles 283 and 284, Labor Code.) Other than these cases, an employee who is dismissed for a just and lawful cause is not entitled to separation pay even if the award were to be called by another name.[10]

Separation pay is likewise awarded in lieu of reinstatement if reinstatement is no longer feasible, as when the relationship between the employer and employee has become strained.[11] Still, in some cases, separation pay or financial assistance may be extended as a measure of social justice. *PLDT v. NLRC* settled the matter on the award and amount of financial assistance or separation pay that may be awarded a legally separated employee based on social or compassionate justice. This Court held:

There should be no question that where it comes to such valid but not iniquitous causes as failure to comply with work standards, the grant of separation pay to the dismissed employee may be both just and compassionate, particularly if he has worked for some time with the company. For example, a subordinate who has irreconcilable policy or personal differences with his employer may be validly dismissed for demonstrated loss of confidence, which is an allowable ground. A working mother who has to be frequently absent because she also has to take care of her child may also be removed because of her poor attendance, this being another authorized ground. x x x Under these and similar circumstances, however, the award to the employee of separation pay would be sustainable under the social justice policy even if the separation is for cause.

But where the cause of the separation is more serious than mere inefficiency, the generosity of the law must be more discerning. There is no doubt it is compassionate to give separation pay to a salesman if he is dismissed for his inability to fill his quota but

[10] G.R. No. 85497, February 24, 1989, 170 SCRA 595, 597-598.

[11] *Gabuay v. Oversea Paper Supply, Inc.*, G.R. No. 148837, August 13, 2004, 436 SCRA 514, 520.

surely he does not deserve such generosity if his offense is misappropriation of the receipts of his sales. This is no longer mere incompetence but clear dishonesty. A security guard found sleeping on the job is doubtless subject to dismissal but may be allowed separation pay since his conduct, while inept, is not depraved. But if he was in fact not really sleeping but sleeping with a prostitute during his tour of duty and in the company premises, the situation is changed completely. This is not only inefficiency but immorality and the grant of separation pay would be entirely unjustified.

We hold that henceforth separation pay shall be allowed as a measure of social justice only in those instances where the employee is validly dismissed for causes other than serious misconduct or those reflecting on his moral character. Where the reason for the valid dismissal is, for example, habitual intoxication or an offense involving moral turpitude, like theft or illicit sexual relations with a fellow worker, the employer may not be required to give the dismissed employee separation pay, or financial assistance, or whatever other name it is called, on the ground of social justice.[12]

As may be noted, *PLDT* declared that separation pay or financial assistance should be denied a legally separated employee when the cause for dismissal is for an act constituting serious misconduct or that reflects on the employee's moral character. *PLDT*, however, did not go further to state that the grant or award of separation pay or financial assistance is automatically awarded when the dismissal is for a cause other than that contemplated in said case. This *PLDT* doctrine was later expanded in *Toyota Motors Phils. Corp. Workers Association v. National Labor Relations Commission* (*Toyota*), where we held that:

In all of the foregoing situations, the Court declined to grant termination pay because the causes for dismissal recognized under Art. 282 of the Labor Code were serious or grave in nature and attended by willful or wrongful intent or they reflected adversely on the moral character of the employees. **We, therefore, find that in addition to serious misconduct, in dismissals based on other grounds under Art. 282, like willful disobedience, gross and habitual neglect of duty, fraud or willful breach of trust, and commission of a crime against the employer or his family, separation pay should not be conceded to the dismissed employee.**

[12] No. 80609, August 23, 1988, 164 SCRA 671, 681-682.

In analogous causes for termination, like inefficiency, drug use, and others, the NLRC or the courts may opt to grant separation pay anchored on social justice in consideration of length of service of the employee, the amount involved, whether the act is the first offense, the performance of the employee and the like, using guideposts enunciated in PLDT on the propriety of the award of separation pay.[13] (Emphasis added.)

To reiterate our ruling in *Toyota*, labor adjudicatory officials and the CA must demur the award of separation pay based on social justice when an employee's dismissal is based on serious misconduct or willful disobedience; gross and habitual neglect of duty; fraud or willful breach of trust; or commission of a crime against the person of the employer or his immediate family—grounds under Art. 282[14] of the Labor Code that sanction dismissals of employees. They must be most judicious and circumspect in awarding separation pay or financial assistance as the constitutional policy to provide full protection to labor is not meant to be an instrument to oppress the employers. The commitment of the Court to the cause of labor should not embarrass us from sustaining the employers when they are right, as here. In fine, we should be more cautious in awarding financial assistance to the undeserving and those who are unworthy of the liberality of the law.

The attendant circumstances in the present case considered, we are constrained to deny Diasnes separation pay since the cause for the termination of his employment amounts to **gross and habitual neglect of his duties**. His repeated and continuous absences without prior leave and his frequent tardiness within the last two months prior to his dismissal exemplify his utter disregard for his employment and his employer's interest. Diasnes' character is also put into question if we take into consideration that he should have been dismissed as early as January 1996, if not for Bandag's benevolence and goodwill. It is unthinkable to award separation pay or financial assistance to an unworthy employee who exploited and took advantage of his employer's past generosity and accommodation.

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[13] G.R. Nos. 158798-99, October 19, 2007, 537 SCRA 172, 223.

[14] *Supra* note 9.

WHEREFORE, the assailed Decision dated June 18, 2003 of the CA in CA-G.R. SP No. 58916 is hereby *REVERSED* and *SET ASIDE* and the Resolution dated October 29, 1999 of the NLRC is hereby *REINSTATED.*

No costs.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Tinga, and *Brion, JJ.,* concur.

THIRD DIVISION

[G.R. No. 165359. July 14, 2008]

HONDA CARS MAKATI, INC., *petitioner, vs.* **COURT OF APPEALS and MICHAEL P. BASSI,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; PROPER REMEDY FOR APPELLATE COURT'S OUTRIGHT DISMISSAL OF PETITION FOR *CERTIORARI*.— That petitioner is assailing the Resolutions of the CA dismissing its petition outright, petitioner's resort to a petition for *certiorari* under Rule 65 is proper. In *Donato v. Court of Appeals*, we held: The proper recourse of an aggrieved party from a decision of the CA is a petition for review on *certiorari* under Rule 45 of the Rules of Court. However, if the error, subject of the recourse, is one of jurisdiction, or the act complained of was perpetrated by a court with grave abuse of discretion amounting to lack or excess of jurisdiction, the proper remedy available to the aggrieved party is a petition for *certiorari* under Rule 65 of the said Rules. As enunciated by the Court in *Fortich vs. Corona:* Anent the first issue, in order to determine whether the recourse of petitioners is proper or not, it is necessary to draw a line between an error of judgment and an error of jurisdiction. 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 where 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 in excess of jurisdiction. This error is correctible only by the extraordinary writ of *certiorari.* Inasmuch as the present petition principally assails the dismissal of the petition on ground of procedural flaws involving the jurisdiction of the court *a quo* to entertain the petition, it falls within the ambit of a special civil action for *certiorari* under Rule 65 of the Rules of Court.

2. ID.; LIBERAL APPLICATION OF THE RULES; FAILURE TO ATTACH REQUIRED PLEADINGS AND DOCUMENTS IN A PETITION, NOT SUFFICIENT GROUND TO DISMISS THE SAME; CASE AT BAR.— While the complaint, as well as the LA decision, is relevant to the petition, as petitioner assailed the NLRC decision which affirmed the LA's decision declaring private respondent's dismissal as illegal; petitioner's failure to append them in its petition is not fatal, since their contents could be found in petitioner's Notice and Memorandum on appeal filed with the NLRC. Petitioner's memorandum tackled and disputed each factual finding of the LA which was attached to the petition filed with the CA. The CA could determine from this document, together with the other pleadings filed, whether the petition for *certiorari* can make out a *prima facie* case. In *Molina v. Court of Appeals,* we held that failure to attach all pleadings and documents is not a sufficient ground to dismiss the petition. In appropriate cases, the courts may liberally construe procedural rules in order to meet and advance the cause of substantial justice. We have held that lapses in the literal observation of a procedural rule will be overlooked when they do not involve public policy, when they arose from an honest mistake or unforeseen accident, and when they have not prejudiced the adverse party or deprived the court of its authority. In this case, petitioners' failure to append the complaint and the LA decision does not touch on public policy; nor do they deprive the appellate court of its authority or prejudice or adversely affect the private respondent. Moreover, two days after petitioner's receipt of the CA Resolution dismissing its petition, it filed a Compliance and Motion for Reconsideration and for Admission of Attached Complaint and

LA Decision, which amounted to substantial compliance. Petitioner corrected the purported deficiency by submitting copies of the same.

3. ID.; ID.; ID.; SUBSEQUENT SUBMISSION OF REQUISITE DOCUMENTS CONSTITUTED SUBSTANTIAL COMPLIANCE WITH PROCEDURAL RULES.— In *Jaro v. Court of Appeals,* we held that the subsequent submission of requisite documents constituted substantial compliance with procedural rules, thus: There is ample jurisprudence holding that the subsequent and substantial compliance of an appellant may call for the relaxation of the rules of procedure. In *Cusi-Hernandez vs. Diaz and Piglas-Kamao vs. National Labor Relations Commission,* we ruled that the subsequent submission of the missing documents with the motion for reconsideration amounts to substantial compliance. The reasons behind the failure of the petitioners in these two cases to comply with the required attachments were no longer scrutinized. What we found noteworthy in each case was the fact that the petitioners therein substantially complied with the formal requirements. We ordered the remand of the petitions in these cases to the Court of Appeals, stressing the ruling that by precipitately dismissing the petitions the appellate court clearly put a premium on technicalities at the expense of a just resolution of the case. The same leniency should be applied to the instant case, considering that petitioner subsequently submitted with its motion for reconsideration the complaint as well as the LA decision. Petitioner had demonstrated willingness to comply with the requirements set by the rules.

4. ID.; ID.; JUSTIFIED BY SUBSTANTIAL JUSTICE.— While it is true that rules of procedure are intended to promote rather than frustrate the ends of justice, and the swift unclogging of court dockets is a laudable objective, they nevertheless must not be met at the expense of substantial justice. Time and again, this Court has reiterated the doctrine that the rules of procedure are mere tools intended to facilitate the attainment of justice, rather than frustrate it. A strict and rigid application of the rules must always be eschewed when it would subvert the primary objective of the rules; that is, to enhance fair trials and expedite justice. Technicalities should never be used to defeat the substantive rights of the other party. Every party-litigant must be afforded the amplest opportunity for the proper and just determination of his cause, free from the constraints of technicalities.

APPEARANCES OF COUNSEL

Mercedita S. Nolledo for petitioner.
Public Attorney's Office for private respondent.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.*:

Before us is a Petition for *Certiorari* under Rule 65 seeking to annul the Resolutions dated March 31, 2004[1] and August 3, 2004[2] issued by the Court of Appeals (CA) in CA-G.R. SP No. 82812.

Honda Cars Makati, Inc. (petitioner) is engaged in the sale and service of brand new Honda cars. Michael P. Bassi (private respondent) was employed by petitioner on September 2, 1996 as Tinsmith II until he became petitioner's car body repair leadman, a position in which he was given access to and was entrusted with tools and spare parts in petitioner's Body and Paint Shop (BPS) premises, particularly in the tinsmith crib room which he was tasked to maintain, with a monthly salary of ₱11,300.00.

On June 2, 2001, JT Abrazado (Abrazado), petitioner's BPS Service and Administration Supervisor, submitted an Incident Report regarding the pull-out of scrap parts from petitioner's premises. The Report narrated that on June 2, 2001, private respondent was seen with a certain Robert Maglalang (Maglalang), a scrap buyer of People's General Insurance Corporation, walking around petitioner's tinsmith crib area checking several units under repair. This crib room was a restricted area, as only authorized personnel were allowed therein. Private respondent hauled a box from the tinsmith crib room and handed it to Maglalang. Upon receiving the box from private respondent, Maglalang then instructed a certain Tony Cordova (Cordova)

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[1] Penned by Justice Juan Q. Enriquez, Jr. and concurred in by Justices Roberto A. Barrios and Fernanda Lampas Peralta; *rollo*, p. 20.

[2] *Id*. at 22.

of the City Service to pull out the box. Cordova then loaded the box in a pick-up driven by Noel Martinez, parts expediter, and they drove until they reached the area where Maglalang's L-300 van was parked. Cordova then unloaded the big box behind Maglalang's van. Maglalang then went to his van and opened its rear door, and when he was about to load the box in his van, Abrazado stopped him and asked for the gate pass but Maglalang could not present any. Thus, Abrazado called the attention of the guard officer in charge as well as Almario Afable, BPS Manager, who personally went to the area. The Incident Report also stated that initial investigation showed that the items enumerated in the material gate pass being signed by Afable while the big box was being pulled out were not similar with those of the parts in the big box; and that the items turned over by private respondent to Maglalang were not scrap parts for disposal but items with minimum damage and supposed to be stored in the recycled parts area.

Private respondent was made to explain in writing why no disciplinary action should be taken against him for the incident. He submitted his written explanation denying the accusation as without any truth and basis in fact. Private respondent attended and participated in the formal hearing conducted by the Investigation Committee.

In a Memorandum[3] dated June 14, 2001, private respondent was asked to explain the incident on June 8, 2001 regarding a spot inspection of his locker and personal belongings conducted in his presence which yielded different old and new tools and car spare parts.

On August 1, 2001, private respondent was served a Notice of Dismissal[4] dated July 20, 2001 for willful breach of management's trust and confidence based on the recommendation submitted by the Investigation Committee, thus:

On July 5, 2001, the Investigation Committee submitted its Investigation Report, finding and recommending as follows:

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[3] *Id*. at 28, Annex "D".

[4] *Id*. at 29.

> "Although Mike denied the allegation that he gave Mr. Maglalang the box nor connived with the guard-on-duty for the release of the parts/items without appropriate authorization/ documentation, it was evident that he played a significant part in the execution of a pre-conceived plan to pull out the said box for Mr. Maglalang's use and/or personal gain. This was established when he allowed Mr. Maglalang to survey the contents of the crib room and the workshop area despite the fact that he knew that both areas are considered restricted to authorized personnel only. Furthermore, he allowed Mr. Maglalang to instruct Tony Cordova of City Service to bring the box to the L300 van and pull out the said box without the required material gate pass. He was negligent of his duty for failing to ensure that all scrap materials are well disposed of to protect the company from individuals who would take advantage."

OFFENSE: Breach of Management's Trust and Confidence.
RECOMMENDED SANCTION: Termination[5]

Private respondent then filed with the Labor Arbiter (LA) a complaint for illegal dismissal, payment of incentive for perfect attendance for five years, and damages. Private respondent alleged that there was no valid cause for his dismissal; that the basis of petitioner's loss of trust and confidence must be real, not imaginary or out of fear; that there was no concrete basis for his dismissal; and that he had worked at his level best and often received commendations for his satisfactory performance.

In its Reply, petitioner argued that private respondent's attempt to commit qualified theft or pilferage in connivance with Maglalang, together with the spot inspection on private respondent's locker and shoe box, which yielded old and new tools and spare parts, created a reasonable ground for petitioner to believe that private respondent was involved in theft and pilferage of reusable items; that he could no longer be trusted, as his position gave him unhampered access to said items, thus, the decision to terminate him; and that his commendations referred to perfect health condition and attendance and an "extra mile" award in the name of service, but did not involve honesty and integrity matters.

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[5] *Id*.

On July 31, 2002, the LA rendered his Decision,[6] the dispositive portion of which reads:

> WHEREFORE, premises considered, judgment is entered FINDING respondent company to have illegally dismissed complainant thus, ORDERING it to reinstate him to his former position without loss of seniority rights and privileges and to pay him full backwages inclusive of 13th month pay, leave benefits and/or 5-day SILP per year of service, allowances and to his other benefits or their monetary equivalent reckoned from date of illegal dismissal on 20 July 2001 until actually reinstated, tentatively computed as basic salary ₱135,600.00 (₱11,300.00 x 12 months), plus 13th month pay ₱11,300.00 (1/12 of basic salary), plus 5 day SILP of ₱1,883.00 (₱11,300.00/30 days x 5), total as of date of this decision to ₱148,783.33.
>
> All other claims of complainant are dismissed for lack of merit.[7]

The LA found that the fact that private respondent was seen incidentally in the company of Maglalang and that he was seen by his immediate superior Abrazado as the one who took the subject box from the tinsmith crib room, where all the replaced parts were kept, and handed it to Maglalang, was not the kind of substantial evidence that would lead to a reasonable conclusion that private respondent was indeed in complicity in the attempt to take out the unauthorized contents of the box from the premises; these pieces of evidence are not direct, but mere suppositions and conjectures.

The LA further found that on June 4, 2001, private respondent was authorized by Manager Afable to go to the dismantled parts storage room to determine which scrap materials may be disposed and those which may be reused; that if ever private respondent erred in his determination as to the scrap items, since Abrazado declared that the contents of the box were only of "minimum damage" and ought not to have been disposed of, such could not be immediately attributed to him as his supposed complicity in the attempted theft; and that even if the contents of the box varied with the contents listed in the gate pass submitted for

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[6] *Id.* at 125-130; penned by Labor Arbiter Renaldo O. Hernandez.

[7] *Id.* at 130.

the approval of Afable, it was not private respondent who made the gate pass or the one charged to do the inspection/inventory and listing of items for gate pass purposes. The LA concluded that it would be incredible to believe that private respondent would just destroy his track record of exemplary performance and promotions, as there was no proven past offense of similar nature.

On appeal, the National Labor Relations Commission (NLRC) in its Decision[8] dated October 21, 2003 dismissed the appeal and affirmed the LA decision.

The NLRC found that although petitioner averred that Abrazado actually saw private respondent hand the box to Maglalang to prove private respondent's direct complicity in the attempt to pull out a box containing reusable parts from petitioner's premises, Abrazado's averment was not supported by his affidavit; that under the NLRC rules, the affidavit of witnesses shall take the place of the latter's direct testimony; thus, failure to present his direct testimony in the form of affidavit made his averment hearsay, which cannot be considered as evidence; that private respondent's alleged breach of duty when he gave out a box containing items that were not scrap parts for disposal, anchored on the presumption that said box was indeed handed by private respondent to Maglalang, was not proven since the only evidence respecting this factual averment was also the hearsay testimony of Abrazado.

The NLRC also found that even the report submitted by petitioner's Investigation Committee did not categorically state that private respondent handed any box to Maglalang; that the Committee's finding that private respondent allowed Maglalang to walk around the crib room and workshop areas despite the fact that said place was considered restricted did not prove that private respondent knew of Maglalang's intention to pull out a box of allegedly reusable parts; and that the Committee's finding that private respondent allowed the pulling out of the box without a gate pass was not proven, as no evidence was shown that

[8] *Id.* at 45-52; Penned by Lourdes C. Javier, Presiding Commissioner, concurred in by Commissioners Ernesto C. Verceles and Tito F. Genilo.

it was part of private respondent's duty to prepare or even oversee the preparation of the gate pass.

The NLRC denied petitioner's motion for reconsideration in a Resolution[9] dated December 15, 2003.

Petitioner filed with the CA a petition for *certiorari* assailing the NLRC ruling. On March 31, 2004, the CA issued its assailed resolution as follows:

> A perusal of the Petition for *Certiorari* at bar reveals that petitioner did not append the Complaint and Decision dated July 3, 2002 of the Labor Arbiter. Section 1, Rule 65 of the 1997 Rules of Civil Procedure, as amended, which governs petitions of this nature requires that the instant petition shall be accompanied by copies of all the pleadings and documents relevant and pertinent thereto and undoubtedly, the aforementioned Complaint and Decision dated July 3, 2002 are material and relevant to the resolution of the instant petition. The petition being fatally defective, the same must fail.[10]

Petitioner subsequently filed a Compliance and Motion for Reconsideration and for Admission of Attached Complaint and Decision, which was denied by the CA in its Resolution dated August 3, 2004.

Hence, herein petition on the following grounds:

I. THE HONORABLE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN DISMISSING HCMI'S PETITION AND IN SUBSEQUENTLY DENYING HCMI'S MOTION FOR RECONSIDERATION OF THE RESOLUTION OF DISMISSAL;

II. THE HONORABLE NLRC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN (A) HOLDING THAT THE FAILURE OF HCMI TO PRESENT THE DIRECT TESTIMONY OF ABRAZADO, IN THE FORM OF AFFIDAVIT, MAKES HCMI'S AVERMENT ABOUT BASSI'S COMPLICITY IN THE PILFERAGE HEARSAY; (B) DISMISSING HCMI'S APPEAL AND AFFIRMING THE LABOR

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[9] *Id.* at 60.

[10] *Id.* at 20.

ARBITER'S DECISION; AND (C) DENYING HCMI'S MOTION FOR RECONSIDERATION.

Petitioner contends that the CA gravely abused its discretion in dismissing the petition for its failure to append the complaint and the LA decision to its petition, which was irrelevant to the issue raised in its petition; that petitioner was only assailing the NLRC decision as well as its Resolution denying petitioner's motion for reconsideration, which documents were attached to the petition; and that its submission of copies of the complaint and the LA decision, with its motion for reconsideration, should be considered substantial compliance.

Preliminarily, we note that petitioner filed the instant petition for *certiorari* under Rule 65 instead of a petition for review under Rule 45. Considering, however, that petitioner is assailing the Resolutions of the CA dismissing its petition outright, petitioner's resort to a petition for *certiorari* under Rule 65 is proper.[11]

In *Donato v. Court of Appeals*,[12] we held:

> The proper recourse of an aggrieved party from a decision of the CA is a petition for review on *certiorari* under Rule 45 of the Rules of Court. However, if the error, subject of the recourse, is one of jurisdiction, or the act complained of was perpetrated by a court with grave abuse of discretion amounting to lack or excess of jurisdiction, the proper remedy available to the aggrieved party is a petition for *certiorari* under Rule 65 of the said Rules. As enunciated by the Court in *Fortich vs. Corona*:
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> > Anent the first issue, in order to determine whether the recourse of petitioners is proper or not, it is necessary to draw a line between an error of judgment and an error of jurisdiction. 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 where 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

[11] See *Lim v. Court of Appeals*, G.R. No. 149748, November 16, 2006, 507 SCRA 38, 49-50.

[12] 462 Phil. 676 (2003).

tantamount to lack or in excess of jurisdiction. This error is correctible only by the extraordinary writ of *certiorari*.

Inasmuch as the present petition principally assails the dismissal of the petition on ground of procedural flaws involving the jurisdiction of the court *a quo* to entertain the petition, it falls within the ambit of a special civil action for *certiorari* under Rule 65 of the Rules of Court.[13]

While the complaint, as well as the LA decision, is relevant to the petition, as petitioner assailed the NLRC decision which affirmed the LA's decision declaring private respondent's dismissal as illegal; petitioner's failure to append them in its petition is not fatal, since their contents could be found in petitioner's Notice and Memorandum on appeal filed with the NLRC. Petitioner's memorandum tackled and disputed each factual finding of the LA which was attached to the petition filed with the CA. The CA could determine from this document, together with the other pleadings filed, whether the petition for *certiorari* can make out a *prima facie* case.

In *Molina v. Court of Appeals*,[14] we held that failure to attach all pleadings and documents is not a sufficient ground to dismiss the petition. In appropriate cases, the courts may liberally construe procedural rules in order to meet and advance the cause of substantial justice.[15] We have held that lapses in the literal observation of a procedural rule will be overlooked when they do not involve public policy, when they arose from an honest mistake or unforeseen accident, and when they have not prejudiced the adverse party or deprived the court of its authority.[16]

In this case, petitioners' failure to append the complaint and the LA decision does not touch on public policy; nor do they deprive the appellate court of its authority or prejudice or adversely affect the private respondent.

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[13] *Id*. at 687-688.

[14] 443 Phil. 123 (2003).

[15] *Id*. at 130-131, citing *Republic of the Philippines v. Court of Appeals*, 343 Phil. 428, 436 (1997).

[16] *Id*. at 131, citing *Case and Nantz v. Jugo*, 77 Phil. 517, 522 (1946).

Moreover, two days after petitioner's receipt of the CA Resolution dismissing its petition, it filed a Compliance and Motion for Reconsideration and for Admission of Attached Complaint and LA Decision, which amounted to substantial compliance. Petitioner corrected the purported deficiency by submitting copies of the same. However, despite such submission, the CA still denied petitioner's motion.

In *Jaro v. Court of Appeals*,[17] we held that the subsequent submission of requisite documents constituted substantial compliance with procedural rules, thus:

> There is ample jurisprudence holding that the subsequent and substantial compliance of an appellant may call for the relaxation of the rules of procedure. In *Cusi-Hernandez vs. Diaz* and *Piglas-Kamao vs. National Labor Relations Commission*, we ruled that the subsequent submission of the missing documents with the motion for reconsideration amounts to substantial compliance. The reasons behind the failure of the petitioners in these two cases to comply with the required attachments were no longer scrutinized. What we found noteworthy in each case was the fact that the petitioners therein substantially complied with the formal requirements. We ordered the remand of the petitions in these cases to the Court of Appeals, stressing the ruling that by precipitately dismissing the petitions the appellate court clearly put a premium on technicalities at the expense of a just resolution of the case.[18]

The same leniency should be applied to the instant case, considering that petitioner subsequently submitted with its motion for reconsideration the complaint as well as the LA decision. Petitioner has demonstrated willingness to comply with the requirements set by the rules.

While it is true that rules of procedure are intended to promote rather than frustrate the ends of justice, and the swift unclogging of court dockets is a laudable objective, they nevertheless must not be met at the expense of substantial justice.[19] Time and again,

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[17] 427 Phil. 532 (2002).

[18] *Id.* at 547.

[19] *Philippine Amusement and Gaming Corporation v. Angara*, G.R. No. 142937, November 15, 2005, 475 SCRA 41, 53, citing *Wack Wack Golf*

this Court has reiterated the doctrine that the rules of procedure are mere tools intended to facilitate the attainment of justice, rather than frustrate it. A strict and rigid application of the rules must always be eschewed when it would subvert the primary objective of the rules; that is, to enhance fair trials and expedite justice. Technicalities should never be used to defeat the substantive rights of the other party. Every party-litigant must be afforded the amplest opportunity for the proper and just determination of his cause, free from the constraints of technicalities.[20]

Thus, in dismissing the petition for *certiorari*, we find that the CA had committed grave abuse of discretion amounting to lack of jurisdiction in putting a premium on technicalities at the expense of a just resolution of the case.

Petitioner's claim that the NLRC committed grave abuse of discretion in holding that the failure of petitioner to present the direct testimony of Abrazado in the form of an affidavit made petitioner's averment about private respondent's complicity in the pilferage hearsay, since cases may be decided on the basis of verified position papers of the parties, accompanied by affidavits of witnesses and such other authentic documents as are relevant; that Abrazado's Incident Report attached to its position paper filed with the LA stated that private respondent handed over a big box to Maglalang; that such Report was made in Abrazado's professional capacity in the performance of his duty and in the ordinary course of business or duty; that the NLRC should have upheld private respondent's dismissal on at least two grounds, namely, loss of trust and confidence, and willful disobedience or insubordination, cannot be resolved in the present petition for *certiorari* as they are best addressed to the CA for proper resolution in CA-G.R. SP No. 82812.

WHEREFORE, the petition is *GRANTED*. The Resolutions dated March 31, 2004 and August 3, 2004 of the Court of

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and Country Club v. National Labor Relations Commission, G.R. No. 149793, April 15, 2005, 456 SCRA 280, 294; *General Milling Corporation v. National Labor Relations Commission,* 442 Phil. 425, 428 (2002).

[20] *Philippine Amusement and Gaming Corporation v. Angara, supra* note 19, at 53.

Appeals in CA-G.R. SP No. 82812 are *REVERSED* and *SET ASIDE*. The case is *REMANDED* to the Court of Appeals for proper disposition of CA-G.R. SP No. 82812.

SO ORDERED.

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

SECOND DIVISION

[G.R. No. 165565. July 14, 2008]

SCHOOL OF THE HOLY SPIRIT OF QUEZON CITY and/or SR. CRISPINA A. TOLENTINO, S.Sp.S., *petitioners, vs.* **CORAZON P. TAGUIAM,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; QUESTION OF FACT, NOT PROPER; EXCEPTIONS; CONTRAST IN FACTUAL FINDINGS BETWEEN THE LABOR COURTS AND THE COURT OF APPEALS IN CASE AT BAR.— The issue of whether a party is negligent is a question of fact. As a rule, the Supreme Court is not a trier of facts and this applies with greater force in labor cases. However, where the issue is shrouded by a conflict of factual perception, we are constrained to review the factual findings of the Court of Appeals. In this case, the findings of facts of the appellate court contradict those of the Labor Arbiter and the NLRC.

2. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; DISMISSAL; GROUNDS; GROSS AND HABITUAL NEGLECT OF DUTIES, PRESENT.— Under Article 282 of the Labor Code, gross and habitual neglect of duties

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* In lieu of Justice Minita V. Chico-Nazario per Special Order No. 508 dated June 25, 2008.

is a valid ground for an employer to terminate an employee. Gross negligence implies a want or absence of or a failure to exercise slight care or diligence, or the entire absence of care. It evinces a thoughtless disregard of consequences without exerting any effort to avoid them. Habitual neglect implies repeated failure to perform one's duties for a period of time, depending upon the circumstances.

3. ID.; ID.; ID.; ID.; GROSS, ALTHOUGH NOT HABITUAL, NEGLECT OF DUTY AS SUFFICIENT CAUSE TO DISMISS EMPLOYEE.— Respondent's negligence, although gross, was not habitual. In view of the considerable resultant damage, however, we are in agreement that the cause is sufficient to dismiss respondent. This is not the first time that we have departed from the requirements laid down by the law that neglect of duties must be both gross and habitual. In *Philippine Airlines, Inc. v. NLRC*, we ruled that Philippine Airlines (PAL) cannot be legally compelled to continue with the employment of a person admittedly guilty of gross negligence in the performance of his duties although it was his first offense. In that case, we noted that a mere delay on PAL's flight schedule due to aircraft damage entails problems like hotel accommodations for its passengers, re-booking, the possibility of law suits, and payment of special landing fees not to mention the soaring costs of replacing aircraft parts. In another case, *Fuentes v. National Labor Relations Commission*, we held that it would be unfair to compel Philippine Banking Corporation to continue employing its bank teller. In that case, we observed that although the teller's infraction was not habitual, a substantial amount of money was lost. The deposit slip had already been validated prior to its loss and the amount reflected thereon is already considered as current liabilities in the bank's balance sheet. Indeed, the sufficiency of the evidence as well as the resultant damage to the employer should be considered in the dismissal of the employee. In this case, the damage went as far as claiming the life of a child.

4. ID.; ID.; ID.; ID.; LOSS OF TRUST AND CONFIDENCE, ELUCIDATED; PRESENT IN CASE AT BAR.— As a result of gross negligence in the present case, petitioners lost its trust and confidence in respondent. Loss of trust and confidence to be a valid ground for dismissal must be based on a willful breach of trust and founded on clearly established facts. A breach is willful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done

carelessly, thoughtlessly, heedlessly or inadvertently. Otherwise stated, it must rest on substantial grounds and not on the employer's arbitrariness, whims, caprices or suspicion; otherwise, the employee would eternally remain at the mercy of the employer. It should be genuine and not simulated; nor should it appear as a mere afterthought to justify earlier action taken in bad faith or a subterfuge for causes which are improper, illegal or unjustified. It has never been intended to afford an occasion for abuse because of its subjective nature. There must, therefore, be an actual breach of duty committed by the employee which must be established by substantial evidence. As a teacher who stands *in loco parentis* to her pupils, respondent should have made sure that the children were protected from all harm while in her company. Respondent should have known that leaving the pupils in the swimming pool area all by themselves may result in an accident. A simple reminder "not to go to the deepest part of the pool" was insufficient to cast away all the serious dangers that the situation presented to the children, especially when respondent knew that Chiara Mae cannot swim. Dismally, respondent created an unsafe situation which exposed the lives of all the pupils concerned to real danger. This is a clear violation not only of the trust and confidence reposed on her by the parents of the pupils but of the school itself.

APPEARANCES OF COUNSEL

Froilan M. Bacuñgan & Associates for petitioners.
Efren C. Carag for respondent.

D E C I S I O N

QUISUMBING, *J.*:

This petition assails the Decision[1] dated June 7, 2004 of the Court of Appeals in CA-G.R. SP No. 81480, which reversed the Resolution[2] dated September 20, 2002 of the National Labor

[1] *Rollo*, pp. 23-34. Penned by Associate Justice Vicente Q. Roxas, with Associate Justices Romeo A. Brawner and Juan Q. Enriquez, Jr. concurring.

[2] *Id*. at 62-66.

Relations Commission (NLRC) in NLRC NCR CA No. 031627-02. The NLRC had affirmed the Decision[3] dated March 26, 2002 of the Labor Arbiter dismissing respondent's complaint for illegal dismissal. This petition likewise assails the Resolution[4] dated September 30, 2004 of the Court of Appeals denying petitioners' motion for reconsideration.

The antecedent facts are as follows:

Respondent Corazon P. Taguiam was the Class Adviser of Grade 5-Esmeralda of the petitioner, School of the Holy Spirit of Quezon City. On March 10, 2000, the class president, wrote a letter[5] to the grade school principal requesting permission to hold a year-end celebration at the school grounds. The principal authorized the activity and allowed the pupils to use the swimming pool. In this connection, respondent distributed the parent's/guardian's permit forms to the pupils.

Respondent admitted that Chiara Mae Federico's permit form[6] was unsigned. Nevertheless, she concluded that Chiara Mae was allowed by her mother to join the activity since her mother personally brought her to the school with her packed lunch and swimsuit.

Before the activity started, respondent warned the pupils who did not know how to swim to avoid the deeper area. However, while the pupils were swimming, two of them sneaked out. Respondent went after them to verify where they were going.

Unfortunately, while respondent was away, Chiara Mae drowned. When respondent returned, the maintenance man was already administering cardiopulmonary resuscitation on Chiara Mae. She was still alive when respondent rushed her to the General Malvar Hospital where she was pronounced dead on arrival.

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[3] Records, pp. 171-192.

[4] *Rollo*, pp. 36-37. Penned by Associate Justice Vicente Q. Roxas, with Associate Justices Salvador J. Valdez, Jr. and Juan Q. Enriquez, Jr. concurring.

[5] Records, p. 28.

[6] CA *rollo,* p. 104.

On May 23, 2000, petitioners issued a Notice of Administrative Charge[7] to respondent for alleged gross negligence and required her to submit her written explanation. Thereafter, petitioners conducted a clarificatory hearing which respondent attended. Respondent also submitted her Affidavit of Explanation.[8]

On July 31, 2000, petitioners dismissed respondent on the ground of gross negligence resulting to loss of trust and confidence.[9] Meanwhile, Chiara Mae's parents filed a ₱7 Million damage suit against petitioners and respondent, among others. They also filed against respondent a criminal complaint for reckless imprudence resulting in homicide.

On July 25, 2001, respondent in turn filed a complaint[10] against the school and/or Sr. Crispina Tolentino for illegal dismissal, with a prayer for reinstatement with full backwages and other money claims, damages and attorney's fees.

In dismissing the complaint, the Labor Arbiter declared that respondent was validly terminated for gross neglect of duty. He opined that Chiara Mae drowned because respondent had left the pupils without any adult supervision. He also noted that the absence of adequate facilities should have alerted respondent before allowing the pupils to use the swimming pool. The Labor Arbiter further concluded that although respondent's negligence was not habitual, the same warranted her dismissal since death resulted therefrom.

Respondent appealed to the NLRC which, however, affirmed the dismissal of the complaint.

Aggrieved, respondent instituted a petition for *certiorari* before the Court of Appeals, which ruled in her favor. The appellate court observed that there was insufficient proof that respondent's negligence was both gross and habitual. The Court of Appeals disposed, thus:

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[7] *Id*. at 84-85.

[8] *Id*. at 86-89.

[9] *Id*. at 90-92.

[10] Records, p. 2.

WHEREFORE, … the Court hereby **GRANTS** the petition. The assailed September 20, 2002 Resolution of the National Labor Relations Commission entitled *Corazon Taguiam vs. School of the Holy Spirit and/or Sister Crispina Tolentino[,] NLRC NCR Case No. 00-07-03877-01[,] NLRC NCR CA No. 031627-02* is hereby **REVERSED** and **SET ASIDE**, and a new one is hereby **ENTERED** directing the private respondent the School of the Holy Spirit to:

(1) Pay the petitioner full backwages, plus all other benefits, bonuses and general increases to which she would have been normally entitled, had she not been dismissed and had she not been forced to stop working computed up to the finality of this decision;

(2) Pay the petitioner separation pay equivalent to one (1) month for every year of service in addition to full backwages;

(3) Pay the petitioner an amount equivalent to 10% of the judgment award as attorney's fees;

(4) Pay the cost of this suit.

SO ORDERED.[11]

In this petition, petitioners contend that the Court of Appeals erred in:

… REVERSING AND SETTING ASIDE THE DECISION AND RESOLUTION OF THE NATIONAL LABOR RELATIONS COMMISSION AFFIRMING THE DECISION OF THE LABOR ARBITER DISMISSING THE COMPLAINT FOR LACK OF MERIT.[12]

Simply stated, the sole issue presented for our resolution is whether respondent's dismissal on the ground of gross negligence resulting to loss of trust and confidence was valid.

The issue of whether a party is negligent is a question of fact. As a rule, the Supreme Court is not a trier of facts and this applies with greater force in labor cases.[13] However, where the issue is shrouded by a conflict of factual perception, we are

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[11] *Rollo,* p. 33.

[12] *Id.* at 15.

[13] *Tres Reyes v. Maxim's Tea House*, G.R. No. 140853, February 27, 2003, 398 SCRA 288, 298.

constrained to review the factual findings of the Court of Appeals. In this case, the findings of facts of the appellate court contradict those of the Labor Arbiter and the NLRC.[14]

Under Article 282[15] of the Labor Code, gross and habitual neglect of duties is a valid ground for an employer to terminate an employee. Gross negligence implies a want or absence of or a failure to exercise slight care or diligence, or the entire absence of care. It evinces a thoughtless disregard of consequences without exerting any effort to avoid them.[16] Habitual neglect implies repeated failure to perform one's duties for a period of time, depending upon the circumstances.[17]

Our perusal of the records leads us to conclude that respondent had been grossly negligent. *First*, it is undisputed that Chiara Mae's permit form was unsigned. Yet, respondent allowed her to join the activity because she assumed that Chiara Mae's mother has allowed her to join it by personally bringing her to the school with her packed lunch and swimsuit.

The purpose of a permit form is precisely to ensure that the parents have allowed their child to join the school activity

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[14] *Go v. Court of Appeals*, G.R. No. 158922, May 28, 2004, 430 SCRA 358, 365.

[15] **ART. 282.** ***Termination by employer.*** **-** An employer may terminate an employment for any of the following causes:

a. Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;

b. Gross and habitual neglect by the employee of his duties;

c. Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;

d. Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and

e. Other causes analogous to the foregoing.

[16] *Manila Memorial Park Cemetery, Inc. v. Panado*, G.R. No. 167118, June 15, 2006, 490 SCRA 751, 770.

[17] *Premiere Development Bank v. Mantal*, G.R. No. 167716, March 23, 2006, 485 SCRA 234, 239.

involved. Respondent cannot simply ignore this by resorting to assumptions. Respondent admitted that she was around when Chiara Mae and her mother arrived. She could have requested the mother to sign the permit form before she left the school or at least called her up to obtain her conformity.

Second, it was respondent's responsibility as Class Adviser to supervise her class in all activities sanctioned by the school.[18] Thus, she should have coordinated with the school to ensure that proper safeguards, such as adequate first aid and sufficient adult personnel, were present during their activity. She should have been mindful of the fact that with the number of pupils involved, it would be impossible for her by herself alone to keep an eye on each one of them.

As it turned out, since respondent was the only adult present, majority of the pupils were left unsupervised when she followed the two pupils who sneaked out. In the light of the odds involved, respondent should have considered that those who sneaked out could not have left the school premises since there were guards manning the gates. The guards would not have allowed them to go out in their swimsuits and without any adult accompanying them. But those who stayed at the pool were put at greater risk, when she left them unattended by an adult.

Notably, respondent's negligence, although gross, was not habitual. In view of the considerable resultant damage, however, we are in agreement that the cause is sufficient to dismiss respondent. This is not the first time that we have departed from the requirements laid down by the law that neglect of duties must be both gross and habitual. In *Philippine Airlines, Inc. v. NLRC*,[19] we ruled that Philippine Airlines (PAL) cannot be legally compelled to continue with the employment of a person admittedly guilty of gross negligence in the performance of his duties although it was his first offense. In that case, we noted that a mere delay on PAL's flight schedule due to aircraft damage entails problems like hotel accommodations for its passengers, re-booking, the possibility of law suits, and payment of special

[18] Records, p. 104.

[19] G.R. No. 82471, February 18, 1991, 194 SCRA 139.

landing fees not to mention the soaring costs of replacing aircraft parts.[20] In another case, *Fuentes v. National Labor Relations Commission*,[21] we held that it would be unfair to compel Philippine Banking Corporation to continue employing its bank teller. In that case, we observed that although the teller's infraction was not habitual, a substantial amount of money was lost. The deposit slip had already been validated prior to its loss and the amount reflected thereon is already considered as current liabilities in the bank's balance sheet.[22] Indeed, the sufficiency of the evidence as well as the resultant damage to the employer should be considered in the dismissal of the employee. In this case, the damage went as far as claiming the life of a child.

As a result of gross negligence in the present case, petitioners lost its trust and confidence in respondent. Loss of trust and confidence to be a valid ground for dismissal must be based on a willful breach of trust and founded on clearly established facts. A breach is willful if it is done intentionally, knowingly and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently.[23] Otherwise stated, it must rest on substantial grounds and not on the employer's arbitrariness, whims, caprices or suspicion; otherwise, the employee would eternally remain at the mercy of the employer. It should be genuine and not simulated; nor should it appear as a mere afterthought to justify earlier action taken in bad faith or a subterfuge for causes which are improper, illegal or unjustified. It has never been intended to afford an occasion for abuse because of its subjective nature. There must, therefore, be an actual breach of duty committed by the employee which must be established by substantial evidence.[24]

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[20] *Id*. at 144.

[21] No. 75955, October 28, 1988, 166 SCRA 752.

[22] *Id*. at 757-758.

[23] *National Bookstore, Inc. v. Court of Appeals*, G.R. No. 146741, February 27, 2002, 378 SCRA 194, 202-203.

[24] *Manila Memorial Park Cemetery, Inc. v. Panado*, *supra* note 16 at 768; *Dela Cruz v. National Labor Relations Commission*, G.R. No. 119536, February 17, 1997, 268 SCRA 458, 470.

As a teacher who stands *in loco parentis* to her pupils, respondent should have made sure that the children were protected from all harm while in her company.[25] Respondent should have known that leaving the pupils in the swimming pool area all by themselves may result in an accident. A simple reminder "not to go to the deepest part of the pool"[26] was insufficient to cast away all the serious dangers that the situation presented to the children, especially when respondent knew that Chiara Mae cannot swim.[27] Dismally, respondent created an unsafe situation which exposed the lives of all the pupils concerned to real danger. This is a clear violation not only of the trust and confidence reposed on her by the parents of the pupils but of the school itself.

Finally, we note that based on the criminal complaint filed by Chiara Mae's parents, the Assistant City Prosecutor found probable cause to indict respondent for the crime of reckless imprudence resulting in homicide. The Assistant City Prosecutor held that respondent "should have foreseen the danger lurking in the waters." By leaving her pupils in the swimming pool, respondent displayed an "inexcusable lack of foresight and precaution."[28] While this finding is not controlling for purposes of the instant case, this only supports our conclusion that respondent has indeed been grossly negligent.

All told, there being a clear showing that respondent was culpable for gross negligence resulting to loss of trust and confidence, her dismissal was valid and legal. It was error for the Court of Appeals to reverse and set aside the resolution of the NLRC.

WHEREFORE, the petition is *GRANTED*. The assailed Decision dated June 7, 2004 of the Court of Appeals in CA-G.R. SP No. 81480 is *SET ASIDE*. The Resolution dated September 20, 2002 of the National Labor Relations Commission

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[25] *Ylarde v. Aquino*, No. L-33722, July 29, 1988, 163 SCRA 697, 704.

[26] CA *rollo*, p. 87.

[27] *Id*.

[28] Records, pp. 85-86.

in NLRC NCR CA No. 031627-02 is *REINSTATED*. No pronouncement as to costs.

SO ORDERED.

Carpio Morales, Tinga, Velasco, Jr., and *Brion, JJ.,* concur.

THIRD DIVISION

[G.R. No. 166097. July 14, 2008]

BOARD OF MEDICINE, DR. RAUL FLORES (now DR. JOSE S. RAMIREZ), in his capacity as Chairman of the Board, PROFESSIONAL REGULATION COMMISSION, through its Chairman, HERMOGENES POBRE (now DR. ALCESTIS M. GUIANG), *petitioners, vs.* **YASUYUKI OTA,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PROFESSIONAL REGULATION COMMISSION (PRC); LICENSE TO PRACTICE MEDICINE; REGULATION THEREOF MUST NOT BE EXERCISED IN AN ARBITRARY MANNER.— There is no question that a license to practice medicine is a privilege or franchise granted by the government. It is a right that is earned through years of education and training, and which requires that one must first secure a license from the state through professional board examinations. Indeed, "[T]he *regulation of the practice of medicine* in all its branches has long been recognized as a reasonable method of protecting the health and safety of the public. That the power to regulate and control the practice of medicine includes the power to regulate admission to the ranks of those authorized to practice medicine, is also well recognized. Thus, legislation and administrative regulations requiring those who wish to practice medicine first *to take and pass medical board examinations* have long ago been recognized as valid exercises of governmental power. Similarly, the establishment of minimum

medical educational requirements — *i.e.,* the completion of prescribed courses in a recognized medical school — for admission to the medical profession, has also been sustained as a legitimate exercise of the regulatory authority of the state." It must be stressed however that the power to regulate the exercise of a profession or pursuit of an occupation cannot be exercised by the State or its agents in an arbitrary, despotic, or oppressive manner. A political body which regulates the exercise of a particular privilege has the authority to both forbid and grant such privilege in accordance with certain conditions. As the legislature cannot validly bestow an arbitrary power to grant or refuse a license on a public agency or officer, courts will generally strike down license legislation that vests in public officials discretion to grant or refuse a license to carry on some ordinarily lawful business, profession, or activity without prescribing definite rules and conditions for the guidance of said officials in the exercise of their power.

2. ID.; ID.; ID.; ID.; FOR FOREIGNERS, THEY ARE REQUIRED TO SUBMIT CERTIFIED EVIDENCE THAT THEIR COUNTRY ALLOWS FILIPINOS TO PRACTICE MEDICINE IN THEIR COUNTRY.— R.A. No. 2382 otherwise known as the Medical Act of 1959 states in Section 9 thereof that: Section 9. *Candidates for Board Examinations*. — Candidates for Board examinations shall have the following qualifications: 1. He shall be a citizen of the Philippines or a citizen of any foreign country who has submitted competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs, showing that his country's existing laws permit citizens of the Philippines to practice medicine under the same rules and regulations governing citizens thereof; x x x Presidential Decree (P.D.) No. 223 also provides in Section (j) thereof that: j) The [Professional Regulation] Commission may, upon the recommendation of the Board concerned, approve the registration of and authorize the issuance of a certificate of registration with or without examination to a foreigner who is registered under the laws of his country: Provided, That the requirement for the registration or licensing in said foreign state or country are substantially the same as those required and contemplated by the laws of the Philippines and that the laws of such foreign state or country allow the citizens of the Philippines to practice the profession on the same basis and

grant the same privileges as the subject or citizens of such foreign state or country: Provided, finally, That the applicant shall submit competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs, showing that his country's existing laws permit citizens of the Philippines to practice the profession under the rules and regulations governing citizens thereof. The Commission is also hereby authorized to prescribe additional requirements or grant certain privileges to foreigners seeking registration in the Philippines if the same privileges are granted to or some additional requirements are required of citizens of the Philippines in acquiring the same certificates in his country.

3. ID.; ID.; ID.; ID.; ID.; EXPANDING THE REQUIREMENT AS IN CASE AT BAR, NOT WARRANTED.— Section (j) of P.D. No. 223 defines the extent of PRC's power to grant licenses, *i.e.,* it may, upon recommendation of the board, approve the registration and authorize the issuance of a certificate of registration with or without examination to a foreigner who is registered under the laws of his country, provided the following conditions are met: (1) that the requirement for the registration or licensing in said foreign state or country are substantially the same as those required and contemplated by the laws of the Philippines; (2) that the laws of such foreign state or country allow the citizens of the Philippines to practice the profession on the same basis and grant the same privileges as the subject or citizens of such foreign state or country; and (3) that the applicant shall submit competent and conclusive documentary evidence, confirmed by the DFA, showing that his country's existing laws permit citizens of the Philippines to practice the profession under the rules and regulations governing citizens thereof. The said provision further states that the PRC is authorized to prescribe additional requirements or grant certain privileges to foreigners seeking registration in the Philippines *if* the same privileges are granted to or some additional requirements are required of citizens of the Philippines in acquiring the same certificates in his country. Nowhere in said statutes is it stated that the foreign applicant must show that the conditions for the practice of medicine in said country are *practical* and *attainable* by Filipinos. Neither is it stated that it must first be proven that a Filipino has been granted license and allowed to practice his profession in said country

> before a foreign applicant may be given license to practice in the Philippines. [T]he applicant shall submit] competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs, showing that his country's existing laws *permit* citizens of the Philippines to practice the profession [of medicine] under the [same] rules and regulations governing citizens thereof. x x x It is enough that the laws in the foreign country *permit* a Filipino to get license and practice therein. Requiring respondent to prove first that a Filipino has already been granted license and is actually practicing therein unduly expands the requirements provided for under R.A. No. 2382 and P.D. No. 223.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
(Ret.) Justice Cuevas Law Office for respondent.

D E C I S I O N

AUSTRIA-MARTINEZ, *J.*:

Before the Court is a Petition for Review on *Certiorari* assailing the Decision[1] of the Court of Appeals (CA) in CA-G.R. SP No. 84945[2] dated November 16, 2004 which affirmed the Decision[3] of the Regional Trial Court (RTC), Branch 22, Manila, dated October 19, 2003.[4]

The facts are as follows:

Yasuyuki Ota (respondent) is a Japanese national, married to a Filipina, who has continuously resided in the Philippines for more than 10 years. He graduated from Bicol Christian

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[1] Penned by Associate Justice Eugenio S. Labitoria and concurred in by Associate Justices Bienvenido L. Reyes and Rosalinda Asuncion-Vicente.

[2] *Rollo*, pp. 28-36.

[3] Penned by Judge Marino M. Dela Cruz, Jr.

[4] *Rollo*, pp. 38-54.

College of Medicine on April 21, 1991 with a degree of Doctor of Medicine.[5] After successfully completing a one-year post graduate internship training at the Jose Reyes Memorial Medical Center, he filed an application to take the medical board examinations in order to obtain a medical license. He was required by the Professional Regulation Commission (PRC) to submit an affidavit of undertaking, stating among others that should he successfully pass the same, he would not practice medicine until he submits proof that reciprocity exists between Japan and the Philippines in admitting foreigners into the practice of medicine.[6]

Respondent submitted a duly notarized English translation of the Medical Practitioners Law of Japan duly authenticated by the Consul General of the Philippine Embassy to Japan, Jesus I. Yabes;[7] thus, he was allowed to take the Medical Board Examinations in August 1992, which he subsequently passed.[8]

In spite of all these, the Board of Medicine (Board) of the PRC, in a letter dated March 8, 1993, denied respondent's request for a license to practice medicine in the Philippines on the ground that the Board "believes that no genuine reciprocity can be found in the law of Japan as there is no Filipino or foreigner who can possibly practice there."[9]

Respondent then filed a Petition for *Certiorari* and *Mandamus* against the Board before the RTC of Manila on June 24, 1993, which petition was amended on February 14, 1994 to implead the PRC through its Chairman.[10]

In his petition before the RTC, respondent alleged that the Board and the PRC, in refusing to issue in his favor a Certificate of Registration and/or license to practice medicine, had acted

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[5] *Id*. at 29 (CA Decision).

[6] *Id*. at 29-30; records, pp. 2-3; 9,11; 309.

[7] *Id*. at 30; records, pp. 221-227.

[8] *Id*.; records, p. 10.

[9] *Rollo*, p. 30; records, p. 21.

[10] Records, pp. 71-82, 92.

arbitrarily, in clear contravention of the provision of Section 20 of Republic Act (R.A.) No. 2382 (The Medical Act of 1959), depriving him of his legitimate right to practice his profession in the Philippines to his great damage and prejudice.[11]

On October 19, 2003, the RTC rendered its Decision finding that respondent had adequately proved that the medical laws of Japan allow foreigners like Filipinos to be granted license and be admitted into the practice of medicine under the principle of reciprocity; and that the Board had a ministerial duty of issuing the Certificate of Registration and license to respondent, as it was shown that he had substantially complied with the requirements under the law.[12] The RTC then ordered the Board to issue in favor of respondent the corresponding Certificate of Registration and/or license to practice medicine in the Philippines.[13]

The Board and the PRC (petitioners) appealed the case to the CA, stating that while respondent submitted documents showing that foreigners are allowed to practice medicine in Japan, it was not shown that the conditions for the practice of medicine there are practical and attainable by a foreign applicant, hence, reciprocity was not established; also, the power of the PRC and the Board to regulate and control the practice of medicine is discretionary and not ministerial, hence, not compellable by a writ of *mandamus*.[14]

The CA denied the appeal and affirmed the ruling of the RTC.[15]

Hence, herein petition raising the following issue:

WHETHER THE COURT OF APPEALS COMMITTED A REVERSIBLE ERROR IN FINDING THAT RESPONDENT HAD ESTABLISHED THE EXISTENCE OF RECIPROCITY IN THE PRACTICE OF MEDICINE BETWEEN THE PHILIPPINES AND JAPAN.[16]

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[11] *Id*. at 5, 80.

[12] *Id*. at 316-318, 322.

[13] *Id*. at 324.

[14] CA *rollo*, pp.11-16.

[15] *Rollo*, pp. 34-35.

[16] *Id*. at 15.

Petitioners claim that: respondent has not established by competent and conclusive evidence that reciprocity in the practice of medicine exists between the Philippines and Japan. While documents state that foreigners are allowed to practice medicine in Japan, they do not similarly show that the conditions for the practice of medicine in said country are practical and attainable by a foreign applicant. There is no reciprocity in this case, as the requirements to practice medicine in Japan are practically impossible for a Filipino to comply with. There are also ambiguities in the Medical Practitioners Law of Japan, which were not clarified by respondent, *i.e.*, what are the provisions of the School Educations Laws, what are the criteria of the Minister of Health and Welfare of Japan in determining whether the academic and technical capability of foreign medical graduates are the same or better than graduates of medical schools in Japan, and who can actually qualify to take the preparatory test for the National Medical Examination. Consul General Yabes also stated that there had not been a single Filipino who was issued a license to practice medicine by the Japanese Government. The publication showing that there were foreigners practicing medicine in Japan, which respondent presented before the Court, also did not specifically show that Filipinos were among those listed as practicing said profession.[17] Furthermore, under *Professional Regulation Commission v. De Guzman,*[18] the power of the PRC and the Board to regulate and control the practice of medicine includes the power to regulate admission to the ranks of those authorized to practice medicine, which power is discretionary and not ministerial, hence, not compellable by a writ of *mandamus*.[19]

Petitioners pray that the CA Decision dated November 16, 2004 be reversed and set aside, that a new one be rendered reinstating the Board Order dated March 8, 1993 which disallows respondent to practice medicine in the Philippines, and that respondent's petition before the trial court be dismissed for lack of merit.[20]

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[17] *Rollo*, pp. 16-22.

[18] G.R. No. 144681, June 21, 2004, 432 SCRA 505.

[19] *Rollo*, p. 23.

[20] *Id*. at 23-24.

In his Comment, respondent argues that: Articles 2 and 11 of the Medical Practitioners Law of Japan and Section 9 of the Philippine Medical Act of 1959 show that reciprocity exists between the Philippines and Japan concerning the practice of medicine. Said laws clearly state that both countries allow foreigners to practice medicine in their respective jurisdictions as long as the applicant meets the educational requirements, training or residency in hospitals and pass the licensure examination given by either country. Consul General Yabes in his letter dated January 28, 1992 stated that "the Japanese Government allows a foreigner to practice medicine in Japan after complying with the local requirements." The fact that there is no reported Filipino who has successfully penetrated the medical practice in Japan does not mean that there is no reciprocity between the two countries, since it does not follow that no Filipino will ever be granted a medical license by the Japanese Government. It is not the essence of reciprocity that before a citizen of one of the contracting countries can demand its application, it is necessary that the interested citizen's country has previously granted the same privilege to the citizens of the other contracting country.[21] Respondent further argues that Section 20 of the Medical Act of 1959[22] indicates the mandatory character of the statute and an imperative obligation on the part of the Board inconsistent with the idea of discretion. Thus, a foreigner, just like a Filipino citizen, who successfully passes the examination and has all the qualifications and none of the disqualifications, is entitled as a matter of right to the issuance of a certificate of registration or a physician's license, which right is enforceable by *mandamus*.[23]

Petitioners filed a Reply[24] and both parties filed their respective memoranda[25] reiterating their arguments.

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[21] *Rollo*, pp. 75-81.

[22] It states that "x x x the Board of Medicine Examiners shall sign and issue certificates of registration to those who have satisfactorily complied with the requirements of the Board."

[23] *Rollo*, pp. 83-84.

[24] *Id*. at 95-104.

[25] Dated October 3, 2006 for respondent and November 28, 2006 for petitioners.

The Court denies the petition for lack of merit.

There is no question that a license to practice medicine is a privilege or franchise granted by the government.[26] It is a right that is earned through years of education and training, and which requires that one must first secure a license from the state through professional board examinations.[27]

Indeed,

> [T]he *regulation of the practice of medicine* in all its branches has long been recognized as a reasonable method of protecting the health and safety of the public. That the power to regulate and control the practice of medicine includes the power to regulate admission to the ranks of those authorized to practice medicine, is also well recognized. Thus, legislation and administrative regulations requiring those who wish to practice medicine first *to take and pass medical board examinations* have long ago been recognized as valid exercises of governmental power. Similarly, the establishment of minimum medical educational requirements – *i.e.*, the completion of prescribed courses in a recognized medical school – for admission to the medical profession, has also been sustained as a legitimate exercise of the regulatory authority of the state."[28]

It must be stressed however that the power to regulate the exercise of a profession or pursuit of an occupation cannot be exercised by the State or its agents in an arbitrary, despotic, or oppressive manner. A political body which regulates the exercise of a particular privilege has the authority to both forbid and grant such privilege in accordance with certain conditions. As the legislature cannot validly bestow an arbitrary power to grant or refuse a license on a public agency or officer, courts will generally strike down license legislation that vests in public officials discretion to grant or refuse a license to carry on some ordinarily lawful business, profession, or activity without prescribing definite

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[26] *Professional Regulation Commission v. De Guzman*, *supra* note 18, at 523.

[27] *Reyes v. Sisters of Mercy Hospital*, 396 Phil. 87, 107 (2000).

[28] *Tablarin v. Gutierrez*, G.R. No. 78164, July 31, 1987, 152 SCRA 730, 742.

rules and conditions for the guidance of said officials in the exercise of their power.[29]

R.A. No. 2382 otherwise known as the Medical Act of 1959 states in Section 9 thereof that:

Section 9. *Candidates for Board Examinations*.- Candidates for Board examinations shall have the following qualifications:

1. He shall be a citizen of the Philippines or a citizen of any foreign country who has submitted competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs, showing that his country's existing laws permit citizens of the Philippines to practice medicine under the same rules and regulations governing citizens thereof;

x x x x x x x x x

Presidential Decree (P.D.) No. 223[30] also provides in Section (j) thereof that:

j) The [Professional Regulation] Commission may, upon the recommendation of the Board concerned, approve the registration of and authorize the issuance of a certificate of registration with or without examination to a foreigner who is registered under the laws of his country: Provided, That the requirement for the registration or licensing in said foreign state or country are substantially the same as those required and contemplated by the laws of the Philippines and that the laws of such foreign state or country allow the citizens of the Philippines to practice the profession on the same basis and grant the same privileges as the subject or citizens of such foreign state or country: Provided, finally, That the applicant shall submit competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs, showing that his country's existing laws permit citizens of the Philippines to practice the profession under the rules and regulations governing citizens thereof. The Commission is also hereby authorized to prescribe additional requirements or grant certain privileges to foreigners seeking registration in the Philippines if the same privileges are granted to

[29] *Professional Regulation Commission v. De Guzman*, *supra* note 18, at 524.

[30] Creating the Professional Regulation Commission and Prescribing Its Powers and Functions, June 22, 1973.

or some additional requirements are required of citizens of the Philippines in acquiring the same certificates in his country;

x x x x x x x x x

As required by the said laws, respondent submitted a copy of the Medical Practitioners Law of Japan, duly authenticated by the Consul General of the Embassy of the Philippines in Japan, which provides in Articles 2 and 11, thus:

Article 2. Anyone who wants to be medical practitioner must pass the national examination for medical practitioner and get license from the Minister of Health and Welfare.

x x x x x x x x x

Article 11. No one can take the National Medical Examination except persons who conform to one of the following items:

1. Persons who finished regular medical courses at a university based on the School Education Laws (December 26, 1947) and graduated from said university.
2. Persons who passed the preparatory test for the National Medical Examination and practiced clinics and public sanitation more than one year after passing the said test.
3. Persons who graduated from a foreign medical school or acquired medical practitioner license in a foreign country, and also are recognized to have the same or more academic ability and techniques as persons stated in item 1 and item 2 of this article.[31]

Petitioners argue that while the Medical Practitioners Law of Japan allows foreigners to practice medicine therein, said document does not show that conditions for the practice of medicine in said country are *practical* and *attainable* by a foreign applicant; and since the requirements are *practically impossible* for a Filipino to comply with, there is no reciprocity between the two countries, hence, respondent may not be granted license to practice medicine in the Philippines.

The Court does not agree.

[31] See records, pp. 221, 224.

R.A. No. 2382, which provides who may be candidates for the medical board examinations, merely requires a foreign citizen to submit competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs (DFA), showing that his country's existing laws permit citizens of the Philippines to practice medicine under the same rules and regulations governing citizens thereof.

Section (j) of P.D. No. 223 also defines the extent of PRC's power to grant licenses, *i.e.*, it may, upon recommendation of the board, approve the registration and authorize the issuance of a certificate of registration with or without examination to a foreigner who is registered under the laws of his country, provided the following conditions are met: (1) that the requirement for the registration or licensing in said foreign state or country are substantially the same as those required and contemplated by the laws of the Philippines; (2) that the laws of such foreign state or country allow the citizens of the Philippines to practice the profession on the same basis and grant the same privileges as the subject or citizens of such foreign state or country; and (3) that the applicant shall submit competent and conclusive documentary evidence, confirmed by the DFA, showing that his country's existing laws permit citizens of the Philippines to practice the profession under the rules and regulations governing citizens thereof.

The said provision further states that the PRC is authorized to prescribe additional requirements or grant certain privileges to foreigners seeking registration in the Philippines *if* the same privileges are granted to or some additional requirements are required of citizens of the Philippines in acquiring the same certificates in his country.

Nowhere in said statutes is it stated that the foreign applicant must show that the conditions for the practice of medicine in said country are *practical* and *attainable* by Filipinos. Neither is it stated that it must first be proven that a Filipino has been granted license and allowed to practice his profession in said country before a foreign applicant may be given license to practice in the Philippines. Indeed, the phrase used in both R.A. No. 2382 and P.D. No. 223 is that:

[T]he applicant shall submit] competent and conclusive documentary evidence, confirmed by the Department of Foreign Affairs, showing that his country's existing laws ***permit*** citizens of the Philippines to practice the profession [of medicine] under the [same] rules and regulations governing citizens thereof. x x x (Emphasis supplied)

It is enough that the laws in the foreign country *permit* a Filipino to get license and practice therein. Requiring respondent to prove first that a Filipino has already been granted license and is actually practicing therein unduly expands the requirements provided for under R.A. No. 2382 and P.D. No. 223.

While it is true that respondent failed to give details as to the conditions stated in the Medical Practitioners Law of Japan — *i.e.,* the provisions of the School Educations Laws, the criteria of the Minister of Health and Welfare of Japan in determining whether the academic and technical capability of foreign medical graduates are the same as or better than that of graduates of medical schools in Japan, and who can actually qualify to take the preparatory test for the National Medical Examination – respondent, however, presented proof that foreigners are actually practicing in Japan and that Filipinos are not precluded from getting a license to practice there.

Respondent presented before the trial court a Japanese Government publication, *Physician-Dentist-Pharmaceutist Survey*, showing that there are a number of foreign physicians practicing medicine in Japan.[32] He also presented a letter dated January 28, 1992 from Consul General Yabes,[33] which states:

S i r :

With reference to your letter dated 12 January 1993, concerning your request for a Certificate of Confirmation for the purpose of establishing a reciprocity with Japan in the practice of medical profession relative to the case of Mr. Yasuyuki Ota, a Japanese national, the Embassy wishes to inform you that inquiries from the

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[32] Exhibits "D", "D-1", "D-2", "D-3" and "E-1", "E-2", "E-3", "E-4"; records, pp. 230-237.

[33] Exhibit "C", *id*. at 228.

Japanese Ministry of Foreign Affairs, Ministry of Health and Welfare as well as Bureau of Immigration yielded the following information:

1. They are not aware of a Filipino physician who was granted a license by the Japanese Government to practice medicine in Japan;
2. However, **the Japanese Government allows a foreigner to practice medicine in Japan after complying with the local requirements such as holding a valid visa for the purpose of taking the medical board exam, checking the applicant's qualifications to take the examination, taking the national board examination in Japanese and filing an application for the issuance of the medical license.**

Accordingly, **the Embassy is not aware of a single Filipino physician who was issued by the Japanese Government a license to practice medicine, because it is extremely difficult to pass the medical board examination in the Japanese language.** Filipino doctors here are only allowed to work in Japanese hospitals as trainees under the supervision of a Japanese doctor. On certain occasions, they are allowed to show their medical skills during seminars for demonstration purposes only. (Emphasis supplied)

Very truly yours,

Jesus I. Yabes
Minister Counsellor &
Consul General

From said letter, one can see that the Japanese Government allows foreigners to practice medicine therein provided that the local requirements are complied with, and that it is not the impossibility or the prohibition against Filipinos that would account for the absence of Filipino physicians holding licenses and practicing medicine in Japan, but the difficulty of passing the board examination in the Japanese language. Granting that there is still no Filipino who has been given license to practice medicine in Japan, it does not mean that no Filipino will ever be able to be given one.

Petitioners next argue that as held in *De Guzman,* its power to issue licenses is discretionary, hence, not compellable by *mandamus*.

The Court finds that the factual circumstances of *De Guzman* are different from those of the case at bar; hence, the principle applied therein should be viewed differently in this case. In *De Guzman*, there were doubts about the integrity and validity of the test results of the examinees from a particular school which garnered unusually high scores in the two most difficult subjects. Said doubts called for serious inquiry concerning the applicants' satisfactory compliance with the Board requirements.[34] And as there was no definite showing that the requirements and conditions to be granted license to practice medicine had been satisfactorily met, the Court held that the writ of *mandamus* may not be granted to secure said privilege without thwarting the legislative will.[35]

Indeed, to be granted the privilege to practice medicine, the applicant must show that he possesses all the qualifications and none of the disqualifications. It must also appear that he has fully complied with all the conditions and requirements imposed by the law and the licensing authority.[36]

In *De Guzman* itself, the Court explained that:

A careful reading of Section 20[37] of the Medical Act of 1959 discloses that the law uses the word "shall" with respect to the issuance

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[34] *Professional Regulation Commission v. De Guzman*, *supra* note 18, at 521.

[35] *Id*. at 525.

[36] *Id*.

[37] Section 20. *Issuance of Certificate of Registration, grounds for refusal of same.* The Commissioner of Civil Service and the Secretary of the Board of Medical Examiners shall sign jointly and issue certificates of registration to those who have satisfactorily complied with the requirements of the Board. They shall not issue a certificate of registration to any candidate who has been convicted by a court of competent jurisdiction of any criminal offense involving moral turpitude, or has been found guilty of immoral or dishonorable conduct after due investigation by the Board of Medical Examiners, or has been declared to be of unsound mind.

of certificates of registration. Thus, the petitioners [PRC] "*shall* sign and issue certificates of registration to those who have satisfactorily complied with the requirements of the Board." In statutory construction the term "shall" is a word of command. It is given imperative meaning. Thus, when an examinee satisfies the requirements for the grant of his physician's license, the Board is obliged to administer to him his oath and register him as a physician, pursuant to Section 20 and par. (1) of Section 22 of the Medical Act of 1959.[38]

In this case, there is no doubt as to the competence and qualifications of respondent. He finished his medical degree from Bicol Christian College of Medicine. He completed a one-year post graduate internship training at the Jose Reyes Memorial Medical Center, a government hospital. Then he passed the Medical Board Examinations which was given on August 8, 1992 with a general average of 81.83, with scores higher than 80 in 9 of the 12 subjects.

In fine, the only matter being questioned by petitioners is the alleged failure of respondent to prove that there is reciprocity between the laws of Japan and the Philippines in admitting foreigners into the practice of medicine. Respondent has satisfactorily complied with the said requirement and the CA has not committed any reversible error in rendering its Decision dated November 16, 2004 and Resolution dated October 19, 2003.

WHEREFORE, the petition is hereby *DENIED* for lack of merit.

SO ORDERED.

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

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[38] *Professional Regulation Commission v. De Guzman*, *supra* note 18, at 520.

* In lieu of Justice Minita V. Chico-Nazario, per Special Order No. 508 dated June 25, 2008.

SECOND DIVISION

[G.R. No. 166211. July 14, 2008]

ASIAN TERMINALS, INC., *petitioner, vs.* **NEPTHALLY B. SALLAO and ASIAN TERMINALS, INC. (MARIVELES) WORKERS' UNION,** *respondents.*

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; DISMISSAL; REQUISITES.— Settled is the rule that the requisites of a valid dismissal are: (1) the employee must be afforded due process, *i.e.*, he must be given an opportunity to be heard and to defend himself; and (2) the dismissal must be for any of the just causes provided in Article 282 of the Labor Code or for any of the authorized causes under Articles 283 and 284 of the same Code.

2. ID.; ID.; ID.; JUST CAUSES; UNAUTHORIZED WITHDRAWAL, USE AND DISPOSAL OF COMPANY PROPERTY IN CASE AT BAR.— Under Article 282 of the Labor Code, the following are deemed just causes to terminate an employee: (a) serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work; (b) gross and habitual neglect by the employee of his duties; (c) fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative; (d) commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and (e) other causes analogous to the foregoing. Per notice of the termination of his employment, Sallao was dismissed for unauthorized withdrawal, use and disposal of company property. In *Philippine Long Distance Telephone Co. v. NLRC*, we declared that theft of company property is a recognized just and valid cause for dismissing an employee under Article 282 (a), (c) and (e), as enumerated above.

3. ID.; ID.; ID.; DUE PROCESS; ELUCIDATED.— On the issue of due process, it is settled that notice and hearing constitute the essential elements of due process in the dismissal of employees.

The employer must furnish the employee with two written notices before termination of employment can be legally effected. The first apprises the employee of the particular acts or omissions for which his dismissal is sought. The second informs the employee of the employer's decision to dismiss him. With regard to the requirement of a hearing, the essence of due process lies simply in an opportunity to be heard, and not that an actual hearing should always and indispensably be held.

VELASCO, JR., *J., separate concurring opinion*:

LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; DISMISSAL; PROCEDURAL DUE PROCESS; REQUISITES; HEARING OR CONFERENCE AS AN INDISPENSABLE ELEMENT; CASE OF *KING OF KINGS TRANSPORT INC. V. MAMAC*, CITED.— On June 29, 2007, the Court in *King of Kings Transport, Inc. v. Mamac,* explained that the requirement of a hearing or conference is an indispensable element of procedural due process, thus: Due process under the Labor Code involves two aspects: *first*, substantive — the valid and authorized causes of termination of employment under the Labor Code; and *second*, procedural — the manner of dismissal. In the present case, the CA affirmed the findings of the labor arbiter and the NLRC that the termination of employment of respondent was based on a "just cause." This ruling is not at issue in this case. The question to be determined is whether the procedural requirements were complied with. Art. 277 of the Labor Code provides the manner of termination of employment, thus: Art. 277. *Miscellaneous Provisions*. — x x x (b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized cause without prejudice to the requirement of notice under Article 283 of this Code, the employer shall furnish the worker whose employment is sought to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the worker to contest the validity or legality of his dismissal by filing a complaint with the regional

branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer. Accordingly, the implementing rule of the aforesaid provision states: SEC. 2. *Standards of due process; requirements of notice.* — In all cases of termination of employment, the following standards of due process shall be substantially observed: 1. For termination of employment based on just causes as defined in Article 282 of the Code: (a) A written notice served on the employee specifying the ground or grounds for termination, and giving said employee reasonable opportunity with which to explain his side. (b) A hearing or conference during which the employee concerned, with the assistance of counsel if he so desires is given opportunity to respond to the charge, present his evidence, or rebut the evidence presented against him. (c) A written notice of termination served on the employee, indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination. In case of termination, the foregoing notices shall be served on the employee's last known address. To clarify, the following should be considered in terminating the services of employees: (1) The **first written notice** to be served on the employees should contain the specific causes or grounds for termination against them, and a directive that the employees are given the opportunity to submit their written explanation within a reasonable period. "Reasonable opportunity" under the Omnibus Rules means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense. This should be construed as a period of at least five (5) calendar days from receipt of the notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint. Moreover, in order to enable the employees to intelligently prepare their explanation and defenses, the notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge against the employees. Lastly, the notice should specifically mention which company rules, if any, are violated and/or which among the grounds under Art. 282 is being charged against the employees. (2) After serving the first notice, the employers should schedule and conduct a **hearing** or **conference** wherein the employees will

be given the opportunity to: (1) explain and clarify their defenses to the charge against them; (2) present evidence in support of their defenses; and (3) rebut the evidence presented against them by the management. During the hearing or conference, the employees are given the chance to defend themselves personally, with the assistance of a representative or counsel of their choice. Moreover, this conference or hearing could be used by the parties as an opportunity to come to an amicable settlement. (3) After determining that termination of employment is justified, the employers shall serve the employees a **written notice of termination** indicating that: (1) all circumstances involving the charge against the employees have been considered; and (2) grounds have been established to justify the severance of their employment. Article 277 of the Labor Code speaks of a "written notice containing a statement of the causes for termination and shall afford the [employee] ample opportunity to be heard and defend himself with the assistance of his representative." Thus, I submit that effective June 29, 2007 when the *King of Kings Transport v. Mamac* was promulgated, the prevailing rule is that the hearing or conference is one of the vital requirements of procedural due process in the dismissal of employees. Non-compliance therewith would be a ground for the imposition of the indemnity of PhP 30,000.

APPEARANCES OF COUNSEL

Jimenez Gonzales Liwanag Bello Valdez Caluya & Fernandez (JGLAW) for petitioner.

Jose S. Espinas for respondent.

D E C I S I O N

QUISUMBING, *J.*:

For review on *certiorari* are the Decision[1] dated January 13, 2004, and the Resolution[2] dated November 12, 2004, of the

[1] *Rollo*, pp. 38-49. Penned by Associate Justice Hakim S. Abdulwahid, with Associate Justices Delilah Vidallon-Magtolis and Jose L. Sabio, Jr. concurring.

[2] *Id*. at 63-64.

Court of Appeals in CA-G.R. SP No. 68457. The appellate court had affirmed the Decision[3] dated July 31, 2000, of the National Labor Relations Commission (NLRC) in CA No. 020887-99, which reversed the Decision[4] dated June 30, 1999, of the Labor Arbiter in NLRC Case No. RAB-III-12-9645-98.

The antecedent facts are as follows.

Nepthally B. Sallao (Sallao) was employed as an electrician by petitioner Asian Terminals, Inc. (ATI). On September 22, 1998, ATI, through Lt. Leonardo M. Soriano, Detachment Commander of the Core Security & Training Agency Corp., conducted an investigation regarding the loss and sale of electric copper wire cable. Lt. Soriano reported that Sallao admitted having sold the wire cable and shared the proceeds with his three co-employees. His co-employees submitted their sworn statements[5] where they detailed how the aforecited infraction was committed.

In a Memorandum[6] dated September 24, 1998, Sallao was directed to explain within 48 hours his participation in the aforecited infraction. In the meantime, he was placed under preventive suspension. On September 28, 1998, Sallao submitted his written explanation[7] wherein he denied the allegations against him. He requested that an investigation in the presence of his counsel be conducted and that he be given copies of the sworn statements of his co-employees.

In his progress report dated October 20, 1998, Lt. Soriano recommended that Sallao be penalized for unauthorized disposition/sale of company property. On October 20, 1998, ATI dismissed Sallao effective immediately.[8]

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[3] CA *rollo*, pp. 21-40.

[4] *Id*. at 94-104.

[5] *Id*. at 82-88.

[6] *Id*. at 89.

[7] *Id*. at 92.

[8] *Id*. at 79.

Sallao then filed on December 3, 1998 a Complaint[9] for illegal dismissal with prayer for reinstatement and payment of backwages, damages, and other monetary claims. On June 30, 1999, the Labor Arbiter dismissed his complaint. The Labor Arbiter found that all evidence pointed to Sallao as the one responsible for the loss of the wire cable. He also ruled that Sallao was afforded due process since ATI conducted an investigation before dismissing him.[10]

On appeal, the NLRC reversed the Labor Arbiter's decision. It ruled that since the sworn statements of Sallao's co-employees were unverified, the same cannot be given any weight. It also noted that the sworn statements were tainted with inconsistencies and falsities. Thus, Sallao should have been given the opportunity to confront his co-employees. The NLRC decreed:

> WHEREFORE, premises considered, the decision under review is hereby REVERSED and SET ASIDE and a new one entered, declaring complainant's dismissal from employment as illegal.
>
> Accordingly, respondent Asian Terminal, Inc. is ordered to reinstate the complainant to his former position without loss of seniority rights and to pay him full backwages to be computed from the time of his dismissal until the finality of this decision.
>
> SO ORDERED.[11]

ATI filed a petition for *certiorari* before the Court of Appeals, which affirmed the NLRC decision. Hence, the instant petition raising the following issues:

I.

THE COURT OF APPEALS COMMITTED SERIOUS ERROR OF LAW WHEN IT RULED THAT DUE PROCESS WAS NOT OBSERVED IN TERMINATING THE SERVICES OF THE RESPONDENT.

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[9] *Id*. at 44-48.

[10] *Id*. at 102-104.

[11] *Id*. at 39.

II.

THE COURT OF APPEALS COMMITTED SERIOUS ERROR OF LAW WHEN IT RULED THAT THE TERMINATION OF THE SERVICES OF THE RESPONDENT WAS WITHOUT JUST CAUSE.

III.

THE COURT OF APPEALS COMMITTED SERIOUS ERROR OF LAW WHEN IT AFFIRMED THE DECISION OF THE NATIONAL LABOR RELATIONS COMMISSION WITH RESPECT TO THE REINSTATEMENT OF RESPONDENT TO HIS FORMER POSITION WITHOUT LOSS OF SENIORITY RIGHTS AND PAYMENT OF FULL BACKWAGES TO BE COMPUTED FROM THE TIME OF HIS DISMISSAL UNTIL THE FINALITY OF THE DECISION.[12]

Simply stated, the issue is whether Sallao was validly dismissed for cause and with due process.

ATI contends that there was substantial evidence to prove that Sallao was responsible for the loss and sale of electric copper wire cable. In his report, Lt. Soriano disclosed that Sallao admitted having sold the wire cable and shared the proceeds with his three co-employees. Such admission was supported by the sworn statements executed by his co-employees involved in the incident. ATI argues that although the statements were unverified, the same should be given probative value since technical rules of procedure are not binding in proceedings before the Labor Arbiter. ATI further avers that its denial of Sallao's request for an investigation in the presence of his counsel should not be taken to mean that he was deprived of due process. Sallao was in fact given the opportunity to submit within 48 hours his written explanation.

Sallao counters that the twin requirements of notice and hearing are conditions *sine qua non* before a dismissal may be effected. Having been deprived of the same, he is entitled to the reliefs granted by the NLRC.

Settled is the rule that the requisites of a valid dismissal are: (1) the employee must be afforded due process, *i.e.*, he must be given an opportunity to be heard and to defend himself; and (2) the dismissal must be for any of the just causes provided in

[12] *Rollo*, pp. 21-22.

Article 282 of the Labor Code or for any of the authorized causes under Articles 283[13] and 284[14] of the same Code.[15]

Under Article 282 of the Labor Code, the following are deemed just causes to terminate an employee: (a) serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work; (b) gross and habitual neglect by the employee of his duties; (c) fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative; (d) commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative; and (e) other causes analogous to the foregoing.

Per notice of the termination of his employment, Sallao was dismissed for unauthorized withdrawal, use and disposal of company property. In *Philippine Long Distance Telephone*

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[13] **ART. 283.** ***Closure of establishment and reduction of personnel.*** - The employer may also terminate the employment of any employee due to the installation of labor saving devices, redundancy, retrenchment to prevent losses or the closing or cessation of operation of the establishment or undertaking unless the closing is for the purpose of circumventing the provisions of this Title, by serving a written notice on the worker and the Ministry of Labor and Employment at least one (1) month before the intended date thereof. In case of termination due to the installation of labor saving devices or redundancy, the worker affected thereby shall be entitled to a separation pay equivalent to at least his one (1) month pay or to at least one (1) month pay for every year of service, whichever is higher. In case of retrenchment to prevent losses and in cases of closures or cessation of operations of establishment or undertaking not due to serious business losses or financial reverses, the separation pay shall be equivalent to one (1) month pay or at least one-half (1/2) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered as one (1) whole year.

[14] **ART. 284.** ***Disease as ground for termination***. — An employer may terminate the services of an employee who has been found to be suffering from any disease and whose continued employment is prohibited by law or is prejudicial to his health as well as to the health of his co-employees: *Provided*, That he is paid separation pay equivalent to at least one (1) month salary or to one-half (1/2) month salary for every year of service, whichever is greater, a fraction of at least six (6) months being considered as one (1) whole year.

[15] *National Bookstore, Inc. v. Court of Appeals*, G.R. No. 146741, February 27, 2002, 378 SCRA 194, 200-201.

Co. v. NLRC,[16] we declared that theft of company property is a recognized just and valid cause for dismissing an employee under Article 282 (a), (c) and (e), as enumerated above.[17]

After reviewing the records of this case, we are in agreement that Sallao's dismissal was in accordance with the law. Upon its discovery of the loss and sale of electric copper wire cable, ATI conducted an initial investigation through Lt. Soriano. In his memorandum, Lt. Soriano disclosed that Sallao admitted his complicity in the incident. To buttress ATI's initial finding, Sallao's co-employees submitted their respective sworn statements where they identified him as the one responsible for the incident.

We note that when ATI required Sallao to explain his alleged infraction, he merely denied in general the allegations and requested for an investigation in the presence of his counsel and for copies of the sworn statements of his co-employees. Sallao never squarely addressed Lt. Soriano's report that Sallao admitted during the initial investigation that he sold the wire cable and shared the proceeds with his three co-employees. Even in the pleadings submitted in this case, Sallao remained silent on this point.

As the admission stands, we are persuaded that Sallao indeed committed the aforecited infraction. In effect, the sworn statements of his co-employees merely corroborated his admission. Thus, we find no need to delve into the probative value of the sworn statements since his guilt has been proven by his own admission.

On the issue of due process, it is settled that notice and hearing constitute the essential elements of due process in the dismissal of employees. The employer must furnish the employee with two written notices before termination of employment can be legally effected. The first apprises the employee of the particular acts or omissions for which his dismissal is sought. The second informs the employee of the employer's decision to dismiss him. With regard to the requirement of a hearing, the essence of due process lies simply in an opportunity to be heard, and not that an actual hearing should always and indispensably be held.[18]

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[16] No. 53552, October 18, 1988, 166 SCRA 422.

[17] *Id*. at 427.

[18] *Metropolitan Bank and Trust Company v. Barrientos*, G.R. No. 157028, January 31, 2006, 481 SCRA 311, 321-322.

In this case, ATI appears to have complied with these requirements. ATI furnished Sallao with a Memorandum dated September 24, 1998, apprising him of the particular acts or omissions constituting the alleged infraction and requiring him to explain within 48 hours. Instead of submitting a written explanation, Sallao merely denied in general the allegations against him and requested for an investigation in the presence of his counsel. He also requested that he be furnished with the sworn statements of his co-employees. Moreover, Sallao submitted his request only on September 28, 1998, beyond the 48-hour period given by ATI. In any event, ATI furnished Sallao with a notice of termination informing him of the basis of his dismissal.

Thus, we find that Sallao was afforded due process before he was dismissed. Even if no face-to-face hearing was conducted, the requirement of due process had been met since he was accorded a chance to explain his side of the controversy.

WHEREFORE, the instant petition is *GRANTED*. The Decision dated January 13, 2004, and the Resolution dated November 12, 2004, of the Court of Appeals in CA-G.R. SP No. 68457 are *REVERSED and SET ASIDE*. The Decision dated June 30, 1999, of the Labor Arbiter in NLRC Case No. RAB-III-12-9645-98 is *REINSTATED*.

No pronouncement as to costs.

SO ORDERED.

Carpio Morales, Tinga, and *Brion, JJ.,* concur.

Velasco, Jr., J., see separate concurring opinion.

SEPARATE CONCURRING OPINION

VELASCO, JR., *J.*:

I concur with the well-written *ponencia* of my esteemed colleague. However, I would like to register my observations in relation to the statement that "with regard to the requirement of a hearing, the essence of due process lies simply in an opportunity to be

heard, and not that of an actual hearing should always and indispensably be held."[1] Moreover, elucidation is needed on the concluding statement that "even if no face-to-face hearing was conducted, the requirement of due process had been met since he was accorded a chance to explain his side of the controversy."

The aforementioned conclusions are correct when applied to the instant case. While no hearing or conference was conducted by petitioner Asian Terminals, Inc. in September 1998 when the administrative proceedings were held against respondent Sallao, the absence thereof does not constitute a breach of the procedural due process for such was the settled jurisprudence as enunciated in *MBTC v. Barrientos*, G.R. No. 157028, Jan. 31, 2006, 481 SCRA 311 and other related cases.

However, on June 29, 2007, the Court in *King of Kings Transport, Inc. v. Mamac*,[2] explained that the requirement of a hearing or conference is an indispensable element of procedural due process, thus:

> Due process under the Labor Code involves two aspects: *first,* substantive - the valid and authorized causes of termination of employment under the Labor Code; and *second*, procedural – the manner of dismissal. In the present case, the CA affirmed the findings of the labor arbiter and the NLRC that the termination of employment of respondent was based on a "just cause." This ruling is not at issue in this case. The question to be determined is whether the procedural requirements were complied with.
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> Art. 277 of the Labor Code provides the manner of termination of employment, thus:
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> Art. 277. *Miscellaneous Provisions*. – x x x
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> (b) Subject to the constitutional right of workers to security of tenure and their right to be protected against dismissal except for a just and authorized cause without prejudice to the requirement of notice under Article 283 of this Code, the employer shall furnish the worker whose employment is sought

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[1] Decision, p. 6.

[2] G.R. No. 166208, June 29, 2007, 526 SCRA 116, 123-127.

> to be terminated a written notice containing a statement of the causes for termination and shall afford the latter ample opportunity to be heard and to defend himself with the assistance of his representative if he so desires in accordance with company rules and regulations promulgated pursuant to guidelines set by the Department of Labor and Employment. Any decision taken by the employer shall be without prejudice to the right of the worker to contest the validity or legality of his dismissal by filing a complaint with the regional branch of the National Labor Relations Commission. The burden of proving that the termination was for a valid or authorized cause shall rest on the employer.

Accordingly, the implementing rule of the aforesaid provision states:

> SEC. 2. *Standards of due process; requirements of notice*. – In all cases of termination of employment, the following standards of due process shall be substantially observed:
>
> 1. For termination of employment based on just causes as defined in Article 282 of the Code:
>
> (a) A written notice served on the employee specifying the ground or grounds for termination, and giving said employee reasonable opportunity with which to explain his side.
>
> (b) A hearing or conference during which the employee concerned, with the assistance of counsel if he so desires is given opportunity to respond to the charge, present his evidence, or rebut the evidence presented against him.
>
> (c) A written notice of termination served on the employee, indicating that upon due consideration of all the circumstances, grounds have been established to justify his termination.
>
> In case of termination, the foregoing notices shall be served on the employee's last known address.

To clarify, the following should be considered in terminating the services of employees:

(1) The **first written notice** to be served on the employees should contain the specific causes or grounds for termination against them,

and a directive that the employees are given the opportunity to submit their written explanation within a reasonable period. "Reasonable opportunity" under the Omnibus Rules means every kind of assistance that management must accord to the employees to enable them to prepare adequately for their defense. This should be construed as a period of at least five (5) calendar days from receipt of the notice to give the employees an opportunity to study the accusation against them, consult a union official or lawyer, gather data and evidence, and decide on the defenses they will raise against the complaint. Moreover, in order to enable the employees to intelligently prepare their explanation and defenses, the notice should contain a detailed narration of the facts and circumstances that will serve as basis for the charge against the employees. Lastly, the notice should specifically mention which company rules, if any, are violated and/or which among the grounds under Art. 282 is being charged against the employees.

(2) After serving the first notice, the employers should schedule and conduct a **hearing** or **conference** wherein the employees will be given the opportunity to: (1) explain and clarify their defenses to the charge against them; (2) present evidence in support of their defenses; and (3) rebut the evidence presented against them by the management. During the hearing or conference, the employees are given the chance to defend themselves personally, with the assistance of a representative or counsel of their choice. Moreover, this conference or hearing could be used by the parties as an opportunity to come to an amicable settlement.

(3) After determining that termination of employment is justified, the employers shall serve the employees a **written notice of termination** indicating that: (1) all circumstances involving the charge against the employees have been considered; and (2) grounds have been established to justify the severance of their employment.

In the instant case, KKTI admits that it had failed to provide respondent with a "charge sheet." However, it maintains that it had substantially complied with the rules, claiming that "respondent would not have issued a written explanation had he not been informed of the charges against him."

We are not convinced.

First, respondent was not issued a *written* notice charging him of committing an infraction. The law is clear on the matter. A verbal

appraisal of the charges against an employee does not comply with the first notice requirement. In *Pepsi-Cola Bottling Co. v. NLRC*, the Court held that consultations or conferences are not a substitute for the actual observance of notice and hearing. Also, in *Loadstar Shipping Co., Inc. v. Mesano*, the Court, sanctioning the employer for disregarding the due process requirements, held that the employee's written explanation did not excuse the fact that there was a complete absence of the first notice.

Second, even assuming that petitioner KKTI was able to furnish respondent an Irregularity Report notifying him of his offense, such would not comply with the requirements of the law. We observe from the irregularity reports against respondent for his other offenses that such contained merely a general description of the charges against him. The reports did not even state a company rule or policy that the employee had allegedly violated. Likewise, there is no mention of any of the grounds for termination of employment under Art. 282 of the Labor Code. Thus, KKTI's "standard" charge sheet is not sufficient notice to the employee.

Third, no hearing was conducted. Regardless of respondent's written explanation, a hearing was still necessary in order for him to clarify and present evidence in support of his defense. Moreover, respondent made the letter merely to explain the circumstances relating to the irregularity in his October 28, 2001 Conductor's Trip Report. He was unaware that a dismissal proceeding was already being effected. Thus, he was surprised to receive the November 26, 2001 termination letter indicating as grounds, not only his October 28, 2001 infraction, but also his previous infractions.

Article 277 of the Labor Code speaks of a "written notice containing a statement of the causes for termination and shall afford the [employee] ample opportunity to be heard and defend himself with the assistance of his representative." The Court, in the *Metrobank (MBTC)* case, gave such provision a myopic and restrictive interpretation which appears off-tangent to the constitutional protection to labor. This strict interpretation was discarded in *King of Kings Transport* for the following reasons:

1. The first written notice containing the charges does not encompass the 2nd requisite of opportunity to be heard. Note should be taken of the conjunctive "and" which means that the

written notice should be distinct from the opportunity to be heard. While it may be conceded that the first notice gives the employee reasonable opportunity to explain his side, such does not cover the 2nd requisite of ample opportunity to be heard and defend himself with the assistance of his representative which will necessitate the conduct of a hearing or conference to give the laborer the chance to respond to the charge, present evidence or rebut the evidence presented against him. "Ample" means full and more than adequate chances to be heard and defend himself against the charges leveled on him. Without the hearing or conference, the written reply or answer to the first notice is insufficient to fully explain and support his defenses, present evidence in support of his defenses due to time constraints in the preparation of the answer and rebut the evidence of the employer since the first notice does not usually contain the evidence intended to support the charges. In addition, the employee's counsel or representative can better articulate his defenses in an actual hearing than by just merely relying on a written reply or answer.

2. The Secretary of Labor is given the power to promulgate rules and regulations to implement the Labor Code. Pursuant to such rule-making power, he approved the Omnibus Rules Implementing the Labor Code which provides in part:

> Sec. 2. *Standards of due process, requirements of notice*.—
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> x x x x x x x x x
>
> I.
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> x x x x x x x x x
>
> (b) A hearing or conference during which the employee concerned, with the assistance of counsel if he so desires is given opportunity to respond to the charge, present his evidence, or rebut the evidence presented against him.[3]

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[3] OMNIBUS RULES IMPLEMENTING THE LABOR CODE, Book V, Rule XXIII.

Any rule or regulation in the implementation of a law issued by the rule-making authority has the force and effect of law.[4]

3. The constitutional provisions on protection to labor and social justice dictate that a liberal interpretation be accorded Article 277 of the Labor Code on the requirement giving an employee ample opportunity to be heard and defend himself.

Thus, I submit that effective June 29, 2007 when the *King of Kings Transport v. Mamac* was promulgated, the prevailing rule is that the hearing or conference is one of the vital requirements of procedural due process in the dismissal of employees. Non-compliance therewith would be a ground for the imposition of the indemnity of PhP 30,000.

SECOND DIVISION

[G.R. No. 170202. July 14, 2008]

OPTIMUM MOTOR CENTER CORPORATION, *petitioner, vs.* **ANNIE TAN, doing business under the name & style "AJ & T Trading,"** *respondent.*

SYLLABUS

1. CIVIL LAW; SPECIAL CONTRACTS; LEASE; WORK AND LABOR; CONTRACT FOR PIECE OF WORK; HE WHO EXECUTED WORK UPON A MOVABLE HAS RIGHT TO RETAIN IT BY WAY OF PLEDGE UNTIL HE IS PAID; MECHANIC'S LIEN IN CASE AT BAR.— The concept of a mechanic's lien is articulated in Article 1731 of the Civil Code, which provides: ARTICLE 1731. He who has executed work upon

[4] *Commissioner of Internal Revenue v. Court of Appeals*, G.R. No. 119761, August 29, 1996, 261 SCRA 236; *De La Salle University Medical Center and College of Medicine v. Laguesma*, G.R. No.102084, August 12, 1998, 294 SCRA 141.

a movable has a right to retain it by way of pledge until he is paid. The mechanic's lien is akin to a contractor's or warehouseman's lien in that by way of pledge, the repairman has the right to retain possession of the movable until he is paid. However, the right of retention is conditioned upon the execution of work upon the movable. The creation of a mechanic's lien does not depend upon the owner's nonpayment. Rather, the contractor "creates" his or her own lien by performing the work or furnishing the materials. In *Bachrach Motor Co. v. Mendoza*, the Court had the occasion to rule that a person who has made repairs upon an automobile at the request of the owner is entitled to retain it until he has been paid the price of the work executed.

2. REMEDIAL LAW; APPEALS; FACTUAL FINDINGS OF THE TRIAL COURT IF AFFIRMED BY THE COURT OF APPEALS, RESPECTED.— Optimum's invocation of the mechanic's lien is apparently based on the repairs it executed on the truck. However, the lower courts had already come up with a categorical finding based on testimonies of independent witnesses that the repairs had not been accomplished in accordance with the agreement of the parties. We have to sustain these factual findings, for basic is the tenet that the trial court's findings of facts as affirmed by the Court of Appeals are binding on this Court, unless the lower courts overlooked, misconstrued or misinterpreted facts and circumstances of substance which, if considered, would change the outcome of the case. Here, however, as a result of the failure to accomplish the repairs on the truck, the right to retain the truck in accordance with Article 1731 did not arise. Optimum's continuous possession or detention of the truck turned to be that of a deforciant and so respondent has every right to recover possession of it.

3. CIVIL LAW; OBLIGATIONS AND CONTRACTS; NATURE & EFFECT OF OBLIGATIONS; DUTY TO TAKE CARE OF SUBJECT PROPERTY WITH PROPER DILIGENCE OF A GOOD FATHER OF A FAMILY; NON-OBSERVANCE AND CONSEQUENCE THEREOF IN CASE AT BAR.— Optimum is obliged to take care of the truck with the proper diligence of a good father to a family while the same is in its possession. Records show that the subject truck had already deteriorated while in the possession of Optimum. Taking into consideration the last known condition of the truck in tandem with the fact that the court proceedings have spanned almost a decade, it can be readily inferred

that the truck has become wholly useless. Since restitution is no longer feasible, Optimum is bound to pay the value of the truck. The value of the truck should be based on the fair market value that the property would command at the time it was entrusted to Optimum. Such recoverable value is fair and reasonable considering that the value of a motor vehicle depreciates. This value may be recovered without prejudice to such other damages a claimant is entitled to under applicable laws.

4. CIVIL LAW; DAMAGES; TEMPERATE DAMAGES; PROPRIETY THEREOF.— Temperate damages have been properly imposed by the appellate court. Under Article 2224 of the Civil Code, temperate damages may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty.

APPEARANCES OF COUNSEL

Melody Anne E. Calo-Villar for petitioner.
Tañada Vivo & Tan for respondent.

D E C I S I O N

TINGA, *J.*:

This Petition for Review[1] seeks to reverse the Decision[2] and Resolution[3] of the Court of Appeals in CA-G.R. CV No. 63985. The decision affirmed with modification the judgment[4] of the Regional Trial Court (RTC) of Manila, Branch 19 in Civil Case No. 94-71847.

The case originated from a Complaint[5] for recovery of possession filed by Annie Tan (respondent) against Optimum

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[1] *Rollo*, pp. 3-17.

[2] *Id*. at 91-100; penned by Associate Justice Magdangal M. De Leon and concurred in by Associate Justices Salvador J. Valdez, Jr. and Mariano C. Del Castillo.

[3] *Id*. at 112-113.

[4] *Id*. at 35-43; penned by Judge Zenaida R. Daguna.

[5] *Id*. at 18-23.

Motor Center Corporation (Optimum) and Cesar Peña (Peña) with the RTC of Manila. Respondent is doing business under the name and style, "AJ & T Trading" which is engaged in transportation of cargoes.[6] AJ & T Trading is the registered owner[7] of an Isuzu cargo truck with Plate No. NWM 418, the subject of this complaint. Optimum is a domestic corporation which owned and operated an auto repair shop located at 120 Del Monte Avenue, Quezon City.[8]

Respondent's version of the facts is as follows.

On 14 January 1994, she brought the subject truck to Optimum for body repair and painting. Peña introduced himself as the owner and manager of Optimum. Respondent verbally contracted with Peña for the repair of the damaged portions of the truck, repainting and upholstery replacement. It was then agreed that the work would take thirty (30) days to complete and would thus be finished on 15 February 1994.[9] Leopoldo Daza, a security guard assigned to Optimum, received the truck and prepared a checklist[10] of the items found therein. On 20 January 1994, an estimate[11] detailing the description and price rates for the repair was sent to respondent. To bring down the repair costs, the parties agreed that respondent would supply the necessary materials such as windshield glasses for the front and back of the truck, rubber strip and quartered glass panel.[12]

On 15 February 1994, respondent went to Optimum but was told to come back in March as the repair was not yet finished.[13] On several occasions, respondent tried to claim her truck from

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[6] TSN, 2 May 1995, p. 6.

[7] Evidenced by Certificate of Registration No. 1683352; Records, p. 7.

[8] TSN, 5 December 1995, pp. 6-9.

[9] TSN, 2 May 1995, p. 19.

[10] Records, p. 37.

[11] *Id*. at 95.

[12] TSN, 2 May 1995, p. 22.

[13] *Id.* at 28.

Optimum[14] to no avail. On 4 March 1994, she again went to Optimum's repair shop and was surprised to see that the trade name "AJ & T Trading" painted in the middle and side doors of the truck had been scraped off. She also noticed that the 100-meter skyline rope, oil stick gauge and right side mirror were missing.[15] On 22 April 1994, she found her truck abandoned and unrepaired at Optimum's compound. On 16 May 1994, she discovered that Optimum had already vacated its shop in Del Monte and that her truck was nowhere to be found.[16] Later, she learned that Optimum had transferred to a new location but her still unrepaired truck was found in Valenzuela City.

This prompted respondent to file the instant complaint with the trial court on 5 October 1994.[17] She prayed for the recovery of possession of the truck or, in the alternative, the payment of the value thereof. She also sought the award of attorney's fees, moral damages and costs of suit.[18] At the trial of the case, two witnesses, Maximo Merigildo[19] and Bel Eduardo Nitafan,[20] testified on the dilapidated condition of the truck when they saw it on separate occasions.

On 20 October 1994, the trial court issued an order directing the seizure of the vehicle upon respondent's filing of a bond in the amount of ₱1,200,000.00.[21] Respondent posted the required bond.[22] Optimum posted a counterbond to lift said order.[23]

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[14] TSN, March 4, 18, April 22, May 16, 25 in 1994.

[15] TSN, 2 May 1995, p. 30.

[16] *Id*. at 34.

[17] Respondent also filed a criminal case for estafa against Peña and is now pending before the RTC; Records, p. 306.

[18] *Id*. at 4-5.

[19] TSN, 25 February 1997, pp. 10-18.

[20] TSN, 9 September 1997, pp. 9-11.

[21] *Id.* at 10.

[22] Records, pp. 12-14.

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

Optimum controverted the allegations of respondent. In its own account of the facts, it denied guaranteeing that the repair work would be completed within 30 days from 15 January 1994. It claimed that the repairs were completed only on 8 May 1994 due to delay in respondent's delivery of the parts.[24] It presented as its witnesses the employees who had undertaken the tinsmithing,[25] painting[26] and electrical works[27] on the truck.

Optimum also explained that by virtue of a writ of execution[28] issued against it by the Metropolitan Trial Court of Quezon City, it was forced to vacate its repair shop and to transfer all its equipment, tools and all the vehicles in its possession and custody, including respondent's truck, to the IIC Compound in Sitio Malinis, Bagbaguin, Valenzuela City. It claimed that it tried to get in touch with respondent to ask her to claim the truck but she was not available.

Optimum claimed its right to retain possession of the truck, by virtue of Article 1731 of the Civil Code, until the cost of repairs is paid. By way of counterclaim, it asked for the payment of ₱79,370.00 as the unpaid cost of repairs and ₱25,000.00 as attorney's fees.[29]

On 31 May 1999, the trial court rendered a decision in favor of respondent, thus:

WHEREFORE, premises considered, judgment is hereby rendered ordering defendants Optimum Motor Center Corporation and/or any person acting for and in its behalf, to surrender in good running condition the Isuzu Cargo Truck, subject matter of this complaint and if this is not feasible, to jointly and severally pay the sum of ₱600,000.00 with legal interest from the date (October 5, 1994) the complaint was filed, until fully satisfied, moral damages of

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[24] TSN, 14 November 1996, p. 18.

[25] TSN, 19 September 1996, p. 6.

[26] *Id*. at 20.

[27] *Id*. at 31.

[28] Records. pp. 38-39.

[29] *Id*. at 29-35.

₱50,000.00 and litigation expenses of ₱30,000.00 plus 25% of the amount awarded from defendants as and for attorney's fees. The counterclaim of defendants is hereby DISMISSED for lack of merit.

SO ORDERED.[30]

Of the two opposing contentions, the trial court accepted the version of respondent that the repairs on her truck had not been accomplished. It observed:

x x x Plaintiff claimed that even after the thirty (30) day period for the completion of the repair on the truck, the same remained unrepaired. This was supported by the testimonies of the Court's personnel, namely: Maximo Merigildo of the RTC, Branch 31, Quezon City, who served on April 25, 1994 the Writ of Execution in the Ejectment case against defendants and implemented the same on May 14, 1994. He observed that the three (3) tires were not installed and there were no left side mirror and door. Eduardo Bel Nitafan, Process Server, declared in open court that the Isuzu Cargo Truck was now parked at the I.I.C. Compound in Valenzuela, Metro Manila. The truck was surrounded with piles of lumber, about eight (8) feet in height. Missing were the two (2) batteries, one spare tire, front side glass, skyline rope and the light on top of the cowl. The electrical wirings were not in order. The interior portion appeared to be newly-painted but the outer portion looked rusty. He could not categorically tell if the truck was in good running condition, because the batteries and ignition key were missing. The testimonies of these witnesses were not rebutted by the defendants. They are independent witnesses whose testimonies deserve full faith and credit being neutral parties to the case. Even defendant Cesar Peña admitted that the repair was not completed after thirty (30) days from receipt of the Cargo Truck.[31]

Furthermore, the trial court held Optimum liable for damages for its failure to execute its part of the contract on time, pursuant to Article 1170 of the Civil Code.[32]

Optimum filed a Notice of Appeal,[33] whereas respondent moved for reconsideration on the ground that the trial court failed to

[30] *Rollo*, p. 43.

[31] *Rollo,* p. 42.

[32] *Id*. at 43.

[33] Records, p. 354.

award actual damages and that Oriental Assurance Corporation, the bonding company of Optimum, should have been adjudged liable for damages payable by the latter.[34] On 5 August 1999, the trial court issued an order denying the motion for reconsideration on the ground that it has already lost jurisdiction over the case.[35] Thus, respondent filed her Notice of Appeal[36] on 25 August 1999.

On 28 June 2005, the Court of Appeals promulgated its Decision affirming with modification the ruling of the RTC, to wit:

> WHEREFORE, the appealed Decision is hereby AFFIRMED with the following MODIFICATIONS:
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> 1. Appellant Optimum is ordered to return the cargo truck or to reimburse its value in the amount of ₱600,000.00 plus legal interest from the time of the commencement of the action until fully satisfied;
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> 2. Temperate or moderate damages in the amount of Thirty Thousand Pesos (₱30,000.00) is awarded;
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> 3. Twenty percent (20%) of the total award is hereby given to appellee/appellant Tan for both attorney's fees and litigation expenses; and
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> 4. The award of moral damages is deleted.
>
> SO ORDERED.[37]

The Court of Appeals adhered to the trial court's findings that the repairs on the truck had not been completed and that Optimum is liable for damages. It likewise ordered the return of the truck to respondent. It noted:

> The trial court, in giving credence to the claim of appellee/appellant Tan that the repair of the cargo truck was not in accordance with her agreement with appellant Optimum, found the testimonies of a court personnel and a process server to be deserving of full faith and credit, being neutral parties. These witnesses categorically declared in favor

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[34] *Id*. at 357-359.

[35] Records, p. 368.

[36] CA *rollo*, p. 108.

[37] *Rollo*, p. 99.

of appellee/appellant Tan that the cargo truck was not yet repaired as of April 25, 1994 and May 14, 1994, respectively. Thus, even if We admit appellant Optimum's defense that the repair was delayed by the late delivery on May 7, 1994 of the quarter glass panel and the rubber strips, the fact remains that even after the said delivery on May 7, 1994, no such repair was yet done. The trial court found the defense of late delivery to be even toppled by a rebuttal witness for appellee/appellant Tan who testified that the said glass need not even be repaired or that it was not necessary for the complete repair of the cargo truck since they were not damaged at the time he had inspected the cargo truck prior to its delivery for repair to appellant Optimum.

Necessarily then, appellant Optimum was already liable to appellee/appellant Tan for damages from the time the latter demanded delivery of the cargo truck and the latter could not as yet deliver the same despite the lapse of the agreed period. The trial court rightly concluded that appellant Optimum was already remiss in the performance of its part of the contract for repair from the time of such demand. Hence, its liability accrues by virtue of Article 1170 of the Civil Code that states: Those who in the performance of their obligation are guilty of fraud, negligence or delay and those who in any manner contravene the tenor thereof are liable for damages. Thus, appellant Optimum may be compelled to deliver the cargo truck to appellee/appellant Tan despite that the agreed repair was not totally made or to reimburse the value thereof in the claimed amount of Six Hundred Thousand Pesos (₱600,000.00), plus the legal interest of six percent (6%) thereof from the filing of the complaint for recovery.[38]

Both parties moved for reconsideration. For her part, respondent reiterated that her claim for compensatory damages is supported by statement of accounts showing the earnings of the truck before it was brought to Optimum for repair. She likewise expressed disinterest in the return of the truck as it was no longer in good condition. Instead, she sought merely the reimbursement of its value at ₱600,000.00 with interest. Both motions were denied in a Resolution dated 17 October 2005. The appellate court however made the following clarifications:

[38] *Rollo*, pp. 97-98.

Nonetheless, this Court wishes to clarify that the order for the return of the cargo truck must be qualified by the phrase "if feasible" AND that the payment of legal interest applies in both circumstances, *i.e.*, whether there would be the return of such truck OR there would be mere reimbursement of its value pegged at Six Hundred Thousand Pesos (₱600,000.00), with the same amount being the basis of the computation of legal interest.[39]

Unfazed by the unfavorable judgment, Optimum now comes to this Court via a petition for review.

In refusing to abide by the appellate court's ruling, Optimum reiterates its claim for mechanic's lien to justify its retention of the truck. It advances the view that by virtue of the repairs it has actually performed on respondent's truck, it has the right under Article 1731 of the Civil Code[40] to enforce the mechanic's lien. It maintains that the lien applies and can be availed of whether or not the repair work was completely executed. Accordingly, it prays for the payment of the cost of repairs amounting to ₱69,145.00 in exchange for the return of the subject truck, as well as for the award of temperate damages in the sum of ₱30,000.00 and attorney's fees.[41]

Respondent counters that Optimum cannot avail of the mechanic's lien because it was found by the lower courts that the repairs on the truck had not been accomplished.

Respondent prevails.

The concept of a mechanic's lien is articulated in Article 1731 of the Civil Code, which provides:

ARTICLE 1731. He who has executed work upon a movable has a right to retain it by way of pledge until he is paid.

The mechanic's lien is akin to a contractor's or warehouseman's lien in that by way of pledge, the repairman has the right to retain possession of the movable until he is paid. However, the

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[39] *Id.* at 113.

[40] *Id.* at 10.

[41] *Id.* at 15.

right of retention is conditioned upon the execution of work upon the movable. The creation of a mechanic's lien does not depend upon the owner's nonpayment. Rather, the contractor "creates" his or her own lien by performing the work or furnishing the materials.[42]

In *Bachrach Motor Co. v. Mendoza*,[43] the Court had the occasion to rule that a person who has made repairs upon an automobile at the request of the owner is entitled to retain it until he has been paid the price of the work executed.[44]

Optimum's invocation of the mechanic's lien is apparently based on the repairs it executed on the truck. However, the lower courts had already come up with a categorical finding based on testimonies of independent witnesses that the repairs had not been accomplished in accordance with the agreement of the parties. We have to sustain these factual findings, for basic is the tenet that the trial court's findings of facts as affirmed by the Court of Appeals are binding on this Court, unless the lower courts overlooked, misconstrued or misinterpreted facts and circumstances of substance which, if considered, would change the outcome of the case.[45]

As a result of the failure to accomplish the repairs on the truck, the right to retain the truck in accordance with Article 1731 did not arise. Optimum's continuous possession or detention of the truck turned to be that of a deforciant and so respondent has every right to recover possession of it.

From another perspective, Optimum is obliged to take care of the truck with the proper diligence of a good father to a family while the same is in its possession.[46] Records show that

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[42] 53 AM. JUR. 2D MECHANICS' LIENS § 5, citing *Hill v. Hill*, 757 So. 2d 468 (Ala. Civ. App. 2000); *Butler Contracting, Inc. v. Court Street*, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006).

[43] 43 Phil. 410 (1922).

[44] *Id*.

[45] *Ampeloquio, Sr. v. Napiza*, G.R. No. 167071, 31 October 2006, 506 SCRA 396, 408.

[46] CIVIL CODE, Art. 1163.

the subject truck had already deteriorated while in the possession of Optimum. Taking into consideration the last known condition of the truck in tandem with the fact that the court proceedings have spanned almost a decade, it can be readily inferred that the truck has become wholly useless. Since restitution is no longer feasible, Optimum is bound to pay the value of the truck.

The value of the truck should be based on the fair market value that the property would command at the time it was entrusted to Optimum. Such recoverable value is fair and reasonable considering that the value of a motor vehicle depreciates. This value may be recovered without prejudice to such other damages a claimant is entitled to under applicable laws.[47]

In this case, however, respondent did not appeal the appellate court's denial of compensatory damages. Hence, the issue has obtained finality and this Court need not pass upon the same.

Nevertheless, temperate damages have been properly imposed by the appellate court. Under Article 2224 of the Civil Code, temperate damages may be recovered when the court finds that some pecuniary loss has been suffered but its amount cannot, from the nature of the case, be proved with certainty.

WHEREFORE, the petition is *DENIED*. The Decision of the Court of Appeals dated 28 June 2005 is *AFFIRMED*.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Velasco, Jr., and *Brion, JJ.,* concur.

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[47] *Co v. Court of Appeals*, 353 Phil. 305, 317 (1998).

SECOND DIVISION

[G.R. No. 172031. July 14, 2008]

JUANITO TALIDANO, *petitioner, vs.* **FALCON MARITIME & ALLIED SERVICES, INC., SPECIAL EIGHTH DIVISION OF THE COURT OF APPEALS, and LABOR ARBITER ERMITA C. CUYUGA,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; FORUM SHOPPING; VIOLATION THEREOF, HOW DETERMINED.— In determining whether a party has violated the rule against forum shopping, the test to be applied is whether the elements of *litis pendentia* are present or whether a final judgment in one case will amount to *res judicata* in the other.

2. ID.; ID.; APPEALS; PROPER REMEDY TO ASSAIL A DECISION OF THE COURT OF APPEALS DISPOSING A CASE; CASE AT BAR.— The proper remedy to assail decisions of the Court of Appeals involving final disposition of a case is through a petition for review under Rule 45. In this case, petitioner filed instead a *certiorari* petition under Rule 65. Notwithstanding this procedural lapse, this Court resolves to rule on the merits of the petition in the interest of substantial justice, the underlying consideration in this petition being the arbitrary dismissal of petitioner from employment.

3. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; ILLEGAL DISMISSAL; NOT SYNONYMOUS TO ALLEGED EMPLOYEE'S CLAIM OF VOLUNTARY REQUEST OF REPATRIATION.— It is highly illogical for an employee to voluntarily request for repatriation and then file a suit for illegal dismissal. As voluntary repatriation is synonymous to resignation, it is proper to conclude that repatriation is inconsistent with the filing of a complaint for illegal dismissal.

4. REMEDIAL LAW; CIVIL PROCEDURE; APPEALS; QUESTION OF FACT, NOT PROPER; EXCEPTIONS; VARIANCE IN FACTUAL FINDINGS.— The paramount issue boils down to the validity of petitioner's dismissal, the

determination of which generally involves a question of fact. It is not the function of this Court to assess and evaluate the facts and the evidence again, our jurisdiction being generally limited to reviewing errors of law that might have been committed by the trial court or administrative agency. Nevertheless, since the factual findings of the Court of Appeals and the Labor Arbiter are at variance with those of the NLRC, we resolve to evaluate the records and the evidence presented by the parties.

5. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; DISMISSAL OF EMPLOYEE; REQUIREMENTS. — The validity of an employee's dismissal hinges on the satisfaction of two substantive requirements, to wit: (1) the dismissal must be for any of the causes provided for in Article 282 of the Labor Code; and (2) the employee was accorded due process, basic of which is the opportunity to be heard and to defend himself.

6. REMEDIAL LAW; EVIDENCE; RULES OF ADMISSIBILITY; PART OF THE *RES GESTAE*; FAX MESSAGES NOT APPRECIATED AS SUCH; CASE AT BAR.— Section 42 of Rule 130 of the Rules of Court mentions two acts which form part of the *res gestae*, namely: spontaneous statements and verbal acts. In spontaneous exclamations, the *res gestae* is the startling occurrence, whereas in verbal acts, the *res gestae* are the statements accompanying the equivocal act. We find that the fax messages cannot be deemed part of the *res gestae*. To be admissible under the first class of *res gestae*, it is required that: (1) the principal act be a startling occurrence; (2) the statements were made before the declarant had the time to contrive or devise a falsehood; and (3) that the statements must concern the occurrence in question and its immediate attending circumstances. Assuming that petitioner's negligence—which allegedly caused the ship to deviate from its course—is the startling occurrence, there is no showing that the statements contained in the fax messages were made immediately after the alleged incident. In addition, no dates have been mentioned to determine if these utterances were made spontaneously or with careful deliberation. Absent the critical element of spontaneity, the fax messages cannot be admitted as part of the *res gestae* of the first kind. Neither will the second kind of *res gestae* apply. The requisites for its admissibility are: (1) the principal act to be characterized must be equivocal;

(2) the equivocal act must be material to the issue; (3) the statement must accompany the equivocal act; and (4) the statements give a legal significance to the equivocal act. Petitioner's alleged absence from watch duty is simply an innocuous act or at least proved to be one. Assuming *arguendo* that such absence was the equivocal act, it is nevertheless not accompanied by any statement more so by the fax statements adverted to as parts of the *res gestae.* No date or time has been mentioned to determine whether the fax messages were made simultaneously with the purported equivocal act. Furthermore, the material contents of the fax messages are unclear. The matter of route encroachment or invasion is questionable. The ship master, who is the author of the fax messages, did not witness the incident. He obtained such information only from the Japanese port authorities. Verily, the messages can be characterized as double hearsay.

7. LABOR AND SOCIAL LEGISLATION; TERMINATION OF EMPLOYMENT; GROUNDS; GROSS AND HABITUAL NEGLECT OF DUTY; NOT APPRECIATED IN SINGLE ISOLATED INSTANCE AS IN CASE AT BAR.— Under Article 282 of the Labor Code, an employer may terminate an employee for gross and habitual neglect of duties. Neglect of duty, to be a ground for dismissal, must be both gross and habitual. Gross negligence connotes want of care in the performance of one's duties. Habitual neglect implies repeated failure to perform one's duties for a period of time, depending upon the circumstances. A single or isolated act of negligence does not constitute a just cause for the dismissal of the employee. Petitioner's supposed absence from watch duty in a single isolated instance is neither gross nor habitual negligence. Without question, the alleged lapse did not result in any untoward incident. If there was any serious aftermath, the incident should have been recorded in the ship's logbook and presented by private respondent to substantiate its claim. Instead, private respondent belittled the probative value of the logbook and dismissed it as self-serving. Quite the contrary, the ship's logbook is the repository of all activities and transactions on board a vessel. Had the route invasion been so serious as to merit petitioner's dismissal, then it would have been recorded in the logbook. Private respondent would have then had all the more reason to preserve it considering that vital pieces of information are contained therein. In termination

cases, the burden of proving just or valid cause for dismissing an employee rests on the employer. Private respondent miserably failed to discharge this burden. Consequently, the petitioner's dismissal is illegal.

8. ID.; ID.; ID.; DUE PROCESS; COMPLIANCE THEREOF IS MANDATORY.— We also note that private respondent failed to comply with the procedural due process required for terminating the employment of an employee. Such requirement is not a mere formality that may be dispensed with at will. Its disregard is a matter of serious concern since it constitutes a safeguard of the highest order in response to man's innate sense of justice. The Labor Code does not, of course, require a formal or trial type proceeding before an erring employee may be dismissed. This is especially true in the case of a vessel on the ocean or in a foreign port. The minimum requirement of due process in termination proceedings, which must be complied with even with respect to seamen on board a vessel, consists of notice to the employees intended to be dismissed and the grant to them of an opportunity to present their own side of the alleged offense or misconduct, which led to the management's decision to terminate. To meet the requirements of due process, the employer must furnish the worker sought to be dismissed with two written notices before termination of employment can be legally effected, *i.e.*, (1) a notice which apprises the employee of the particular acts or omissions for which his dismissal is sought; and (2) the subsequent notice after due hearing which informs the employee of the employer's decision to dismiss him.

9. ID.; ID.; MIGRANT WORKER'S ACT; ILLEGAL DISMISSAL; PROPER DAMAGES.— Pursuant to Section 10 of Republic Act No. 8042 or the Migrant Worker's Act, employees who are unjustly dismissed from work are entitled to an amount representing their three (3) months' salary considering that their employment contract has a term of exactly one (1) year plus a full refund of his placement fee, with interest at 12% per annum.

APPEARANCES OF COUNSEL

R.C. Carrera Law Office for petitioner.
Arturo L. Limoso for respondent.

D E C I S I O N

TINGA, *J.*:

This Petition for *Certiorari*[1] under Rule 65 of the Rules of Court seeks to annul the Decision[2] and Resolution[3] of the Court of Appeals, dated 16 November 2005 and 2 February 2006, respectively, which upheld the validity of the dismissal of Juanito Talidano (petitioner). The challenged decision reversed and set aside the Decision[4] of the National Labor Relations Commission (NLRC) and reinstated that of the Labor Arbiter.[5]

Petitioner was employed as a second marine officer by Falcon Maritime and Allied Services, Inc. (private respondent) and was assigned to *M/V Phoenix Seven*, a vessel owned and operated by Hansu Corporation (Hansu) which is based in Korea. His one (1)-year contract of employment commenced on 15 October 1996 and stipulated the monthly wage at $900.00 with a fixed overtime pay of $270.00 and leave pay of $75.00.[6]

Petitioner claimed that his chief officer, a Korean, always discriminated against and maltreated the vessel's Filipino crew. This prompted him to send a letter-complaint to the officer-in-charge of the International Transport Federation (ITF) in London, a measure that allegedly was resented by the chief officer. Consequently, petitioner was dismissed on 21 January 1997. He filed a complaint for illegal dismissal on 27 October 1999.[7]

Private respondent countered that petitioner had voluntarily disembarked the vessel after having been warned several times

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[1] *Rollo,* pp. 3-24.

[2] Penned by Associate Justice Mario L. Guarina, III and concurred in by Associate Justices Roberto A. Barrios and Mariflor Punzalan Castillo.

[3] *Id*. at 122.

[4] *Id*. at 129-133; penned by Commissioner Ireneo B. Bernardo and concurred in by Commissioners Lourdes C. Javier and Tito Genilo; Third Division.

[5] *Id*. at 54-59; penned by Labor Arbiter Ermita T. Abrasaldo C. Cuyuca.

[6] CA *rollo*, p. 38.

[7] *Rollo*, p. 55.

of dismissal from service for his incompetence, insubordination, disrespect and insulting attitude toward his superiors. It cited an incident involving petitioner's incompetence wherein the vessel invaded a different route at the Osaka Port in Japan due to the absence of petitioner who was then supposed to be on watch duty. As proof, it presented a copy of a fax message, sent to it on the date of incident, reporting the vessel's deviation from its course due to petitioner's neglect of duty at the bridge,[8] as well as a copy of the report of crew discharge issued by the master of *M/V Phoenix Seven* two days after the incident.[9]

Private respondent stated that since petitioner lodged the complaint before the Labor Arbiter two (2) years and nine (9) months after his repatriation, prescription had already set in by virtue of Revised POEA Memorandum Circular No. 55, series of 1996 which provides for a one-year prescriptive period for the institution of seafarers' claims arising from employment contract.[10]

On 5 November 2001, the Labor Arbiter rendered judgment dismissing petitioner's complaint, holding that he was validly dismissed for gross neglect of duties. The Labor Arbiter relied on the fax messages presented by private respondent to prove petitioner's neglect of his duties, thus:

> x x x The fax message said that the Master of M/V Phoenix Seven received an emergency warning call from Japan Sisan Sebo Naika Radio Authority calling attention to the Master of the vessel M/V Phoenix Seven that his vessel is invading other route [*sic*]. When the Master checked the Bridge, he found out that the Second Officer (complainant) did not carry out his duty watch. There was a confrontation between the Master and the Complainant but the latter insisted that he was right. The argument of the Complainant asserting that he was right cannot be sustained by this Arbitration Branch. The fact that there was an emergency call from the Japanese port authority that M/V Phoenix Seven was invading other route simply means that Complainant neglected his duty. The fax message stating that Complainant was not at the bridge at the time of the emergency

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[8] CA *rollo*, p. 75.

[9] *Id*. at 76.

[10] *Rollo*, p. 56.

call was likewise not denied nor refuted by the Complainant. Under our jurisprudence, any material allegation and/or document which is not denied specifically is deemed admitted. If not of the timely call [*sic*] from the port authority that M/V Phoenix Seven invaded other route, the safety of the vessel, her crew and cargo may be endangered. She could have collided with other vessels because of complainant's failure to render watch duty.[11]

On appeal, the NLRC reversed the ruling of the Labor Arbiter and declared the dismissal as illegal. The dispositive portion of the NLRC's decision reads:

WHEREFORE, premises considered, the decision appealed from is hereby reversed and set aside and a new one entered declaring the dismissal of the complainant as illegal. Respondents Falcon Maritime & Allied Services, Inc. and Hansu Corporation are hereby ordered to jointly and severally pay complainant the amount equivalent to his three (3) months salary as a result thereof.[12]

The NLRC held that the fax messages in support of the alleged misbehavior and neglect of duty by petitioner have no probative value and are self-serving. It added that the ship's logbook should have been submitted in evidence as it is the repository of all the activities on board the vessel, especially those affecting the performance or attitude of the officers and crew members, and, more importantly, the procedures preparatory to the discharge of a crew member. The NLRC also noted that private respondent failed to comply with due process in terminating petitioner's employment.[13]

Private respondent moved for reconsideration,[14] claiming that the complaint was filed beyond the one-year prescriptive period. The NLRC, however, denied reconsideration in a Resolution dated 30 August 2002.[15] Rejecting the argument that the complaint had already prescribed, it ruled:

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[11] *Id*. at 58-59.

[12] *Id*. at 133.

[13] *Id*. at 132.

[14] CA *rollo,* pp. 25-31.

[15] *Rollo*, pp. 65-67.

Records show that respondent in this case had filed a motion to dismiss on the ground of prescription before the Labor Arbiter *a quo* who denied the same in an Order dated August 1, 2000. Such an Order being unappealable, the said issue of prescription cannot be raised anew specially in a motion for reconsideration. (Citations omitted)[16]

It appears that respondent received a copy of the NLRC Resolution[17] on 24 September 2002 and that said resolution became final and executory on 7 October 2002.[18]

Private respondent brought the case to the Court of Appeals via a Petition for *Certiorari*[19] on 8 October 2002. The petition, docketed as CA-G.R. SP. No. 73521, was dismissed on technicality in a Resolution dated 29 October 2002. The pertinent portion of the resolution reads:

(1) [T]he VERIFICATION AND CERTIFICATION OF NON-FORUM SHOPPING was signed by one Florida Z. Jose, President of petitioner Falcon Maritime and Allied Services, Inc., without proof that she is the duly authorized representative of petitioner-corporation;
(2) [T]here is no affidavit of service of the petition to the National Labor Relations Commission and to the adverse party;
(3) [T]here is no explanation to justify service by mail in lieu of the required personal service. (Citations omitted)[20]

An entry of judgment was issued by the clerk of court on 23 November 2002 stating that the 29 October 2002 Resolution had already become final and executory.[21] Meanwhile, on 12 November 2002, private respondent filed another petition before the Court of Appeals,[22] docketed as CA G.R. SP No. 73790. This is the subject of the present petition.

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[16] *Id*. at 66.

[17] *Id*. at 60-64; 31 March 2002, Third Division.

[18] CA *rollo*, p. 85.

[19] *Id*. at 87-99.

[20] *Rollo*, p. 69.

[21] *Rollo,* p. 70.

[22] CA *rollo*, pp. 2-18.

Petitioner dispensed with the filing of a comment.[23] In his Memorandum,[24] however, he argued that an entry of judgment having been issued in CA-G.R. SP No. 73521, the filing of the second petition hinging on the same cause of action after the first petition had been dismissed violates not only the rule on forum shopping but also the principle of *res judicata*. He highlighted the fact that the decision subject of the second petition before the Court of Appeals had twice become final and executory, with entries of judgment made first by the NLRC and then by the Court of Appeals.

The appellate court ultimately settled the issue of prescription, categorically declaring that the one-year prescriptive period applies only to employment contracts entered into as of 1 January 1997 and not those entered prior thereto, thus:

> x x x The question of prescription is untenable. Admittedly, POEA Memorandum Circular [No.] 55 prescribing the standard terms of an employment contract of a seafarer was in effect when the respondent was repatriated on January 21, 1997. This administrative issuance was released in accordance with Department Order [No.] 33 of the Secretary of Labor directing the revision of the existing Standard Employment Contract to be effective by January 1, 1997. Section 28 of this revised contract states: all claims arising therefrom shall be made within one year from the date of the seafarer's return to the point of hire.
>
> It is crystal clear that the one-year period of prescription of claims in the revised standard contract applies only to employment contracts entered into as of January 1, 1997. If there is still any doubt about this, it should be removed by the provision of Circular [No.] 55 which says that the new schedule of benefits to be embodied in the standard contract will apply to any Filipino seafarer that will be deployed on or after the effectivity of the circular.
>
> The respondent was deployed before January 1, 1997. As acknowledged by the petitioners, the rule prior to Circular [No.] 55 provided for a prescriptive period of three years. We cannot avoid

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[23] CA *rollo*, p. 79.

[24] *Id*. at 80-84.

the ineluctable conclusion that the claim of the respondent was filed within the prescriptive period.[25]

Despite ruling that prescription had not set in, the appellate court nonetheless declared petitioner's dismissal from employment as valid and reinstated the Labor Arbiter's decision.

The appellate court relied on the fax messages issued by the ship master shortly after petitioner had committed a serious neglect of his duties. It noted that the said fax messages constitute the *res gestae*. In defending the non-presentation of the logbook, it stated that three years had already passed since the incident and Hansu was no longer the principal of private respondent.

Petitioner's motion for reconsideration was denied. Hence he filed this instant petition.

Citing grave abuse of discretion on the part of the Court of Appeals, petitioner reiterates his argument that the appellate court should not have accepted the second petition in view of the fact that a corresponding entry of judgment already has been issued. By filing the second petition, petitioner believes that private respondent has engaged in forum shopping.[26]

Private respondent, for its part, defends the appellate court in taking cognizance of the second petition by stressing that there is no law, rule or decision that prohibits the filing of a new petition for *certiorari* within the reglementary period after the dismissal of the first petition due to technicality.[27] It rebuts petitioner's charge of forum shopping by pointing out that the dismissal of the first petition due to technicality has not ripened into *res judicata*, which is an essential element of forum shopping.[28]

In determining whether a party has violated the rule against forum shopping, the test to be applied is whether the elements

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[25] *Rollo*, p. 30.

[26] *Id*. at 13.

[27] *Id*. at 144.

[28] *Id*.

of *litis pendentia* are present or whether a final judgment in one case will amount to *res judicata* in the other.[29] This issue has been thoroughly and extensively discussed and correctly resolved by the Court of Appeals in this wise:

The respondent's two arguments essay on certain developments in the case after the NLRC rendered its decision. He points out with alacrity that an entry of judgment was issued twice – first by the NLRC with respect to its decision and then by the Ninth Division of the Court of Appeals after it dismissed on technical grounds the first petition for *certiorari* filed by the petitioner. Neither event, for sure, militates against the institution of a second petition for *certiorari*. A decision of the NLRC is never final for as long as it is the subject of a petition for *certiorari* that is pending with a superior court. A contrary view only demeans our *certiorari* jurisdiction and will never gain currency under our system of appellate court review. It is more to the point to ask if a second petition can stand after the first is dismissed, but under the particular circumstances in which the second was brought, we hold that it can. The theory of *res judicata* invoked by the respondent to bar the filing of the second petition does not apply. The judgment or final resolution in the first petition must be on the merits for *res judicata* to inhere, and it will not be on the merits if it is founded on a consideration of only technical or collateral points. Yet this was exactly how the first petition was disposed of. SP 73521 was dismissed as a result of the failure of the petitioner to comply with the procedural requirements of a petition for *certiorari*. The case never touched base. There was no occasion for the determination of the substantive rights of the parties and, in this sense, the merits of the case were not involved. The petitioner had actually the option of either refilling [*sic*] the case or seeking reconsideration in the original action. It chose to file SP 73790 after realizing that it still had enough time left of the original period of 60 days under Rule 65 to do so.

Since the dismissal of the first petition did not ripen into *res judicata*, it may not be said that there was forum shopping with the filing of the second. The accepted test for determining whether a party violated the rule against forum shopping insofar as it is applicable to this setting is whether the judgment or final resolution in the first case amounts to *res judicata* in the second. *Res judicata* is central to the idea of forum shopping. Without it, forum shopping

[29] *Sps. Tirona v. Hon. Alejo*, 419 Phil. 285, 305 (2001).

is non-existent. The dismissal of the first petition, moreover, if it does not amount to *res judicata*, need not be mentioned in the certification of non-forum shopping accompanying the second action. The omission will not be fatal to the viability of the second case. (Citations omitted)[30]

Private respondent, in turn, questions the propriety of the instant *certiorari* petition and avers that the issues raised by petitioner can only be dealt with under Rule 45 of the Rules of Court.[31] Against this thesis, petitioner submits that the acceptance of the petition is addressed to the sound discretion of this Court.[32]

The proper remedy to assail decisions of the Court of Appeals involving final disposition of a case is through a petition for review under Rule 45. In this case, petitioner filed instead a *certiorari* petition under Rule 65. Notwithstanding this procedural lapse, this Court resolves to rule on the merits of the petition in the interest of substantial justice,[33] the underlying consideration in this petition being the arbitrary dismissal of petitioner from employment.

Petitioner submits that the Court of Appeals erred in relying merely on fax messages to support the validity of his dismissal from employment. He maintains that the first fax message containing the information that the vessel encroached on a different route was a mere personal observation of the ship master and should have thus been corroborated by evidence, and that these fax messages cannot be considered as *res gestae* because the statement of the ship master embodied therein is just a report. He also contends that he has not caused any immediate danger to the vessel and that if he did commit any wrongdoing, the incident would have been recorded in the logbook.

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[30] *Rollo*, pp. 28-29.

[31] *Id*. at 141.

[32] *Id*. at 153.

[33] *Hanjin Engineering & Construction Co., Ltd.. v. Court of Appeals*, G.R. No. 165910, 10 April 2006, 487 SCRA 78, 96; *Capitol Medical Center, Inc. v. Meris*, G.R. No. 155098, 16 September 2005, 470 SCRA 125, 134; *Pobre v. Court of Appeals*, G.R. No. 141805, 8 July 2005, 463 SCRA 50, 59; *Caraan v. Court of Appeals*, 352 Phil. 417, 421 (1998).

Thus, he posits that the failure to produce the logbook reinforces the theory that the fax messages have been concocted to justify his unceremonious dismissal from employment. Hence, he believes that his dismissal from employment stemmed from his filing of the complaint with the ITF which his superiors resented.[34]

Private respondent insists that the appellate court is correct in considering the fax messages as *res gestae* statements. It likewise emphasizes that non-presentment of the logbook is justified as the same could no longer be retrieved because Hansu has already ceased to be its principal. Furthermore, it refutes the allegation of petitioner that he was dismissed because he filed a complaint with the ITF in behalf of his fellow crew members. It claims that petitioner's allegation is a hoax because there is no showing that the alleged complaint has been received by the ITF and that no action thereon was ever taken by the ITF.[35]

Private respondent also asserts that petitioner was not dismissed but that he voluntarily asked for his repatriation. This assertion, however, deserves scant consideration. It is highly illogical for an employee to voluntarily request for repatriation and then file a suit for illegal dismissal. As voluntary repatriation is synonymous to resignation, it is proper to conclude that repatriation is inconsistent with the filing of a complaint for illegal dismissal.[36]

The paramount issue therefore boils down to the validity of petitioner's dismissal, the determination of which generally involves a question of fact. It is not the function of this Court to assess and evaluate the facts and the evidence again, our jurisdiction being generally limited to reviewing errors of law that might have been committed by the trial court or administrative agency. Nevertheless, since the factual findings of the Court of Appeals and the Labor Arbiter are at variance with those of the

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[34] *Rollo*, pp. 15-20.

[35] *Id.* at 148.

[36] *Oriental Shipmanagement Co., Inc. v. Court of Appeals*, G.R. No. 153750, 25 January 2006, 480 SCRA 100, 110.

NLRC, we resolve to evaluate the records and the evidence presented by the parties.[37]

The validity of an employee's dismissal hinges on the satisfaction of two substantive requirements, to wit: (1) the dismissal must be for any of the causes provided for in Article 282 of the Labor Code; and (2) the employee was accorded due process, basic of which is the opportunity to be heard and to defend himself.[38]

The Labor Arbiter held that petitioner's absence during his watch duty when an emergency call was received from the Japanese port authority that *M/V Phoenix Seven* was "invading other route" constituted neglect of duty, a just cause for terminating an employee. Records reveal that this information was related to private respondent via two fax messages sent by the captain of *M/V Phoenix Seven*. The first fax message dated 18 January 1997 is reproduced below:

JUST RECEIVED PHONE CALL FROM MASTER N C/OFFICER THAT THEY DECIDED TO DISCHARGE 2/OFFICER AT OSAKA PORT.

DUE TO MIS-BEHAVIOUR N RESEST [*SIC*] TO OFFICIAL ORDER.

CAPT. HAD RECEIVED EMERGENCY WARNING CALL FROM JAPAN BISAN SETO NAIKAI RADIO AUTHORITY THAT SHIP IS INVADING OTHER ROUTE.

SO, HE WAS SURPRISED N CAME TO BRIDGE N FOUND 2/O NOT CARRY OUT HIS WATCH DUTY.

MASTER SCOLD HIM ABOUT THIS N CORRECT HIS ERROR BUT HE RESIST [SIC] THAT HE IS RIGHT AND THEN SAID THAT HE WILL COME BACK HOME.

FURTHER MORE HE ASKED MASTER TO PAY HIM I.T.F. WAGE SCALE.

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[37] *Philemploy Services and Resources, Inc. v. Rodriguez*, G.R. No. 152616, 31 March 2006, 486 SCRA 302, 314-315; *Molina v. Pacific Plans, Inc.,* G.R. No. 165476, 10 March 2006, 484 SCRA 498.

[38] *Petron Corporation v. National Labor Relations Commission*, G.R. No. 154532, 27 October 2006, 505 SCRA 596, 609.

MASTER N/CIO STRONGLY ASKED US HIS REPATRIATION WITH I.E.U.

PLS. CONFIRM YOUR OPINION ON THIS HAPPENING.[39]

The second fax message dated 20 January 1997 pertained to a report of crew discharge essentially containing the same information as the first fax message. The Court of Appeals treated these fax messages as part of the *res gestae* proving neglect of duty on the part of petitioner.

Section 42 of Rule 130[40] of the Rules of Court mentions two acts which form part of the *res gestae*, namely: spontaneous statements and verbal acts. In spontaneous exclamations, the *res gestae* is the startling occurrence, whereas in verbal acts, the *res gestae* are the statements accompanying the equivocal act.[41] We find that the fax messages cannot be deemed part of the *res gestae*.

To be admissible under the first class of *res gestae*, it is required that: (1) the principal act be a startling occurrence; (2) the statements were made before the declarant had the time to contrive or devise a falsehood; and (3) that the statements must concern the occurrence in question and its immediate attending circumstances.[42]

Assuming that petitioner's negligence—which allegedly caused the ship to deviate from its course—is the startling occurrence, there is no showing that the statements contained in the fax messages were made immediately after the alleged incident. In addition, no dates have been mentioned to determine if these

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[39] CA *rollo*, p. 75.

[40] SEC. 42. *Part of the res gestae*. —Statements made by a person while a startling occurrence is taking place or immediately prior or subsequent thereto with respect to the circumstances thereof, may be given in evidence as part of the *res gestae*. So, also, statements accompanying an equivocal act material to the issue, and giving it a legal significance may be received as part of the *res gestae*.

[41] FRANCISCO, VICENTE, JR., *THE REVISED RULES OF COURT IN THE PHILIPPINES*, Vol. VII, Part 1, 1997 Ed., p. 609.

[42] *Digital Pool of Accredited Insurance Companies v. Radio Mindanao Network*, G.R. No. 147039, 27 January 2006, 480 SCRA 314, 324-325.

utterances were made spontaneously or with careful deliberation. Absent the critical element of spontaneity, the fax messages cannot be admitted as part of the *res gestae* of the first kind.

Neither will the second kind of *res gestae* apply. The requisites for its admissibility are: (1) the principal act to be characterized must be equivocal; (2) the equivocal act must be material to the issue; (3) the statement must accompany the equivocal act; and (4) the statements give a legal significance to the equivocal act.[43]

Petitioner's alleged absence from watch duty is simply an innocuous act or at least proved to be one. Assuming *arguendo* that such absence was the equivocal act, it is nevertheless not accompanied by any statement more so by the fax statements adverted to as parts of the *res gestae*. No date or time has been mentioned to determine whether the fax messages were made simultaneously with the purported equivocal act.

Furthermore, the material contents of the fax messages are unclear. The matter of route encroachment or invasion is questionable. The ship master, who is the author of the fax messages, did not witness the incident. He obtained such information only from the Japanese port authorities. Verily, the messages can be characterized as double hearsay.

In any event, under Article 282 of the Labor Code,[44] an employer may terminate an employee for gross and habitual

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[43] REGALADO, FLORENZ, D., *REMEDIAL LAW COMPENDIUM*, 9th Revised Edition, p. 651.

[44] ART. 282. An employer may terminate an employment for any of the following causes:

(a) Serious misconduct or willful disobedience by the employee of the lawful orders of his employer or representative in connection with his work;

(b) Gross and habitual neglect by the employee of his duties;

(c) Fraud or willful breach by the employee of the trust reposed in him by his employer or duly authorized representative;

(d) Commission of a crime or offense by the employee against the person of his employer or any immediate member of his family or his duly authorized representative;

(e) Other causes analogous to the foregoing.

neglect of duties. Neglect of duty, to be a ground for dismissal, must be both gross and habitual. Gross negligence connotes want of care in the performance of one's duties. Habitual neglect implies repeated failure to perform one's duties for a period of time, depending upon the circumstances. A single or isolated act of negligence does not constitute a just cause for the dismissal of the employee.[45]

Petitioner's supposed absence from watch duty in a single isolated instance is neither gross nor habitual negligence. Without question, the alleged lapse did not result in any untoward incident. If there was any serious aftermath, the incident should have been recorded in the ship's logbook and presented by private respondent to substantiate its claim. Instead, private respondent belittled the probative value of the logbook and dismissed it as self-serving. Quite the contrary, the ship's logbook is the repository of all activities and transactions on board a vessel. Had the route invasion been so serious as to merit petitioner's dismissal, then it would have been recorded in the logbook. Private respondent would have then had all the more reason to preserve it considering that vital pieces of information are contained therein.

In *Haverton Shipping Ltd. v. NLRC,*[46] the Court held that the vessel's logbook is an official record of entries made by a person in the performance of a duty required by law.[47] In *Abacast Shipping and Management Agency, Inc. v. NLRC*,[48] a case cited by petitioner, the logbook is a respectable record that can be relied upon to authenticate the charges filed and the procedure taken against the employees prior to their dismissal.[49] In *Wallem Maritime Services, Inc. v. NLRC*,[50] the logbook is a vital evidence as Article 612 of the Code of Commerce requires the ship captain to keep a record of the decisions he had adopted as the vessel's

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[45] *Id*.

[46] G.R. No. 65442, 15 April 1985, 135 SCRA 685.

[47] *Id.* at 690.

[48] G.R. Nos. 81124-26, 23 June 1988, 162 SCRA 541.

[49] *Id*. at 544.

[50] 331 Phil. 476 (1996).

head.[51] Therefore, the non-presentation of the logbook raises serious doubts as to whether the incident did happen at all.

In termination cases, the burden of proving just or valid cause for dismissing an employee rests on the employer.[52] Private respondent miserably failed to discharge this burden. Consequently, the petitioner's dismissal is illegal.

We also note that private respondent failed to comply with the procedural due process required for terminating the employment of an employee. Such requirement is not a mere formality that may be dispensed with at will. Its disregard is a matter of serious concern since it constitutes a safeguard of the highest order in response to man's innate sense of justice. The Labor Code does not, of course, require a formal or trial type proceeding before an erring employee may be dismissed. This is especially true in the case of a vessel on the ocean or in a foreign port. The minimum requirement of due process in termination proceedings, which must be complied with even with respect to seamen on board a vessel, consists of notice to the employees intended to be dismissed and the grant to them of an opportunity to present their own side of the alleged offense or misconduct, which led to the management's decision to terminate. To meet the requirements of due process, the employer must furnish the worker sought to be dismissed with two written notices before termination of employment can be legally effected, *i.e.*, (1) a notice which apprises the employee of the particular acts or omissions for which his dismissal is sought; and (2) the subsequent notice after due hearing which informs the employee of the employer's decision to dismiss him.[53]

Private respondent's sole reliance on the fax messages in dismissing petitioner is clearly insufficient as these messages were addressed only to itself. No notice was ever given to petitioner apprising him in writing of the particular acts showing

[51] *Id.* at 182.

[52] *Dusit Hotel Nikko v. Gatbonton*, G.R. No. 161654, 5 May 2006, 489 SCRA 671, 676.

[53] *Skippers United Pacific, Inc. v. Maguad*, G.R. No. 166363, 15 August 2006, 498 SCRA 639, 663.

neglect of duty. Neither was he informed of his dismissal from employment. Petitioner was never given an opportunity to present his side. The failure to comply with the two-notice rule only aggravated respondent's liability on top of dismissing petitioner without a valid cause.

Pursuant to Section 10 of Republic Act No. 8042[54] or the Migrant Worker's Act, employees who are unjustly dismissed from work are entitled to an amount representing their three (3) months' salary considering that their employment contract has a term of exactly one (1) year plus a full refund of his placement fee, with interest at 12% per annum.[55]

IN LIGHT OF THE FOREGOING, the petition is *GRANTED*. The Decision of the Court of Appeals is *REVERSED* and *SET ASIDE*. The Decision of the NLRC is *REINSTATED* with the *MODIFICATION* that in addition to the payment of the sum equivalent to petitioner's three (3) months' salary, the full amount of placement fee with 12% legal interest must be refunded.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Velasco, Jr., and *Brion, JJ.,* concur.

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[54] Section 10. Money Claims—

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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.

[55] *Asian Int'l Manpower Services, Inc. v. Court of Appeals*, G.R. No. 169652, 9 October 2006, 504 SCRA 103, 113-114; *JSS Indochina Corp. v. Ferrer*, G.R. No. 156381, 14 October 2005, 473 SCRA 120, 128.

SECOND DIVISION

[G.R. No. 174466. July 14, 2008]

ACI PHILIPPINES, INC., *petitioner, vs.* **EDITHA C. COQUIA, DOING BUSINESS IN THE NAME OF E. CARDOZO COQUIA ENTERPRISE,** *respondent.*

SYLLABUS

1. CIVIL LAW; OBLIGATIONS & CONTRACTS; CONTRACT OF ADHESION; CASE AT BAR.— A contract of adhesion is one wherein a party, usually a corporation, prepares the stipulations in the contract, and the other party merely affixes his signature or his "adhesion" thereto. Through the years, the courts have held that in this type of contract, the parties do not bargain on equal footing, the weaker party's participation being reduced to the alternative to take it or leave it. Thus, adhesion contracts are viewed as traps for the weaker party whom the courts of justice must protect. However, we have also been steadfast in reminding courts to be careful in their evaluation of allegations of blind adherence to contracts. There is every indication in this case that respondent, a presumably astute businesswoman who has dealings with big corporations such as La Tondeña as the latter's sole buyer of cullets and has the financial savvy to obtain a loan from a bank, gave her assent to Purchase Order No. 106211 with full knowledge. She was, in fact, the one who sought a contract with petitioner upon learning of the latter's need for a supply of flint cullets. We cannot, therefore, apply the rule on contracts of adhesion in construing the provisions of the purchase orders in this case. Even the conditions of purchase enumerated at the reverse side of the purchase orders do not reveal any hint of one-sidedness in favor of petitioner.

2. REMEDIAL LAW; EVIDENCE; DOCUMENTARY EVIDENCE; BEST EVIDENCE RULE; EXCEPTION.— It is a cardinal rule of evidence, not just one of technicality but of substance, that the written document is the best evidence of its own contents. It is also a matter of both principle and policy that when the written contract is established as the repository of the parties' stipulations, any other evidence is excluded and

the same cannot be used as a substitute for such contract, nor even to alter or contradict them. This rule, however, is not without exception. Section 9, Rule 130 of the Rules of Court states that a party may present evidence to modify, explain or add to the terms of the agreement if he puts in issue in his pleading the failure of the written agreement to express the true intent and agreement of the parties. Since an exception to the parol evidence rule was squarely raised as an issue in the answer, the trial court should not have been so inflexible as to completely disregard petitioner's evidence.

3. ID.; ID.; EXTINGUISHMENT OF OBLIGATIONS; NOVATION; CASE AT BAR.— Petitioner accepted deliveries under Purchase Order No. 106211 on 8, 12, 15, 18, 20 and 22 October 1994 and paid for these deliveries in accordance with the terms of the purchase order, *i.e.,* at the contract price of ₱4.20 per kilo. However, the original contract between the parties evidenced by Purchase Order No. 106211 was unequivocally novated by Purchase Order No. 106373, thereby extinguishing the original obligation of petitioner to accept deliveries from respondent until the 2,500-3,000 metric tons of flint cullets originally contracted for is filled. Petitioner, therefore, cannot be compelled to accept more deliveries of flint cullets from respondent to complete the quantity originally contracted for.

4. ID.; DAMAGES; ACTUAL DAMAGES; REQUIRES SUFFICIENT EVIDENCE.— As regards damages, we find the award thereof to respondent to be without factual basis. Respondent sought to prove the actual damages she incurred merely through her own testimony, without adducing any documentary evidence to substantiate her alleged losses. While she claims that she obtained a bank loan at an interest rate of 21%, respondent did not present any document to prove the said loan or the use thereof to purchase flint cullets for delivery to petitioner. Neither did respondent present documents to prove her alleged stock of 1,000 metric tons of flint cullets for which she allegedly invested ₱2,500,000.00. The claim for actual damages in this case should be admitted with extreme caution since it is based only on bare assertions without support from independent evidence. In determining actual damages, the Court cannot rely on mere assertions, speculations, conjectures or guesswork but must depend on competent proof

and on the best evidence obtainable regarding the actual amount of loss.

APPEARANCES OF COUNSEL

Picazo Buyco Tan Fider & Santos for petitioner.
Tanopo & Serafica for respondent.

D E C I S I O N

TINGA, *J.*:

Petitioner ACI Philippines, Inc.[1] is engaged in the business of manufacturing fiberglass, which is used in both commercial and industrial equipment for thermal and acoustic insulation. In 1993, it ceased from using silica sand in the manufacture of fiberglass and started using instead recycled broken glass or flint cullets to save on manufacturing costs.[2]

Petitioner contracted with respondent Editha C. Coquia for the purchase of one (1) lot of flint cullets, consisting of 2,500 to 3,000 metric tons, at a price of ₱4.20 per kilo under Purchase Order No. 106211[3] dated 6 October 1994. Several deliveries made by respondent were accepted and paid for by petitioner at the unit price of ₱4.20 per kilo as indicated in Purchase Order No. 106211.[4]

However, on 28 October 1994, petitioner demanded the reduction of the purchase price from ₱4.20 per kilo to ₱3.65 per kilo to which respondent acceded, albeit allegedly under duress. Petitioner accordingly issued Purchase Order No. 106373[5] explicitly superseding Purchase Order No. 106211. Deliveries

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[1] *Rollo*, p. 264. Petitioner has changed its corporate name from ACI Philippines, Inc. to Asia Pacific Insulation Corporation.

[2] *Id*. at 7-8; Petition.

[3] Records, p. 7.

[4] *Rollo*, p. 90; RTC Decision.

[5] Records, p. 15.

were again made by respondent on 5, 8 and 12 November 1994 under Delivery Receipt Nos. 901, 719 and 735,[6] respectively. Petitioner accepted the deliveries but refused to pay for them even at the reduced price of ₱3.65 per kilo, demanding instead that the unit price be further reduced to ₱3.10 per kilo.[7]

Respondent then filed a Complaint[8] for specific performance and damages against petitioner seeking payment for the deliveries made under Delivery Receipt Nos. 901, 719 and 735, amounting to 46,390 kilos at the renegotiated price of ₱3.65 per kilo. Respondent further demanded that petitioner be directed to accept and pay for the remaining deliveries to complete the one (1) lot of flint cullets originally contracted for.

On 26 November 1994, three (3) days after the complaint against it was filed, petitioner paid for the flint cullets under Delivery Receipt Nos. 901, 719 and 735 at the unit price of ₱3.65 per kilo.

Ruling in favor of the respondent, the trial court ordered petitioner to accept deliveries of the flint cullets contracted for under Purchase Order No. 106211 and to pay for the said deliveries within ten (10) days from each delivery at the unit price of ₱4.20 per kilo. It further directed petitioner to pay ₱2,540,300.00 in damages plus interest at the legal rate from the time of the filing of the complaint on 23 November 1994 until fully paid. The trial court also awarded respondent attorney's fees in the amount of ₱200,000.00, litigation expenses in the amount of ₱20,000.00 and costs of suit.

The Court of Appeals affirmed the decision of the trial court but deleted the award of attorney's fees, litigation expenses and costs of suit. In its Decision[9] dated 15 September 2005, the appellate court held that Purchase Order No. 106211 is a

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[6] *Id*. at 18-20.

[7] *Rollo*, p. 10; RTC Decision.

[8] Records, pp. 1-6.

[9] *Rollo*, pp. 50-64; Penned by Associate Justice Jose L. Sabio, Jr. and concurred in by Associate Justices Mariano Del Castillo and Mariflor P. Punzalan Castillo.

contract of adhesion whose terms must be strictly construed against petitioner. It also deemed as contrary to the original agreement, which pegged the unit price of flint cullets at ₱4.20 per kilo, petitioner's willful refusal to pay for the deliveries unless the price is reduced, for which petitioner should be held liable.

The appellate court denied petitioner's Partial Motion for Reconsideration,[10] as well as respondent's Urgent *Ex Parte* Application for Attachment,[11] in its Resolution[12] dated 30 August 2006.

Petitioner claims that the Court of Appeals erred in ruling that Purchase Order No. 106211 is a contract of adhesion despite the fact that respondent is an established businesswoman who has the freedom to negotiate the terms and conditions of any contract she enters into. It stresses that Purchase Order No. 106211 was superseded by Purchase Order No. 106373 and that in both contracts, it was made clear to respondent that her assurance of prompt delivery of the flint cullets motivated the transaction.

Petitioner asserts that the appellate court erred in affirming the trial court's decision which compelled it to accept and pay for the deliveries at the price of ₱4.20 per kilo and at the same required it to pay damages representing respondent's alleged unrealized profits. It also alleges that the appellate court erroneously applied Article 21 of the Civil Code despite the existence of purchase orders which should govern the contractual obligations of the parties.

Apart from stating that petitioner appears to have shut down its operations, respondent's Comment[13] dated 12 January 2007 merely reiterates her position that Purchase Order No. 106373 was a product of intimidation practiced upon her by petitioner.

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[10] CA *rollo*, pp. 162-177.

[11] *Id*. at 156-161.

[12] *Id*. at 66-67.

[13] *Id*. at 226-232.

In its Reply[14] dated 22 April 2007, petitioner asserts that its juridical personality continues to subsist despite the change of its corporate name from ACI Philippines, Inc. to Asia Pacific Insulation Corporation. It emphasizes that Purchase Order No. 106211 is not a contract of adhesion and should be considered valid and binding considering that the parties voluntarily executed the same and that, furthermore, Purchase Order No. 106211 had already been superseded by Purchase Order No. 106373.

Petitioner maintains that it did not exercise any intimidation on respondent to force the latter to acquiesce to the new purchase order and that assuming that it did, the resultant voidable contract was ratified by respondent's delivery of the flint cullets and the fact that the Statement of Account dated 28 October and 16 November 1994 sent by respondent to petitioner already reflected the reduced unit price of ₱3.65 per kilo.

Petitioner also maintains that it entered into a contract with respondent upon the latter's assurance that she could promptly deliver the 2,500-3,000 metric tons of flint cullets required by petitioner. However, it believes that the trial court and the appellate court erroneously refused to receive evidence *aliunde* to prove that time was an important element of the agreement.

The Court of Appeals identified the three issues for resolution: (1) whether petitioner may be bound to accept the deliveries of washed cullets from respondent; (2) what is the unit price applicable; and (3) who is entitled to damages. Central to these issues is the soundness of the appellate court's pronouncement that the purchase orders in question are contracts of adhesion whose terms must be strictly construed against petitioner.

A contract of adhesion is one wherein a party, usually a corporation, prepares the stipulations in the contract, and the other party merely affixes his signature or his "adhesion" thereto. Through the years, the courts have held that in this type of contract, the parties do not bargain on equal footing, the weaker party's participation being reduced to the alternative to take it or leave it. Thus, adhesion contracts are viewed as traps for

[14] *Id*. at 263-283.

the weaker party whom the courts of justice must protect. However, we have also been steadfast in reminding courts to be careful in their evaluation of allegations of blind adherence to contracts.[15]

There is every indication in this case that respondent, a presumably astute businesswoman who has dealings with big corporations such as La Tondeña as the latter's sole buyer of cullets and has the financial savvy to obtain a loan from a bank,[16] gave her assent to Purchase Order No. 106211 with full knowledge. She was, in fact, the one who sought a contract with petitioner upon learning of the latter's need for a supply of flint cullets. Respondent testified:

Q: Could you tell the Court how you were able to get this PO?
A: I went to ACI, sir.

Q: You went to ACI because you have knowledge that they were in need of flint cullets?
A: Yes, sir.

Q: And who told you that ACI is in need of flint cullets?
A: With information, I learned that ACI is in need of cullets, so I went to ACI.

Q: You went to ACI to see a person, who is that person?
A: I went to see ACI that I will deliver cullets, and then I was ordered to go to the purchasing department, sir.

Q: When you went to ACI, you said to deliver cullets?
A: To sell cullets, sir.[17]

We cannot, therefore, apply the rule on contracts of adhesion in construing the provisions of the purchase orders in this case. Even the conditions of purchase enumerated at the reverse side of the purchase orders, which uniformly provide —

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[15] *Gulf Resorts, Inc. v. Philippine Charter Insurance Corporation*, G.R. No. 156167, May 16, 2005, 458 SCRA 550, 575.

[16] *Rollo*, p. 85; RTC Decision.

[17] TSN, December 11, 1995, pp. 32-33.

1. Acknowledgement by the Vendor to the Purchaser or any delivery made by the Vendor pursuant to this order shall constitute acceptance by the Vendor of this order and a contract between the Vendor and the Purchaser in terms of this order to the exclusion of all other terms and conditions between them.

2. The Vendor guarantees the goods ordered to be of merchantable quality and condition and this condition shall apply notwithstanding any examination of the goods by or on behalf of the Purchaser. Any stipulation as to the quality of goods is also a condition of any contract arising from this order. If a sample of the goods has been made available to the Purchaser then contract arising from this order shall have contract for sale by sample as well as a contract for sale by descriptions.

3. The prices stated in this order are firm prices save that any reduction in price resulting from a reduction in customs duties or sales tax from those in force at the date hereof is to be allowed to the Purchase in reduction of the price agreed hereunder.

4. Delivery of the goods must be made at the Purchaser's address shown on the face of this order or as otherwise directed, on a working day between the hours of 8:00 and 3:30 p.m. Until delivery the goods shall be at the Vendor's risk. Any delivery date shown on this order shall be of the essence of any contract arising. Delivery must be made in strict accordance with the order or delivery schedule and any quantities delivered in excess of that specified on the order may be returned by the Purchaser at the Vendor's risk and expense.

5. All goods must be suitably packed or otherwise prepared for delivery to the satisfaction of the carrier. No charges are to be made for wrapping packing cartons boxes or crating unless authorized by this order.

6. The Purchaser may without prejudice to any other rights at any time after delivery of the good reject them if on inspection the Purchaser considers them not to be in conformity with any contract arising from this order. Goods rejected will be held at the vendor's risk and are returnable at the Vendor's risk and expense.

7. All drawings, blueprints, tools or patterns furnished in connection with this order at any time, are confidential to the Vendor and Purchaser and shall be used solely to complete this contract or any other contract relating to the products between the Vendor

and the Purchaser, and for no other purpose, except with the prior consent in writing of the Purchaser, and shall remain the property of the Purchaser and be returned to the Purchaser on demand. The Vendor shall not without the written prior approval of the Purchaser furnish to any third party any goods for the manufacture of which drawings, blueprints, tools, patterns, specifications or samples have been supplied to the Vendor by the Purchaser, or manufacture such articles except for the Purchaser. This restriction shall continue notwithstanding termination of this order.

8. The Purchaser reserves the right to cancel or suspend this order or any part thereof, if the goods are not delivered according to deliveries as specified, or if the Purchaser is unable to accept delivery for any cause beyond the Purchaser's control. The Purchaser further reserves the right to cancel this order if the goods are not in accordance with drawings, blueprints, approved samples or specifications, or are defective in workmanship or material or are not otherwise satisfactory to the Purchaser.

9. Vendor warrants that the sale to the Purchaser and the use by the Purchaser of the goods in any way will not infringe any patent, [trademark], [copyright], industrial design or process of manufacture, and covenants that Vendor will, at Vendor's own expense, upon demand of Purchaser, investigate and deal with every claim and/or suit or action, which may be brought against Purchaser or against those selling or using any goods or products of Purchaser for any alleged infringement or claim of infringement of any patent, [trademark], [copyright], industrial design, or process of manufacture by reason of the sale or use of the goods by the Purchaser and will pay all costs[,] damages and expenses which Purchaser may sustain by reason of any such claim and/or suit [or] action.

10. Invoices quoting this Order number and Vendor's packing slip numbers are required for each individual order and shipment, and shall be mailed to the Purchaser not later than the day of despatch of the goods. All products shall be accompanied by original packing slips. Overseas Vendors must render an additional certified invoice for Philippines Customs purposes. Negotiable bills of lading or consignment notes properly signed by the Carrier must be attached to the Vendor's invoices.

11. Waiver by the Purchaser of any specific defaults by the Vendor, or failure of the Purchaser to cancel this order or any part thereof when such a right arises shall not constitute a waiver by the Purchaser

> of any of the conditions of this order except such defaults as are specifically waived and then only in respect of the actual defaults.[18]

— do not reveal any hint of one-sidedness in favor of petitioner.

If anything, in fact, Condition 4 above seems to have worked to petitioner's disadvantage as it underpins the refusal of the trial court to accept evidence *aliunde* to show that time was of the essence in the transaction. The said condition specifically mentions that the "delivery date shown on (the purchase order) shall be of the essence of any contract arising" and that "delivery must be made in strict accordance with the order or delivery schedule…" Purchase Order No. 106211, however, is unusually silent as to the date the flint cullets are needed.

Petitioner remedied this seeming inadvertence by squarely raising the failure of the purchase order to express the true intent of the parties, *i.e.,* that petitioner entered into a contract with respondent conditioned upon the latter's prompt delivery of flint cullets, as an issue in its Answer with Counterclaims.[19] Unfortunately, the trial court sustained respondent's objection based on the parol evidence rule.

It is a cardinal rule of evidence, not just one of technicality but of substance, that the written document is the best evidence of its own contents. It is also a matter of both principle and policy that when the written contract is established as the repository of the parties' stipulations, any other evidence is excluded and the same cannot be used as a substitute for such contract, nor even to alter or contradict them.[20] This rule, however, is not without exception. Section. 9, Rule 130 of the Rules of Court states that a party may present evidence to modify, explain or add to the terms of the agreement if he puts in issue in his pleading the failure of the written agreement to express the true intent and agreement of the parties. Since an exception to the

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[18] Records, pp. 7, 15.

[19] Records, pp. 38-46.

[20] *Sabio v. The International Corporate Bank, Inc*., G.R. No. 132709, September 4, 2001.

parol evidence rule was squarely raised as an issue in the answer, the trial court should not have been so inflexible as to completely disregard petitioner's evidence.

Sifting through the testimony of respondent, we find that although she was not given definite days during which she should deliver the flint cullets, she was indeed apprised of petitioner's urgent need for large quantities thereof.[21] Furthermore, petitioner presented the unrebutted testimony of Ermilinda Batalon, its materials control manager, to prove that it agreed to the ₱4.20 per kilo purchase price only because respondent assured it of prompt deliveries sufficient for petitioner's production requirements.[22] These testimonies give us a more complete picture of the transaction between the parties and allow for a more reasoned resolution of the issues, without over-reliance on the tenuous application of the rule on contracts of adhesion.

Coming now to the second purchase order, we find that Purchase Order No. 106211 had indeed been superseded by Purchase Order No. 106373 as the latter plainly states. Respondent testified that the deliveries of flint cullets on 28 October 1994 and on subsequent dates were already covered by the new purchase order which did indicate the reduced unit price but did not mention the quantity to be delivered. She said:

Q: And of course you were told by Mrs. Batalon that the PO that will be issued to you is an open PO?

Atty. Tanopo:
What do you mean by open PO?

Atty. Buyco:
It does not indicate the quantity that will deliver.

Q: There is no quantity mentioned as to how much you are going to deliver, you deliver as they come. [I]n other words at ₱3.65?
A: Yes, sir.

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[21] TSN, December 11, 1995, p. 39.

[22] *Rollo*, p. 89; RTC Decision.

Q: So much so that your subsequent deliveries after October 28 is already on the basis of this PO?
A: Yes, sir.

Q: Exhibit D?
A: Yes, sir.

Q: Now, your counsel earlier manifested that he filed this complaint on November 24, 1994, it was after November 23, 1994 Mrs. Coquia [*sic*] that there were developments that substantially affected the allegations in this complaint, like substantial payments made by you by ACI, Philippines?

Atty. Tanopo:
Counsel may show us, your Honor.

Court:
Counsel may stipulate.

Q: Did the deliveries of invoices no. [901, 719] and 735[,] Exhibits F, F1 and F2 has already been paid by the plaintiff?

Atty. Tanopo:
Admitted, paid at the rate of ₱3.65.[23]

Clearly, respondent knew, at the time she made the deliveries on 28 October 1994 and thereafter, that Purchase Order No. 106373 would already govern the transaction. Significantly, payments on these deliveries were made by petitioner on 26 November and 8 December 1994, after the complaint for specific performance was filed and without respondent making as much as a whimper of protest against the terms of the new purchase order or the reduced purchase price indicated therein.

By acquiescing to the new purchase order which no longer indicated a specific quantity of flint cullets to be delivered, respondent knew or should be presumed to have known that deliveries made thereafter were no longer meant to complete the original quantity contracted for under Purchase Order No. 106211.

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[23] TSN, December 11, 1995, pp. 52-54.

The foregoing leads us to resolve the first and second issues framed by the Court of Appeals in favor of petitioner. Petitioner accepted deliveries under Purchase Order No. 106211 on 8, 12, 15, 18, 20 and 22 October 1994 and paid for these deliveries in accordance with the terms of the purchase order, *i.e.,* at the contract price of ₱4.20 per kilo. However, the original contract between the parties evidenced by Purchase Order No. 106211 was unequivocally novated by Purchase Order No. 106373, thereby extinguishing the original obligation of petitioner to accept deliveries from respondent until the 2,500-3,000 metric tons of flint cullets originally contracted for is filled.[24] Petitioner, therefore, cannot be compelled to accept more deliveries of flint cullets from respondent to complete the quantity originally contracted for.

By the same token, petitioner cannot be tied down to the ₱4.20 per kilo unit price under Purchase Order No. 106211, nor even to the ₱3.65 per kilo indicated in Purchase Order No. 106373, the latter contract not having stated the quantity petitioner is willing to accept delivery of and pay for under that price.

As regards damages, we find the award thereof to respondent to be without factual basis. Respondent sought to prove the actual damages she incurred merely through her own testimony, without adducing any documentary evidence to substantiate her alleged losses. While she claims that she obtained a bank loan at an interest rate of 21%, respondent did not present any document to prove the said loan or the use thereof to purchase flint cullets for delivery to petitioner. Neither did respondent present documents to prove her alleged stock of 1,000 metric tons of flint cullets for which she allegedly invested ₱2,500,000.00.

The claim for actual damages in this case should be admitted with extreme caution since it is based only on bare assertions without support from independent evidence. In determining actual damages, the Court cannot rely on mere assertions, speculations,

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[24] Art. 1292. In order that an obligation may be extinguished by another which substitute the same, it is imperative that it be so declared in unequivocal terms, or that the old and the new obligations be on every point incompatible with each other.

conjectures or guesswork but must depend on competent proof and on the best evidence obtainable regarding the actual amount of loss.[25]

Finally, we find the appellate court's citation of Article 21 of the Civil Code misplaced not only because of the pre-existing contractual relation between the parties which bars the application of this provision, but more importantly because we do not deem petitioner to have acted fraudulently or in bad faith.[26]

WHEREFORE, the Decision of the Court of Appeals in CA-G.R. CV No. 57678 dated 15 September 2005, and its Resolution dated 30 August 2006 are *REVERSED*. The complaint dated 23 November 1994 filed by Editha C. Coquia against ACI Philippines, Inc. is hereby *DISMISSED*. No pronouncement as to costs.

SO ORDERED.

Quisumbing (Chairperson), Carpio Morales, Velasco, Jr., and *Brion, JJ.,* concur.

SECOND DIVISION

[G.R. No. 177120. July 14, 2008]

PAUL T. IRAO, *petitioner, vs.* **BY THE BAY, INC.,** *respondent.*

SYLLABUS

1. CIVIL LAW; SPECIAL CONTRACTS; LEASE; NOTICE OF TERMINATION AND DEMAND TO VACATE LEASED

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[25] *Premiere Development Bank v. Court of Appeals*, G.R. No. 159352, April 14, 2004, 427 SCRA 686, 699.

[26] *GF Equity, Inc. v. Valenzona*, G.R. No. 156841, June 30, 2005, 462 SCRA 466; *Far East Bank and Trust Company v. Court of Appeals*, 311 Phil. 783 (1995).

PREMISES; PRESENT IN DEMAND LETTER.— The present petition for review on *certiorari* hinged on the issue of whether the lessor's demand letter to respondent contains a **notice of termination** of the lease contract and a **demand to vacate** the leased premises to justify the taking over of possession thereof by the lessor and/or its representative-herein petitioner. The Court finds in the affirmative. The pertinent portions of the demand letter read: x x x Our client [the lessor] has informed us that **since June 2003, you failed to pay and refused to pay your monthly rentals including the intererst due thereon,** which to date amounts to Php1,450,000. In addition, **you also owe our client the amount of Php567,333.36 by way of penalty and interest for late payment of your rentals from January 2003 to January 2004.** A statement of account is attached herewith for your guidance and information. x x x In view of the foregoing, **formal demand is hereby made on you to pay our client the full amount of Php2,517,333.36 within five (5) days from receipt** hereof, **otherwise we shall be constrained, much to our regret, to terminate your Contract of Lease and take the necessary legal measures against you** to protect our client's interest, **without further notice.** The language and intent of the abovequoted portions of the demand letter are unambiguous. The lessor demanded from respondent the full payment of its unpaid rentals of ₱2,517,333.36 within five days from notice. The phrase **"otherwise we shall be constrained, much to our regret"** in the letter sends a clear **warning** that failure to settle the amount within the stated period would constrain the lessor to **"terminate [the] Contract of Lease"** and **"take the necessary legal measures against [respondent] to protect [its] interest without further notice."** The letter made it clear to respondent that the therein stated adverse consequences would ensue **"without further notice,"** an unmistakable **warning** to respondent that upon its default, the lease contract would be **deemed terminated** and that its continued possession of the leased premises would no longer be permitted. The notice of impending **termination** was not something strange to respondent since it merely implemented the stipulation in Section 31 of their contract that "if default or breach be made of any of such covenants and conditions, then this lease, at the discretion of the LESSOR, may be **terminated and cancelled forthwith.**" To "warn" means "to

give notice to somebody beforehand, especially of danger"; and a "warning" may be "a notice of termination of an agreement, employment, *etc*." Its purpose is "to **apprise a party of the existence of danger of which he is not aware** to enable him to protect himself against it." "[W]here," as here, "the party is **aware of the danger,** the warning will serve no useful purpose and is unnecessary, and there is no duty to warn against risks which are open and obvious."

2. ID.; ID.; ID.; ID.; DEMAND TO VACATE; SUFFICIENCY THEREOF.— The appellate court's ruling that the lessor's letter did not demand respondent to vacate is flawed. A notice or demand to vacate does not have to expressly use the word "vacate," as it suffices that the demand letter puts the lessee or occupant on notice that if he does not pay the rentals demanded or comply with the terms of the lease contract, it should move out of the leased premises.

3. ID.; ID.; ID.; STIPULATIONS THAT LESSOR MAY REPOSSESS LEASED PROPERTY EXTRAJUDICIALLY FROM DEFORCIANT LESSEE, VALID.— It bears reiteration that the demand letter priorly warned respondent that upon its default the lease contract would not only be terminated, but the lessor would "take the necessary legal measures against [respondent] to protect [its] interest, without further notice" and "without resorting to court action" as stipulated in their lease contract. The "necessary legal measures" are **those expressly stipulated in Section 31 of the lease contract.** Contractual stipulations **empowering** the lessor and/or his representative to **repossess** the leased property **extrajudicially** from a deforciant lessee, as in the present case, have been held to be valid. Being the law between the parties, they must be respected. Respondent cannot thus feign ignorance that the repossession of the leased property by the lessor and/or its representative-herein petitioner was the appropriate legal measure it (respondent) itself authorized under their contract.

APPEARANCES OF COUNSEL

A. Tan Zoleta & Associates Law Firm for petitioner.
Recalde Law Offices for respondent.

D E C I S I O N

CARPIO MORALES, *J.*:

By Resolution of February 20, 2008, this Court **denied** the Petition for Review on *Certiorari* filed by Paul T. Irao (petitioner) due to non-compliance with the September 17, 2007 Resolution directing him to file a reply to the comment of By the Bay, Inc. (respondent) on the petition.

Petitioner, through counsel, promptly filed an Urgent Omnibus Motion[1] praying for the reconsideration of the above-said February 20, 2008 Resolution, the reinstatement of his petition, and the admission of his belated reply attached to the motion.

Explaining the non-compliance, petitioner's counsel Atty. Tristram B. Zoleta of *A., Tan, Zoleta and Associates* alleges that "the previous lawyer (Atty. Wilfred F. Neis) assigned to this case inadvertently and unintentionally failed to file the required reply due to his resignation from the law firm, without properly turning over all the cases assigned to him;" that "the law firm and its associates had no slightest intention" to disobey the September 17, 2007 Resolution; and that they have "committed themselves under their oath as lawyers that they will be more circumspect in the supervision and handling of petitioner's case."[2] Atty. Zoleta further averred that "petitioner has a valid and meritorious case," warranting the grant of the petition.[3]

The Court finds counsel's excuse to be flimsy and hackneyed. It is preposterous for his law firm to allow the handling lawyer to resign **without requiring him to turn over all the cases assigned to him**.

Given that the findings on the case by the Metropolitan Trial Court and the Regional Trial Court on one hand, and the Court of Appeals on the other, are **conflicting**, however, and the *prima facie* merit of the petition, the Court heeds petitioner's

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[1] *Rollo*, pp. 176-185.

[2] *Id.* at 177-178.

[3] *Id.* at 179.

entreaty and thus **reconsiders** the February 20, 2008 Resolution, **reinstates** the petition, and **admits** petitioner's belated reply to respondent's comment on the petition.

In June of 2002, the Estate of Doña Trinidad de Leon Roxas represented by Ruby Roxas as lessor, and herein respondent represented by Ronald M. Magbitang as lessee, forged a contract of lease[4] over a three-storey building with an area of 662 square meters, located at Roxas Boulevard corner Salud Street, Pasay City, for a term of five (5) years commencing on July 1, 2002 until June 30, 2007, for a monthly rental of ₱200,000.00, to be increased annually by ₱50,000.00.[5]

It appears that in November 2003, respondent's restaurant business at the leased premises was "closed down by the City Government."

Respondent defaulted in the payment of rentals which, as of January 2004, totaled ₱2,517,333.36[6] inclusive of interest and penalty charges. Despite demands to pay the amount and comply with the terms and conditions of the contract, respondent failed and refused to do so.[7]

The lessor's counsel thereupon demanded, by letter[8] of January 16, 2004, the payment by respondent of ₱2,517,333.36 within five (5) days from notice "**otherwise the Contract of Lease would be terminated without notice**." It appears that the letter to respondent was received on January 23, 2004.[9]

Respondent failed to heed the demand, however, drawing the lessor to terminate the contract without notice, in accordance with Section 31 of the contract which provides:

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[4] Annex "C", Petition, *rollo*, pp. 61-69.

[5] *Id.* at 61.

[6] Annex "D" (lessor's demand letter dated January 16, 2004), Petition, *rollo*, pp. 70-71.

[7] Petition, *id*. at 14-15.

[8] Annex "D", *supra* note 6.

[9] *Vide* Exhibit "K-1", left bottom portion, records, p. 65.

31. DEFAULT – **The LESSEE agrees** that all the covenants and agreements herein contained shall be deemed conditions as well as covenants and that **if default or breach be made of any of such covenants and conditions then this lease, at the discretion of the LESSOR, may be terminated and cancelled forthwith**, and the LESSEE shall be liable for any and all damages, actual and consequential, resulting from such default and termination.

If **after due notice has been given to the LESSEE of the cancellation of the lease**, the latter fails to comply with the LESSOR's demand for the return to it of the possession of the premises and the payment of the LESSEE's accrued obligations pursuant to the provisions of this Contract or in the event the LESSOR should exercise its Contract or in the event the LESSOR should exercise its right to enforce its preferred lien on the personal properties of the LESSEE existing on the Leased Premises, or in the event of default or breach by the LESSEE of any of the provisions herein contained, **the LESSEE hereby empowers the LESSOR and/or her authorized representatives to open, enter, occupy**, padlock, secure, enclose, fence and/or discontinue public utilities **and otherwise take full and complete physical possession and control of the Leased Premises without resorting to court action**; x x x. For purposes of this provision and other pertinent provisions of this Contract, **the LESSEE hereby constitutes the LESSOR and her authorized representatives as the LESSEE's attorney-in-fact, and all acts performed by them in the exercise of their authority are hereby confirmed.** The LESSEE hereby expressly agrees that only or all acts performed by the LESSOR, her authorized agents, employees and/or representatives under the provisions of this Section may not be the subject of any Petition for a Writ of Preliminary Injunction or Mandatory Injunction in court.[10] (Emphasis and underscoring supplied)

Subsequently or on February 4, 2004, the lessor executed a lease contract[11] over the same property with herein petitioner, Paul T. Irao, effective February 1, 2004 until January 30, 2009. Paragraph 6 of this contract empowers petitioner to enter and take over the possession of the leased premises, thus:

6. TURNOVER OF POSSESSION – The Leased Premises is presently being unlawfully detained by the previous lessee and the

[10] *Rollo*, pp. 67-68.

[11] Annex "E", *id.* at 72-80.

LESSEE acknowledges and recognizes such fact. The LESSEE undertakes that it shall take the necessary legal measures to eject or evict the previous lessee and its employees and assigns and take over possession of the Leased Premises.[12]

Consequently, on or about February 6, 2004, petitioner, accompanied by a *Barangay Kagawad* and some security guards from the Spy Master Security Agency, entered and took possession of the leased premises.

Respondent thereupon filed with the Metropolitan Trial Court (MeTC) of Pasay City a complaint[13] for forcible entry with prayer for preliminary mandatory injunction and damages against petitioner and all persons claiming rights under him, docketed as Civil Case No. 89-04 CFM.

In its complaint, respondent alleged that its lease contract had not been terminated[14] because the lessor's demand letter was merely a demand to pay the rental arrears, without a notice to terminate the contract, hence, it "has the right to occupy the leased premises until June 30, 2007,"[15] the expiry date of the lease; and that, therefore, petitioner's taking over the possession of the leased premises on February 6, 2004 was illegal.

By Decision[16] of May 21, 2004, Branch 44 of the MeTC dismissed respondent's complaint, it holding that by respondent's failure to pay monthly rentals, it "violated its contractual obligations and therefore come to Court with unclean hands."[17]

On appeal, the Regional Trial Court (RTC) of Pasay City, Branch 108, by Decision[18] dated August 16, 2004, dismissed respondent's appeal and affirmed the MeTC Decision.

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[12] *Id*. at 73.

[13] Annex "F", *id*. at 81-89.

[14] Par. 6, *id*. at 82.

[15] Par. 17, *id*. at 84.

[16] Annex "H", Petition; *Rollo*, pp. 140-147.

[17] *Id.* at 147.

[18] Annex "H-1", *id.* at 148-151.

Respondent elevated the case via petition for review to the Court of Appeals which, by Decision[19] of February 22, 2006, granted the petition, disposing as follows:

> WHEREFORE, the petition is **GRANTED**. Accordingly, the August 16, 2004 Decision of the Regional Trial Court of Pasay City, Branch 108, and May 21, 2004 Decision of the Metropolitan Trial Court of Pasay City, Branch 44, are **REVERSED** and **SET ASIDE**. A **NEW JUDGMENT** is rendered ordering respondent [herein petitioner] Paul Irao to turn over the possession of the subject premises to petitioner.
>
> SO ORDERED. (Emphasis in the original; underscoring supplied)

In reversing the RTC decision, the appellate court held that "while the contract with respondent provided that [i]n case of default, the parties stipulated that the lessor (or its authorized representative) **could take over the physical possession of the leased premises** '**without resorting to court action**,' [t]his empowerment, however, comes into play only '**after due notice has been given to the LESSEE of the cancellation of the lease**,'"[20] citing the second paragraph of Section 31 of respondent's lease contract, quoted earlier. Finding that a **termination notice** and a **demand to vacate** the leased premises were not incorporated in the lessor's demand letter, the appellate court ruled that respondent's eviction was improper.

Petitioner's motion for reconsideration was denied by Resolution[21] of March 26, 2007.

Hence, the present petition for review on *certiorari* filed on May 15, 2007 hinged on the issue of whether the lessor's demand letter to respondent contains a **notice of termination** of the lease contract and a **demand to vacate** the leased premises to justify the taking over of possession thereof by the lessor and/or its representative-herein petitioner.

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[19] Penned by Associate Justice Jose Catral Mendoza and concurred in by Associate Justices Jose L. Sabio, Jr. and Arturo G. Tayag; Annex "A", *id.* at 32-43.

[20] CA Decision, p. 7; *rollo*, p. 39.

[21] Annex "B", Petition; *id.* at 44.

The Court finds in the affirmative.

The pertinent portions of the demand letter read:

x x x x x x x x x

Our client [the lessor] has informed us that **since June 2003, you failed to pay and refused to pay your monthly rentals including the interest due thereon**, which to date amounts to Php1,450,000. In addition, **you also owe our client the amount of Php567,333.36 by way of penalty and interest for late payment of your rentals from January 2003 to January 2004**. A statement of account is attached herewith for your guidance and information.

x x x x x x x x x

In view of the foregoing, **formal demand is hereby made on you to pay our client the full amount of Php2,517,333.36 within five (5) days from receipt** hereof, **otherwise we shall be constrained, much to our regret, to terminate your Contract of Lease and take the necessary legal measures against you** to protect our client's interest, **without further notice**. (Emphasis and underscoring supplied)

The language and intent of the abovequoted portions of the demand letter are unambiguous. The lessor demanded from respondent the full payment of its unpaid rentals of ₱2,517,333.36 within five days from notice. The phrase "**otherwise we shall be constrained, much to our regret**" in the letter sends a clear **warning** that failure to settle the amount within the stated period would constrain the lessor to "**terminate [the] Contract of Lease**" and "**take the necessary legal measures against [respondent] to protect [its] interest without further notice.**"

The letter made it clear to respondent that the therein stated adverse consequences would ensue "**without further notice**," an unmistakable **warning** to respondent that upon its default, the lease contract would be **deemed terminated** and that its continued possession of the leased premises would no longer be permitted.

The notice of impending **termination** was not something strange to respondent since it merely implemented the stipulation in Section 31 of their contract that "if default or breach be

made of any of such covenants and conditions, then this lease, at the discretion of the LESSOR, may be **terminated and cancelled forthwith**."

To "warn" means "to give notice to somebody beforehand, especially of danger"; and a "warning" may be "a notice of termination of an agreement, employment, *etc*."[22] Its purpose is "to **apprise a party of the existence of danger of which he is not aware** to enable him to protect himself against it."[23]

"[W]here," as here, "the party is **aware of the danger**, the warning will serve no useful purpose and is unnecessary, and there is no duty to warn against risks which are open and obvious."[24]

The appellate court's ruling that the lessor's letter did not demand respondent to vacate is flawed. A notice or demand to vacate does not have to expressly use the word "vacate," as it suffices that the demand letter puts the lessee or occupant on notice that if he does not pay the rentals demanded or comply with the terms of the lease contract, it should move out of the leased premises.[25]

It bears reiteration that the demand letter priorly warned respondent that upon its default the lease contract would not only be terminated, but the lessor would "take the necessary legal measures against [respondent] to protect [its] interest, without further notice" and "without resorting to court action" as stipulated in their lease contract. The "necessary legal measures" are **those expressly stipulated in Section 31 of the lease contract** among which are, for expediency, requoted below:

"x x x in the event of default or breach by the LESSEE of any of the provisions herein contained, **the LESSEE hereby empowers**

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[22] *English Dictionary*, Penguin Reference, Centennial Edition 2004, London, England, p. 1589.

[23] *Black's Law Dictionary*, Sixth Centennial Edition, p. 1584, citing *Wiseman v. Northern Pac. Ry. Co.*, 214 Minn. 101, 7 N.W.2d 672, 675.

[24] *Id*.

[25] *Golden Gate Realty, Corporation v. Intermediate Appellate Court*, No. 74289, July 31, 1987, 152 SCRA 684.

the LESSOR and/or her authorized representatives to open, enter, occupy, x x x **and otherwise take full and complete physical possession and control of the Leased Premises without resorting to court action**; x x x. For purposes of this provision and other pertinent provisions of this Contract, **the LESSEE hereby constitutes the LESSOR and her authorized representatives as the LESSEE's attorney-in-fact, and all acts performed by them in the exercise of their authority are hereby confirmed**. x x x." (Emphasis and underscoring supplied)

Contractual stipulations **empowering** the lessor and/or his representative to **repossess** the leased property **extrajudicially** from a deforciant lessee, as in the present case, have been held to be valid.[26] Being the law between the parties, they must be respected. Respondent cannot thus feign ignorance that the repossession of the leased property by the lessor and/or its representative-herein petitioner was the appropriate legal measure it (respondent) itself authorized under their contract.

In *Viray v. Intermediate Appellate Court*[27] where the lessor and the lessee stipulated as follows:

7. Upon failure of the Lessee to comply with any of the terms and conditions of this lease, as well as such other terms and conditions which may be imposed by the Lessor prior to and/or upon renewal of this lease agreement as provided in par. 2 above, then the Lessor shall have the right, upon five (5) days written notice to the Lessee or in his absence, upon written notice posted at the entrance of the premises leased, to *enter and take possession of the said premises* holding in his trust and custody and such possessions and belongings of the Lessee found therein after an inventory of the same in the presence of a witness, all these *acts being hereby agreed to by the Lessee as tantamount to his voluntary vacation of the leased premises without the necessity of suit in court."* (Underscoring supplied; italics in the original),

this Court, finding that the stipulation empowered the lessor to repossess the leased premises extrajudicially, and citing, *inter*

[26] *Viray v. Intermediate Appellate Court*, G.R. No. 81015, July 4, 1991, 198 SCRA 786, 791; *Consing v. Jamandre*, No. L-27674, May 12, 1975, 64 SCRA 1.

[27] *Ibid*.

alia, *Consing v. Jamadre*[28] wherein this Court sustained the validity of a lease agreement empowering the sub-lessor to take possession of the leased premises, in case the sub-lessee fails "to comply with any of the terms and conditions" of the contract "without necessity of resorting to court action," held that the stipulation was valid.

In *Subic Bay Metropolitan Authority v. Universal International Group of Taiwan,*[29] this Court, in resolving in the affirmative the issue of whether a "stipulation authorizing [the therein petitioner-lessor] to extrajudicially rescind its contract [with the therein respondent-lessee] and to recover possession of the property in case of contractual breach is lawful," considered, among other things, the therein lessee's several violations of the Lease and Development Agreement including its failure to complete the "rehabilitation of the Golf Course in time for the APEC Leaders' Summit, and to pay accumulated lease rentals, and to post the required performance bond," which violations the lessee did not deny or controvert. The Court therein concluded that the lessee "effectively . . . offered no valid or sufficient objection to the lessor's exercise of its stipulated right to extrajudicially rescind the [agreement] and take over the property in case of material breach."

As in *Subic Bay,*[30] herein respondent-lessee violated its agreement with the lessor and offered no valid or sufficient objection to the exercise by the lessor through petitioner of its stipulated right to extrajudicially take possession of the leased premises.

Apropos with respect to herein respondent's having already been ousted of the leased premises is this Court's explanation in *Viray* that "the existence of . . . an affirmative right of action [of the lessor] constitutes a valid defense against, and is fatal to any action by the tenant who has been ousted otherwise than

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[28] *Ibid*.

[29] G.R. No. 131680, September 14, 2000, 340 SCRA 359.

[30] *Ibid*.

judicially to recover possession," citing *Apundar v. Andrin*[31] which held:

> . . . The existence of an affirmative right of action on the part of the landlord to oust the tenant is fatal to the maintenance of any action by the tenant. Otherwise, the absurd result would follow that a tenant ousted under the circumstances here revealed would be restored to possession only himself to be immediately put out in a possessory action instituted by the landlord. To prevent circuity of action, therefore, we must recognize the affirmative right of action on the part of the landlord as a complete and efficacious defense to the maintenance of an action by the tenant. *Circuitus est evitandus; et boni judices est lites dirimere, ne lis ex lite oriatur*.
>
> Another consideration based upon an idea familiar to jurisprudence is equally decisive. This is found in one of the implications of the familiar maxim, *Ubi jus ibi* remedium, the converse of which is of course equally true, namely: *Nullum jus nullum remedium*. Applying this idea to the case before us, it is manifest that inasmuch as the plaintiffs right of possession has been destroyed, the remedy is also necessarily taken away.[32] (Underscoring supplied)

To restore possession of the premises to herein respondent, who was ousted under the circumstances reflected above, would undoubtedly, certainly result to absurdity.

WHEREFORE, the petition is *GRANTED*. The challenged Court of Appeals Decision dated February 22, 2006 and its Resolution dated March 26, 2007 are *REVERSED* and *SET ASIDE*.

The August 16, 2004 Decision of the Regional Trial Court of Pasay City, Branch 108 affirming that of the Metropolitan Trial Court of Pasay City, Branch 44 is *REINSTATED*.

Costs against respondent.

SO ORDERED.

Quisumbing (Chairperson), Tinga, Velasco, Jr., and *Brion, JJ.,* concur.

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[31] G.R. No. L-16220, November 19, 1921, 42 Phil. 356, 361-362; *vide* also *Medel v. Militante*, No. L-16096, March 30, 1921, 41 Phil. 526.

[32] *Viray v. Intermediate Appellate Court*, *supra* citing also *Medel v. Militante*, No. L-16096, March 30, 1921, 41 Phil. 526.

EN BANC

[G.R. No. 178830. July 14, 2008]

ROLEX SUPLICO, *petitioner, vs.* **NATIONAL ECONOMIC AND DEVELOPMENT AUTHORITY, represented by NEDA SECRETARY ROMULO L. NERI, and the NEDA-INVESTMENT COORDINATION COMMITTEE, DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS (DOTC), represented by DOTC SECRETARY LEANDRO MENDOZA, including the COMMISSION ON INFORMATION AND COMMUNICATIONS TECHNOLOGY, headed by its Chairman, RAMON P. SALES, THE TELECOMMUNICATIONS OFFICE, BIDS AND AWARDS FOR INFORMATION AND COMMUNICATIONS TECHNOLOGY (ICT), headed by DOTC ASSISTANT SECRETARY ELMER A. SONEJA as Chairman, and the TECHNICAL WORKING GROUP FOR ICT, AND DOTC ASSISTANT SECRETARY LORENZO FORMOSO, AND ALL OTHER OPERATING UNITS OF THE DOTC FOR INFORMATION AND COMMUNICATIONS TECHNOLOGY, and ZTE CORPORATION, AMSTERDAM HOLDINGS, INC., AND ALL PERSONS ACTING IN THEIR BEHALF,** *respondents.*

[G.R. No. 179317. July 14, 2008]

AMSTERDAM HOLDINGS, INC., and NATHANIEL SAUZ, *petitioners, vs.* **DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS, SECRETARY LEANDRO MENDOZA, COMMISSION ON INFORMATION AND COMMUNICATIONS TECHNOLOGY, and ASSISTANT SECRETARY LORENZO FORMOSO III,** *respondents.*

[G.R. No. 179613. July 14, 2008]

GALELEO P. ANGELES, VICENTE C. ANGELES, JOB FLORANTE L. CASTILLO, TRINI ANNE G. NIEVA, ROY ALLAN T. ARELLANO, CARLO MAGNO M. REONAL, ETHEL B. REGADIO, RAENAN B. MALIG, AND VINALYN M. POTOT, TOGETHER WITH LAWYERS AND ADVOCATES FOR ACCOUNTABILITY, TRANSPARENCY, INTEGRITY AND GOOD GOVERNANCE (LATIGO), *petitioners, vs.* **DEPARTMENT OF TRANSPORTATION AND COMMUNICATIONS (DOTC), represented by DOTC SECRETARY LEANDRO MENDOZA, and ZHONG XING EQUIPMENT (ZTE) COMPANY, LTD., AND ANY AND ALL PERSONS ACTING ON THEIR BEHALF,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; WHAT NEED NOT BE PROVED; JUDICIAL NOTICE, WHEN MANDATORY; ON OFFICIAL ACTS OF THE PRESIDENT OF THE PHILIPPINES; CASE AT BAR.— Section 1, Rule 129 of the Rules of Court provides: SECTION 1. *Judicial Notice,* ***when mandatory.*** **–** A court shall take judicial notice, **without introduction of evidence**, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, **the official acts of the** legislative, **executive** and judicial **departments of the Philippines**, the laws of nature, the measure of time, and the geographical divisions. Under the rules, it is **mandatory** and the Court has no alternative but to take judicial notice of the official acts of the President of the Philippines, who heads the executive branch of our government. It is further provided in the above-quoted rule that the court shall take judicial notice

of the foregoing facts **without introduction of evidence**. Since we consider the act of cancellation by President Macapagal-Arroyo of the proposed ZTE-NBN Project during the meeting of October 2, 2007 with the Chinese President in China as an **official act of the executive department**, the Court must take judicial notice of such official act without need of evidence. xxx Moreover, under Section 2, paragraph (m) of Rule 131 of the Rules of Court, the **official duty** of the executive officials of informing this Court of the government's decision not to continue with the ZTE-NBN Project is also presumed to **have been regularly performed**, absent proof to the contrary.

2. ID.; CIVIL PROCEDURE; JUDICIAL POWER PRESUPPOSES ACTUAL CONTROVERSIES. — Concomitant to its fundamental task as the ultimate citadel of justice and legitimacy is the judiciary's role of strengthening political stability indispensable to progress and national development. Pontificating on issues which no longer legitimately constitute an actual case or controversy will do more harm than good to the nation as a whole. Wise exercise of judicial discretion militates against resolving the academic issues, as petitioners want this Court to do. This is especially true where the legal issues raised cannot be resolved without previously establishing the factual basis or antecedents. Judicial power presupposes actual controversies, the very antithesis of mootness. In the absence of actual justiciable controversies or disputes, the Court generally opts to refrain from deciding moot issues. Where there is no more live subject of controversy, the Court ceases to have a reason to render any ruling or make any pronouncement.

3. ID.; EVIDENCE; COURT CANNOT JUST PRESUME NON-COMPLIANCE WITH THE LAWS; CASE AT BAR.— [T]he Court cannot completely rule on the merits of the case because **the resolution of the three petitions involves settling factual issues which definitely requires reception of evidence**. There is not an iota of doubt that **this may not be done by this Court in the first instance because**, as has been stated often enough, **this Court is not a trier of facts**. Petitioner Suplico in G.R. No. 178830 prayed that this Court order "public respondents to *forthwith* comply with pertinent provisions of

law regarding procurement of government ICT contracts and public bidding for the NBN contract." **It would be too presumptuous on the part of the Court to summarily compel public respondents** to comply with pertinent provisions of law regarding procurement of government infrastructure projects **without any factual basis** or prior determination of very particular violations committed by specific government officials of the executive branch. For the Court to do so would amount to a breach of the norms of comity among co-equal branches of government. A perceived error cannot be corrected by committing another error. Without proper evidence, the Court cannot just presume that the executive did not comply with procurement laws. Should the Court allow itself to fall into this trap, it would plainly commit grave error itself. xxx Let it be clarified that the Senate investigation in aid of legislation cannot be the basis of Our decision which requires a judicial finding of facts.

AZCUNA, *J.*, *separate concurring opinion:*

POLITICAL LAW; CONSTITUTIONAL LAW; JUDICIARY; JUDICIAL POWER FOR ACTUAL CONTROVERSY NOT PROPER IN CASE AT BAR AS ISSUE HAD BECOME MOOT AND ACADEMIC.— [U]nder the facts and pursuant to Article VIII, Section 1 of the Constitution that defines judicial power as the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, I am of the view that the desistance from the agreement in question renders the matter academic and moot, leaving no actual controversy calling for the exercise of judicial power. The resolution of the issue in these proceedings would, therefore, partake of the nature of an advisory opinion which this Court is not allowed to render.

CARPIO, *J.*, *dissenting opinion*:

1. POLITICAL LAW; GOVERNMENT CONTRACTS; ZTE SUPPLY CONTRACT IS VOID FROM THE BEGINNING

ABSENT APPROPRIATION LAW, A CERTIFICATE OF APPROPRIATION AND FUND AVAILABILITY AND PUBLIC BIDDING.— This case raises the following issues: 1. Whether the ZTE Supply Contract is void from the beginning in the absence of an appropriation by law to fund the contract, and in the absence of a certificate of appropriation and fund availability; and 2. Whether the ZTE Supply Contract is void from the beginning in the absence of a public bidding. The simple answer to each question is yes, the ZTE Supply Contract is void from the beginning. The absence of **any** of the three – an appropriation law, a certificate of appropriation and fund availability, and public bidding – renders the ZTE Supply Contract void from the beginning. x x x A contract void from the beginning is legally non-existent. As such, it cannot be annulled because to annul a contract assumes a voidable contract. A cancellation of a contract void from the beginning has no legal effect because the contract is legally non-existent. Any cancellation may simply be construed as an acknowledgment or admission that the contract is void from the beginning. A contract void from the beginning can only be declared as such, that is, void from the beginning. Thus, the discontinuance or cancellation of the ZTE Supply Contract by the Philippine Government, apart from being unilateral, had no legal effect and did not moot this petition. The members of this Court have the sworn duty to uphold the system of checks and balances that is so essential to our democratic system of government. In the present case, the members of this Court must uphold the check and balance in the appropriation and expenditure of public funds as embodied in Section 29(2), Article VI of the Constitution and the statutes insuring its compliance. If our democratic institutions are to be strengthened, this Court must not shirk from its primordial duty to preserve and uphold the Constitution. It is time to put an end to government procurement contracts, amounting to tens of billions of pesos, exceeding even the annual budget of the Judiciary, that are awarded and signed without an appropriation from Congress, and without the required public

bidding. This Court must categorically declare the ZTE Supply Contract void from the beginning.

2. ID.; ID.; THAT THE CONSTITUTION REQUIRES AN APPROPRIATION LAW BEFORE PUBLIC FUNDS ARE SPENT FOR ANY PURPOSE; ELUCIDATED.— The Constitution requires an appropriation law before public funds are spent for any purpose. Section 29(2), Article VI of the Constitution provides: No money shall be paid out of the Treasury except in pursuance of an appropriation made by law. The power of the purse – or the power of Congress to authorize payment from funds in the National Treasury – is lodged **exclusively** in Congress. One of the fundamental checks and balances finely crafted in the Constitution is that Congress authorizes the amount to be spent, while the Executive spends the amount so authorized. The Executive cannot authorize its own spending, and neither can Congress spend what it has authorized. The rationale of this basic check and balance is to prevent abuse of discretion in the expenditure of public funds. Thus, the Executive branch cannot spend a single centavo of government receipts, whether from taxes, sales, donations, dividends, profits, loans, or from any other source, unless there is an appropriation law authorizing the expenditure. Any government expenditure without the corresponding appropriation from Congress is unconstitutional. There is no exception to this constitutional prohibition that "no money shall be paid out of the Treasury except in pursuance of an appropriation made by law." This constitutional prohibition is self-executory.

3. ID.; ID.; ID.; COMPLIANCE THEREIN INSURED UNDER THE ADMINISTRATIVE CODE OF 1987 AND THE GOVERNMENT AUDITING CODE OF THE PHILIPPINES; DISCUSSED.— To further insure compliance with Section 29(2), Article VI of the Constitution, the Administrative Code of 1987 **expressly prohibits the entering into contracts** involving the expenditure of public funds unless two prior requirements are satisfied. ***First,*** **there must be an appropriation law authorizing the expenditure required**

in the contract. *Second,* there must be attached to the contract a certification by the proper accounting official and auditor that funds have been appropriated by law and such funds are available. Failure to comply with any of these two requirements renders the contract void. Thus, Sections 46, 47 and 48, Chapter 8, Subtitle B, Title 1, Book V of the Administrative Code of 1987 provide: x x x Sections 85, 86, 87 of the Government Auditing Code of the Philippines, an earlier law, contain the same provisions. The Administrative Code of 1987 and the Government Auditing Code expressly mandate that "**[N]o contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor.**" The law prohibits the **mere entering into a contract** without the corresponding appropriation from Congress. It does not matter whether the contract is subject to a condition as to its effectivity, such as a subsequent favorable legal opinion by the Department of Justice, because even a contract with such condition is still a contract under the law. Moreover, the Administrative Code of 1987 and the Government Auditing Code expressly mandate that "**[N]o contract involving the expenditure of public funds x x x shall be entered into or authorized unless the proper accounting official x x x shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure.**" The law prohibits not only the entering into the contract, but also authorizing the entering into the contract without the certification from the proper accounting official. This means that the certificate of appropriation and fund availability must be issued **before** the signing of the contract. In addition, the Administrative Code of 1987 and the Government Auditing Code expressly require that the "**certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract.**" The certificate of appropriation and fund availability must be **attached to the**

"**proposed contract,**" again clearly showing that the certificate must be issued **before** the signing of the contract.

4. ID.; ID.; ID.; ID.; PROCUREMENT CONTRACT LIKE THE ZTE SUPPLY CONTRACT RENDERED VOID FOR FAILURE TO COMPLY WITH THE TWO REQUIREMENTS OF 1. AN APPROPRIATION LAW FUNDING THE CONTRACT AND 2. A CERTIFICATION OF APPROPRIATION AND FUND AVAILABILITY.— The law expressly declares void a procurement contract that fails to comply with the two requirements, namely, an appropriation law funding the contract and a certification of appropriation and fund availability. The clear purpose of these requirements is to insure that government contracts are never signed unless supported by the corresponding appropriation law and fund availability. **The ZTE Supply Contract does not comply with any of these two requirements.** Thus, the ZTE Supply Contract is void for violation of Sections 46, 47 and 48, Chapter 8, Subtitle B, Title 1, Book V of the Administrative Code of 1987, as well as Sections 85, 86 and 87 of the Government Auditing Code of the Philippines. These provisions of both Codes implement Section 29(2), Article VI of the Constitution.

5. ID.; ID.; GOVERNMENT PROCUREMENT REFORM ACT; PUBLIC BIDDING IN ALL PROCUREMENT OF INFRASTRUCTURE, GOODS AND SERVICES, REQUIRED.— The Government Procurement Reform Act requires public bidding in **all procurement** of infrastructure, goods and services. Section 10, Article IV of the Government Procurement Reform Act provides: Section 10. Competitive Bidding – **All procurement shall be done through Competitive Bidding**, except as provided for in Article XVI of this Act. In addition, Section 4 of the Government Procurement Reform Act provides that the Act applies to government procurement "regardless of source of funds, whether local or foreign." Hence, the requirement of public bidding applies to foreign-funded contracts like the ZTE Supply Contract.

6. ID.; ID.; ID.; ID.; A PRIOR LAW THAT CANNOT BE REPEALED OR AMENDED BY AN EXECUTIVE AGREEMENT.— Admittedly, an executive agreement has the force and effect of law, just like implementing rules of executive agencies. However, just like implementing rules of executive agencies, executive agreements cannot amend or repeal prior laws but must comply with the laws they implement. Only a treaty, upon ratification by the Senate, acquires the status of a municipal law. Thus, a treaty may amend or repeal a prior law and *vice-versa*. Hence, a treaty may change state policy embodied in a prior law. In sharp contrast, an executive agreement, being an exclusive act of the Executive branch, does not have the status of a municipal law. Acting alone, the Executive has no law-making power. While the Executive does possess rule-making power, such power must be exercised consistent with the law it seeks to implement. Consequently, an executive agreement cannot amend or repeal a prior law. An executive agreement must comply with state policy embodied in existing municipal law. x x x Executive agreements are intended to carry out **well-established national policies**, and these are found in statutes.

7. ID.; ID.; ID.; ID.; ID.; EXECUTIVE AGREEMENT; THAT THE CHINESE GOVERNMENT HANDPICKED THE ZTE CORPORATION AS ITS SUPPLIER TO THE PHILIPPINE GOVERNMENT DOES NOT MAKE THE CONTRACT WITH ZTE AN EXECUTIVE AGREEMENT.— An executive agreement is an agreement **between governments**. The Executive branch has defined an "international agreement," which includes an executive agreement, to refer to a contract or an understanding "**entered into between the Philippines and another government.**" That the Chinese Government handpicked the ZTE Corporation to supply the goods and services to the Philippine Government does not make the ZTE Supply Contract an executive agreement. ZTE Corporation is not a government or even a government agency performing governmental or developmental functions like the Export-Import

Bank of China or the Japan Bank for International Cooperation, or a multilateral lending agency organized by governments like the World Bank. ZTE Corporation is a business enterprise performing purely commercial functions. ZTE Corporation is publicly listed in the Hong Kong and Shenzhen stock exchanges, with individual and juridical stockholders that receive dividends from the corporation. Moreover, an executive agreement is governed by international law. However, the ZTE Supply Contract expressly provides that it shall be governed by Philippine law. Thus, the ZTE Supply Contract is not an executive agreement but simply a commercial contract, which must comply with public bidding as mandated by the governing law, which is Philippine law.

8. ID.; ID.; ID.; ID.; EXECUTIVE AGREEMENT NOT ALLOWED TO OVERRIDE THE MANDATORY PUBLIC BIDDING.— [R]espondents seek refuge in the second sentence of Section 4 of the Government Procurement Reform Act: Thus, x x x **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed.** Respondents argue that the second sentence of Section 4 allows an executive agreement to override the mandatory public bidding in Section 10 of the Government Procurement Reform Act. Respondents' argument is flawed. First, an executive agreement, being an exclusive act of the Executive branch, cannot amend or repeal a mandatory provision of law requiring public bidding in government procurement contracts. To construe otherwise the second sentence of Section 4 would constitute an undue delegation of legislative powers to the President, making such sentence unconstitutional. x x x Second, under Section 10 of the Government Procurement Reform Act, the only exceptions to mandatory public bidding are those specified in Article XVI of the Act. These specified exceptions do not include purchases from foreign suppliers handpicked by foreign governments, or from suppliers owned or controlled by foreign governments. Moreover, Section 4 of the Government Procurement Reform

Act mandates that the "Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, **regardless of source of funds, whether local or foreign** x x x." Third, the second sentence of Section 4 should be read in conjunction with Section 4 of the Foreign Borrowings Act. x x x Likewise, Section 4 of the Government Procurement Reform Act should be read in conjunction with Section 11-A of the Official Development Assistance Act of 1996: x x x Consequently, as construed together, the executive agreements mentioned in the second sentence of Section 4 of the Government Procurement Reform Act should refer to executive agreements on **(1) the waiver or modification of preferences to local goods or domestic suppliers; (2) the waiver or modification of restrictions on international competitive bidding; and (3) the method or procedure in the comparison of bids.** The executive agreements cannot refer to the waiver of public bidding for two reasons. *First,* the law only allows the President to "waive or modify, the application of any law x x x imposing **restrictions** on international competitive bidding." The law does not authorize the President to waive entirely public bidding but only the restrictions on public bidding. Thus, the President may **restrict** the public bidding to suppliers domiciled in the country of the creditor. This is the usual modification on restrictions imposed by creditor countries. *Second,* when the law speaks of executive agreements on the method or procedure **in the comparison of bids,** the obvious assumption is there will be competitive bidding. *Third,* there is no provision of law allowing waiver of public bidding outside of the well-defined exceptions in Article XVI of the Government Procurement Reform Act.

9. ID.; ID.; ID.; ID.; PUBLIC BIDDING NOT NEGATED BY THE FACT THAT FUNDING FOR THE ZTE SUPPLY CONTRACT WILL COME FROM A FOREIGN LOAN.— That the funding for the ZTE Supply Contract will come from a foreign loan does not negate the rationale for public bidding. **Filipino taxpayers will still pay for the loan with interest.**

The need to safeguard public interest against anomalies exists in all government procurement contracts, regardless of the source of funding. Public bidding is the most effective means to prevent anomalies in the award of government contracts. Public bidding promotes transparency and honesty in the expenditure of public funds. Public bidding is accepted as the best means of securing the most advantageous price for the government, whether in procuring infrastructure, goods or services, or in disposing off government assets.

CARPIO MORALES, *J., dissenting opinion:*

REMEDIAL LAW; CIVIL PROCEDURE; PETITION WITH LEGAL ISSUES WHICH BY THEIR VERY NATURE ARE IMPORTANT TO BE DECIDED, SHOULD NOT BE DISMISSED EVEN WHEN THEY HAVE BECOME MOOT AND ACADEMIC.— I share Justice Carpio's opinion that these petitions should not be dismissed on the ground of mootness. *David v. Arroyo* instructs: The moot and academic principle is not a magical formula that can automatically dissuade the courts in resolving a case. Courts will decide cases, otherwise moot and academic, if: first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review. The reasons underlined above in *David* are just as applicable in the present case as they were, not only in *David,* but also in *Province of Batangas v. Romulo* and *Manalo v. Calderon,* where the Court similarly decided the case on the merits, supervening events that would have ordinarily rendered the same moot notwithstanding. The legal issues raised in the present case, **by their very nature**, are just as important, if not even more so, and are as susceptible of recurrence as those involved in the above-cited cases. These issues also call for the formulation of controlling principles for the guidance of all concerned. That the contract subject of the present petitions has been

cancelled is, therefore, not an excuse for the Court not to decide the petitions on the merits.

APPEARANCES OF COUNSEL

G.P. Angeles and Associates Law Office for petitioners in G.R. No. 179613.

Angara Abello Concepcion Regala and Cruz for Zhong Xing Telecommunication Equipment.

Sugay Law for Amsterdam Holdings, Inc.

Fortun Narvasa & Salazar for R. Suplico.

The Solicitor General for public respondents.

R E S O L U T I O N

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

Under consideration is the Manifestation and Motion[1] dated October 26, 2007 of the Office of the Solicitor General (OSG) which states:

The Office of the Solicitor General (OSG) respectfully avers that in an Indorsement dated October 24, 2007, the Legal Service of the Department of Transportation and Communications (DOTC) has informed it of the Philippine Government's decision not to continue with the ZTE National Broadband Network Project (see attachment[2]). That said, there is no more justiciable controversy for this Honorable Court to resolve. WHEREFORE, public respondents respectfully pray that the present petitions be DISMISSED.

On November 13, 2007, the Court noted the OSG's manifestation and motion and required petitioners in G.R. Nos. 178830, 179317, and 179613 to comment.

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[1] *Rollo* (G.R. No. 178830), p. 1093.

[2] **1st Indorsement** dated October 24, 2007 from the DOTC signed by Atty. Raquel Desiderio, Director III, Legal Service states:

Respectfully indorsed to SOLICITOR GENERAL AGNES VST DEVANADERA (Attention: ASSISTANT SOLICITOR GENERAL AMPARO

On December 6, 2007, Rolex Suplico, petitioner in G.R. No. 178830, filed his Consolidated Reply and Opposition,[3] opposing the aforequoted OSG Manifestation and Motion, arguing that:

66. Aside from the fact that the *Notes of the Meeting Between President Gloria Macapagal-Arroyo and Chinese President Hu Jintao* held 2 October 2007 were not attached to the 26 October 2007 Manifestation and Motion – thus depriving petitioners of the opportunity to comment thereon – a mere verbally requested *1st Indorsement* is not sufficient basis for the conclusion that the ZTE-DOTC NBN deal has been permanently scrapped.

67. Suffice to state, said *1st Indorsement* is glaringly **self-serving**, especially without the *Notes of the Meeting Between President Gloria Macapagal-Arroyo and Chinese President Hu Jintao* to support its allegations or other proof of the supposed decision to cancel the ZTE-DOTC NBN deal. Public respondents can certainly do better than that.[4]

Petitioner Suplico further argues that:

79. *Assuming arguendo* that some aspects of the present Petition have been rendered moot (which is vehemently denied), this Honorable

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M. CABOTAJE-TANG), herein copy of the ***Highlights From the Notes of the Meeting Between President Gloria Macapagal-Arroyo and Chinese President Hu Jintao*** which was held in *Xi Jiao Guesthouse, Shanghai, The People's Republic of China on 02 October 2007* as transmitted from the Office of the President as provided by the Department of Foreign Affairs (DFA).

As per verbal request from your honorable office we are furnishing you a copy of the record of the said meeting which states in sum the Philippine Government's decision not to continue with the ZTE National Broadband Network Project due to several reasons and constraints. It is the understanding of the DOTC that this document will form part of the evidence that will be submitted to the Honorable Supreme Court in connection with the cases filed against the DOTC in relation to the NBN Project.

Kindly refer to the attached document and respectfully request appropriate action on the same. Thank you very much for your continued support and assistance to the Department of Transportation and Communications.

[3] *Rollo* (G.R. No. 178830), p. 1124.

[4] *Id.* at 1157.

Court, consistent with well-entrenched jurisprudence, may still take cognizance thereof.[5]

Petitioner Suplico cites this Court's rulings in *Gonzales v. Chavez*,[6] *Rufino v. Endriga*,[7] and *Alunan III v. Mirasol*[8] that despite their mootness, the Court nevertheless took cognizance of these cases and ruled on the merits due to the Court's symbolic function of educating the bench and the bar by formulating guiding and controlling principles, precepts, doctrines, and rules.

On January 31, 2008, Amsterdam Holdings, Inc. (AHI) and Nathaniel Sauz, petitioners in G.R. No. 179317, also filed their comment expressing their sentiments, thus:

3. First of all, the present administration has never been known for candor. The present administration has a very nasty habit of not keeping its word. It says one thing, but does another.

4. This being the case, herein petitioners are unable to bring themselves to feel even a bit reassured that the government, in the event that the above-captioned cases are dismissed, will not backtrack, re-transact, or even resurrect the now infamous NBN-ZTE transaction. This is especially relevant since what was attached to the OSG's Manifestation and Motion was a mere one (1) page written communication sent by the Department of Transportation and Communications (DOTC) to the OSG, allegedly relaying that the Philippine Government has decided not to continue with the NBN project **"x x x due to several reasons and constraints."**

Petitioners AHI and Sauz further contend that because of the transcendental importance of the issues raised in the petition, which among others, included the President's use of the power to borrow, *i.e.*, to enter into foreign loan agreements, this Court should take cognizance of this case despite its apparent mootness.

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[5] *Id.* at 1160.

[6] G.R. No. 97351, February 4, 1992, 205 SCRA 816.

[7] G.R. No. 139554, July 21, 2006, 496 SCRA 13.

[8] G.R. No. 108399, July 31, 1997, 276 SCRA 501.

On January 15, 2008, the Court required the OSG to file respondents' reply to petitioners' comments on its manifestation and motion.

On April 18, 2008, the OSG filed respondents' reply, reiterating their position that for a court to exercise its power of adjudication, there must be an actual case or controversy – one which involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; the case must not be moot or academic or based on extra-legal or other similar considerations not cognizable by a court of justice.[9]

Respondents also insist that there is no perfected contract in this case that would prejudice the government or public interest. Explaining the nature of the NBN Project as an executive agreement, respondents stress that it remained in the negotiation stage. The conditions precedent[10] for the agreement to become effective have not yet been complied with.

Respondents further oppose petitioners' claim of the right to information, which they contend is not an absolute right. They contend that the matters raised concern executive policy, a political

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[9] Citing *Republic v. Tan*, G.R. No. 145255, March 30, 2004, 426 SCRA 485, 492-493.

[10] (a) Issuance of a Forward Obligation Authority (FOA) by the Department of Budget and Management (DBM) of the Government of the Republic of the Philippines;

(b) Conclusion of the Loan Agreement between the Export-Import Bank of China and the Department of Finance (DOF) of the Government of the Republic of the Philippines;

(c) Legal Opinion on the procurement process by the Department of Justice of the Government of the Republic of the Philippines;

(d) The ratification by the Government of the Republic of the Philippines and the People's Republic of China of the Executive Agreement evidenced by the letter dated 02 December 2006 of Chinese Ambassador Li Jinjun to Presidential Chief of Staff Michael T. Defensor relating to the NBN project and the letter of the NEDA Secretary dated 20 April 2007 addressed to Honorable Minister Bo Xilai, Ministry of Commerce and Honorable Li Rougu, Chairman and President of the Export-Import Bank of China, People's Republic of China nominating the NBN Project.

question which the judicial branch of government would generally hesitate to pass upon.

On July 2, 2008, the OSG filed a Supplemental Manifestation and Motion. Appended to it is the Highlights from the Notes of Meeting between President Gloria Macapagal-Arroyo and Chinese President Hu Jintao, held in XI Jiao Guesthouse, Shanghai, China, on October 2, 2007. In the Notes of Meeting, the Philippine Government conveyed its decision not to continue with the ZTE National Broadband Network Project due to several constraints. The same Notes likewise contained President Hu Jintao's expression of understanding of the Philippine Government decision.

We resolve to grant the motion.

Firstly, the Court notes the triple petitions to be for *certiorari*, prohibition and *mandamus*, with application for the issuance of a Temporary Restraining Order (TRO) and/or Preliminary Injunction. The individual prayers in each of the three (3) consolidated petitions are:

G.R. No. 178830

WHEREFORE, it is respectfully prayed of this Honorable Court:

1. Upon the filing of this Petition, pursuant to the second paragraph of Rule 58, Section 5 of the Rules of Court, issue *forthwith* an *ex parte* temporary restraining order **enjoining respondents**, their subordinates, agents, representatives and any and all persons acting on their behalf **from pursuing, entering into indebtedness, disbursing funds, and implementing the ZTE-DOTC Broadband Deal**;

2. **Compel respondents**, upon Writ of *Mandamus*, **to *forthwith* produce and furnish petitioner or his undersigned counsel a certified true copy of the contract or agreement covering the NBN project as agreed upon with ZTE Corporation**;

3. Schedule Oral Arguments in the present case pursuant to Rule 49 in relation to Section 2, Rule 56 of the revised Rules of Court; and,

4. **Annul and set aside the award of the ZTE-DOTC Broadband Deal**, and compel public respondents to *forthwith* comply with pertinent provisions of law regarding procurement of government ICT contracts and public bidding for the NBN contract.[11] (Emphasis supplied)

G.R. No. 179317

WHEREFORE, petitioners Amsterdam Holdings, Inc., and Nathaniel Sauz respectfully pray as follows:

A. upon the filing of this Petition for *Mandamus* and conditioned upon the posting of a bond in such amount as the Honorable Court may fix, a temporary restraining order and/or writ of preliminary injunction **be issued directing the Department of Transportation and Communication**, the Commission on Information and Communications Technology, all other government agencies and instrumentalities, their officers, employees, and/or other persons acting for and on their behalf **to desist** during the pendency of the instant Petition for Mandamus **from entering into any other agreements and from commencing with any kind, sort, or specie of activity in connection with the National Broadband Network Project**;

B. the instant Petition for *Mandamus* be given due course; and,

C. after due consideration of all relevant issues, judgment be rendered directing respondents to allow herein petitioners access to all agreements entered into with the Government of China, the ZTE Corporation, and/or other entities, government instrumentalities, and/or individuals with regard to the National Broadband Network Project.[12] (Emphasis supplied)

G.R. No. 179613

WHEREFORE, it is respectfully prayed of this Honorable Court to:

1. Compel respondents, upon Writ of *Mandamus*, **to *forthwith* produce and furnish petitioner or his undersigned counsel a certified true copy of the contract or agreement**

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[11] *Rollo* (G.R. No. 178830), pp. 127-128.

[12] *Rollo* (G.R. No. 179317), pp. 35-36.

covering the NBN project as agreed upon with ZTE Corporation;

2. Schedule Oral Arguments in the present case pursuant to Rule 49 in relation to Section 2, Rule 56 of the Revised Rules of Court;

3. **Annul and set aside the award of the contract for the national broadband network to respondent ZTE Corporation**, upon the ground that said contract, as well as the procedures resorted to preparatory to the execution thereof, is contrary to the Constitution, to law and to public policy;

4. **Compel public respondent to *forthwith* comply with pertinent provisions of law regarding procurement of government infrastructure projects**, including public bidding for said contract to undertake the construction of the national broadband network.[13] (Emphasis supplied)

On September 11, 2007, the Court issued a TRO[14] in G.R. No. 178830, enjoining the parties from "pursuing, entering into indebtedness, disbursing funds, and implementing the ZTE-DOTC Broadband Deal and Project" as prayed for. Pertinent parts of the said Order read:

WHEREAS, the Supreme Court, on 11 September 2007, adopted a resolution in the above-entitled case, to wit:

"G.R. No. 178830 (*Rolex Suplico vs. National Economic and Development Authority*, represented by NEDA Secretary Romulo L. Neri, and the NEDA Investment Coordination Committee, Department of Transportation and Communications (DOTC), represented by DOTC Secretary Leandro Mendoza, including the Commission on Information and Communications Technology, headed by its Chairman, Ramon P. Sales, The Telecommunications Office, Bids and Awards for Information and Communications Technology Committee (ICT), headed by DOTC Assistant Secretary Elmer A. Soneja as Chairman, and The Technical Working Group for ICT, and DOTC Assistant Secretary Lorenzo Formoso, and All Other Operating Units

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[13] *Rollo* (G.R. No. 179613), pp. 77-78.

[14] *Rollo* (G.R. No. 178830), p. 232.

of the DOTC for Information and Communications Technology, and ZTE Corporation, Amsterdam Holdings, Inc., and ARESCOM, Inc.—Acting on the instant petition with prayer for temporary restraining order and/or writ of preliminary injunction, the Court Resolved, without giving due course to the petition, to

x x x x x x x x x

> (d) Issue a TEMPORARY RESTRAINING ORDER, effective immediately and continuing until further orders from this Court, enjoining the (i) National Economic and Development Authority, (ii) NEDA-Investment Coordination Committee, (iii) Department of Transportation and Communications, Commission on Information and Communications Technology, (iv) Telecommunications Office, Bids and Awards for Information and Communications Technology Committee (ICT), (v) Technical Working Group for ICT, and all other Operating Units of the DOTC for Information and Communications Technology, (vi) ZTE Corporation; (vii) Amsterdam Holdings, Inc., and (viii) ARESCOM, Inc., and any and all persons acting on their behalf from 'pursuing, entering into indebtedness, disbursing funds, and implementing the ZTE-DOTC Broadband Deal and Project' as prayed for."

NOW THEREFORE, effective immediately and continuing until further orders from this Court, You, Respondents (i) National Economic and Development Authority, (ii) NEDA-Investment Coordination Committee, (iii) Department of Transportation and Communications, Commission on Information and Communications Technology, (iv) Telecommunications Office, Bids and Awards for Information and Communications Technology Committee (ICT), (v) Technical Working Group for ICT, and all other Operating Units of the DOTC for Information and Communications Technology, (vi) ZTE Corporation; (vii) Amsterdam Holdings, Inc., and (viii) ARESCOM, Inc., and any and all persons acting on their behalf are hereby **ENJOINED from "pursuing, entering into indebtedness, disbursing funds, and implementing the ZTE-DOTC Broadband Deal and Project" as prayed for**.[15] (Emphasis supplied.)

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[15] *Id*. at 233-235.

Petitioners in G.R. Nos. 178830 and 179613 pray that they be furnished certified true copies of the "contract or agreement covering the NBN project as agreed upon with ZTE Corporation." It appears that during one of the Senate hearings on the NBN project, copies of the supply contract[16] were readily made available to petitioners.[17] Evidently, the said prayer has been complied with and is, thus, **mooted**.

When President Gloria Macapagal-Arroyo, acting in her official capacity during the meeting held on October 2, 2007 in China, informed China's President Hu Jintao that the Philippine Government had decided not to continue with the ZTE-National Broadband Network (ZTE-NBN) Project due to several reasons and constraints, there is no doubt that **all the other principal prayers in the three petitions** (to annul, set aside, and enjoin the implementation of the ZTE-NBN Project) **had also become moot**.

Contrary to petitioners' contentions that these declarations made by officials belonging to the executive branch on the Philippine Government's decision not to continue with the ZTE-NBN Project are self-serving, hence, inadmissible, the Court has no alternative but to take judicial notice of this official act of the President of the Philippines.

Section 1, Rule 129 of the Rules of Court provides:

SECTION 1. *Judicial Notice, **when mandatory***. – A court shall take judicial notice, **without introduction of evidence**, of the existence and territorial extent of states, their political history, forms of government and symbols of nationality, the law of nations, the admiralty and maritime courts of the world and their seals, the political constitution and history of the Philippines, **the official acts of the**

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[16] Also attached to public respondents' Comment in G.R. No. 178830 as Annex "LL". *Id*. at 537.

[17] *Id*. at 589-590; Annex "OO". Letter of Sec. Leandro Mendoza, DOTC, to Sen. Allan Peter Cayetano dated September 25, 2007. In response to a request of the Senate Blue Ribbon Committee to be furnished with the copy of the supply contract, DOTC Secretary Mendoza informed Sen. Allan Peter Cayetano that the pertinent documents were transmitted as publicly requested, and the same were distributed to guests who requested a copy.

legislative, **executive** and judicial **departments of the Philippines**, the laws of nature, the measure of time, and the geographical divisions. (Emphasis supplied)

Under the rules, it is **mandatory** and the Court has no alternative but to take judicial notice of the official acts of the President of the Philippines, who heads the executive branch of our government. It is further provided in the above-quoted rule that the court shall take judicial notice of the foregoing facts **without introduction of evidence**. Since we consider the act of cancellation by President Macapagal-Arroyo of the proposed ZTE-NBN Project during the meeting of October 2, 2007 with the Chinese President in China as an **official act of the executive department**, the Court must take judicial notice of such official act without need of evidence.

In *David v. Macapagal-Arroyo*,[18] We took judicial notice of the announcement by the Office of the President banning all rallies and canceling all permits for public assemblies following the issuance of Presidential Proclamation No. 1017 and General Order No. 5.

In *Estrada v. Desierto*,[19] the Court also resorted to judicial notice in resolving the factual ingredient of the petition.

Moreover, under Section 2, paragraph (m) of Rule 131 of the Rules of Court, the **official duty** of the executive officials[20] of informing this Court of the government's decision not to continue with the ZTE-NBN Project is also presumed to **have**

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[18] G.R. No. 171396, May 3, 2006, 489 SCRA 160.

[19] G.R. No. 146710, March 2, 2001, 353 SCRA 452.

[20] The Highlights from the notes of the meeting between President Gloria Macapagal-Arroyo and Chinese President Hu Jintao which was held in the Xi Jiao Guesthouse, Shanghai, China on October 2, 2007 was transmitted by the Office of the President through the Department of Foreign Affairs (DFA) to the Department of Transportation and Communications (DOTC), which in turn transmitted the communication through 1st Indorsement dated October 24, 2007 (*Rollo* [G.R. No. 178830], p. 1097) to the Office of the Solicitor General, which in informed this Court, through its Manifestation and Motion dated October 26, 2007 (*Id*. at 1093).

been regularly performed, absent proof to the contrary. Other than petitioner AHI's unsavory insinuation in its comment, the Court finds no factual or legal basis to disregard this disputable presumption in the present instance.

Concomitant to its fundamental task as the ultimate citadel of justice and legitimacy is the judiciary's role of strengthening political stability indispensable to progress and national development. Pontificating on issues which no longer legitimately constitute an actual case or controversy will do more harm than good to the nation as a whole. Wise exercise of judicial discretion militates against resolving the academic issues, as petitioners want this Court to do. This is especially true where, as will be further discussed, the legal issues raised cannot be resolved without previously establishing the factual basis or antecedents.

Judicial power presupposes actual controversies, the very antithesis of mootness. In the absence of actual justiciable controversies or disputes, the Court generally opts to refrain from deciding moot issues. Where there is no more live subject of controversy, the Court ceases to have a reason to render any ruling or make any pronouncement.

Kapag wala nang buhay na kaso, wala nang dahilan para magdesisyon ang Husgado.

In *Republic Telecommunications Holdings, Inc. v. Santiago*,[21] the lone issue tackled by the Court of Appeals (CA) was whether the Securities Investigation and Clearing Department (SICD) and Securities and Exchange Commission (SEC) *en banc* committed reversible error in issuing and upholding, respectively, the writ of preliminary injunction. The writ enjoined the execution of the questioned agreements between Qualcomm, Inc. and Republic Telecommunications Holdings, Inc. (RETELCOM). The implementation of the agreements was restrained through the assailed orders of the SICD and the SEC *en banc* which, however, were nullified by the CA decision. Thus, RETELCOM

[21] G.R. No. 140338, August 7, 2007, 529 SCRA 232.

elevated the matter to this Court praying for the reinstatement of the writ of preliminary injunction of the SICD and the SEC *en banc*. However, before the matter was finally resolved, Qualcomm, Inc. withdrew from the negotiating table. Its withdrawal had thwarted the execution and enforcement of the contracts. Thus, the resolution of whether the implementation of said agreements should be enjoined became no longer necessary.

Equally applicable to the present case is the Court ruling in the above-cited *Republic Telecommunications*. There We held, thus:

> Indeed, the instant petition, insofar as it assails the Court of Appeals' Decision nullifying the orders of the SEC *en banc* and the SICD, has been rendered moot and academic. To rule, one way or the other, on the correctness of the questioned orders of the SEC *en banc* and the SICD will be indulging in a theoretical exercise that has no practical worth in view of the supervening event.
>
> The rule is well-settled that for a court to exercise its power of adjudication, there must be an actual case or controversy – one which involves a conflict of legal rights, an assertion of opposite legal claims susceptible of judicial resolution; the case must not be moot or academic or based on extra-legal or other similar considerations not cognizable by a court of justice. Where the issue has become moot and academic, there is no justiciable controversy, and an adjudication thereon would be of no practical use or value as courts do not sit to adjudicate mere academic questions to satisfy scholarly interest, however intellectually challenging.
>
> In the ultimate analysis, petitioners are seeking the reinstatement of the writ of injunction to prevent the concerned parties from pushing through with transactions with Qualcomm, Inc. Given that Qualcomm, Inc. is no longer interested in pursuing the contracts, there is no actual substantial relief to which petitioners would be entitled and which would be negated by the dismissal of the petition.
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> The Court likewise finds it unnecessary to rule whether the assailed Court of Appeals' Decision had the effect of overruling the Court's Resolution dated 29 January 1999, which set aside the TRO issued by the appellate court.

A ruling on the matter practically partakes of a mere advisory opinion, which falls beyond the realm of judicial review. The exercise of the power of judicial review is limited to actual cases and controversies. Courts have no authority to pass upon issues through advisory opinions or to resolve hypothetical or feigned problems.

While there were occasions when the Court passed upon issues although supervening events had rendered those petitions moot and academic, the instant case does not fall under the exceptional cases. In those cases, the Court was persuaded to resolve moot and academic issues to formulate guiding and controlling constitutional principles, precepts, doctrines or rules for future guidance of both bench and bar.

In the case at bar, the resolution of whether a writ of preliminary injunction may be issued to prevent the implementation of the assailed contracts calls for an appraisal of factual considerations which are peculiar only to the transactions and parties involved in this controversy. Except for the determination of whether petitioners are entitled to a writ of preliminary injunction which is now moot, the issues raised in this petition do not call for a clarification of any constitutional principle or the interpretation of any statutory provision.[22]

Secondly, even assuming that the Court will choose to disregard the foregoing considerations and brush aside mootness, the Court cannot completely rule on the merits of the case because **the resolution of the three petitions involves settling factual issues which definitely requires reception of evidence**. There is not an iota of doubt that **this may not be done by this Court in the first instance because**, as has been stated often enough, **this Court is not a trier of facts**.

Ang pagpapasiya sa tatlong petisyon ay nangangailangan ng paglilitis na hindi gawain ng Hukumang ito.

Respondent ZTE, in its Comment in G.R. No. 178830,[23] correctly pointed out that since petitioner Suplico filed his petition

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[22] *Republic Telecommunications Holdings, Inc. v. Santiago, id*. at 242-244.

[23] *Rollo* (G.R. No. 178830), p. 676.

directly with this Court, without prior factual findings made by any lower court, a determination of pertinent and relevant facts is needed. ZTE enumerated some of these factual issues, to wit:

(1) Whether an executive agreement has been reached between the Philippine and Chinese governments over the NBN Project;

(2) Whether the ZTE Supply Contract was entered into by the Republic of the Philippines, through the DOTC, and ZTE International pursuant to, and as an integral part of, the executive agreement;

(3) Whether a loan agreement for the NBN Project has actually been executed;

(4) Whether the Philippine government required that the NBN Project be completed under a Build-Operate-and-Transfer Scheme;

(5) Whether the AHI proposal complied with the requirements for an unsolicited proposal under the BOT Law;

(6) Whether the Philippine government has actually earmarked public finds for disbursement under the ZTE Supply Contract; and

(7) Whether the coverage of the NBN Project to be supplied under the ZTE Supply Contract is more extensive than that under the AHI proposal or such other proposal submitted therefor.[24]

Definitely, some very specific reliefs prayed for in both G.R. Nos. 178830 and 179613 require prior determination of facts before pertinent legal issues could be resolved and specific reliefs granted.

In **G.R. No. 178830**, petitioner seeks to **annul and set aside** the award of the ZTE-DOTC Broadband Deal and compel public respondents to *forthwith* comply with pertinent provisions of law regarding procurement of government ICT contracts and public bidding for the NBN contract.

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[24] *Id*. at 720-721.

In **G.R. No. 179613**, petitioners also pray that the Court **annul and set aside the award** of the contract for the national broadband network to respondent ZTE Corporation, upon the ground that said contract, as well as the procedures resorted to preparatory to the execution thereof, is contrary to the Constitution, to law and to public policy. They also ask the Court to **compel public respondent to *forthwith* comply with pertinent provisions of law regarding procurement** of government infrastructure projects, including public bidding for said contract to undertake the construction of the national broadband network.

It is simply **impossible** for this Court "*to annul and set aside the award of the ZTE-DOTC Broadband Deal*" **without any evidence** to support a prior factual finding pointing to any violation of law that could lead to such annulment order. For sure, the Supreme Court is not the proper venue for this factual matter to be threshed out.

Thirdly, petitioner Suplico in G.R. No. 178830 prayed that this Court order "public respondents to *forthwith* comply with pertinent provisions of law regarding procurement of government ICT contracts and public bidding for the NBN contract."[25] **It would be too presumptuous on the part of the Court to summarily compel public respondents** to comply with pertinent provisions of law regarding procurement of government infrastructure projects **without any factual basis** or prior determination of very particular violations committed by specific government officials of the executive branch. For the Court to do so would amount to a breach of the norms of comity among co-equal branches of government. A perceived error cannot be corrected by committing another error. Without proper evidence, the Court cannot just presume that the executive did not comply with procurement laws. Should the Court allow itself to fall into this trap, it would plainly commit grave error itself.

Magiging kapangahasan sa Hukumang ito na pilitin ang mga pinipetisyon na tumalima sa batas sa pangongontrata ng pamahalaan kung wala pang pagtitiyak o angkop na ebidensiya ng nagawang paglabag dito.

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[25] *Id*. at 127-128.

Let it be clarified that the Senate investigation in aid of legislation cannot be the basis of Our decision which requires a judicial finding of facts.

Justice Antonio T. Carpio takes the view that the National Broadband Network Project should be declared null and void. The foregoing threefold reasons would suffice to address the concern of Our esteemed colleague.

The Court is, therefore, constrained to dismiss the petitions and deny them due course because of mootness and because their resolution requires reception of evidence which cannot be done in an original petition brought before the Supreme Court.

WHEREFORE, the petitions are *DISMISSED*. The Temporary Restraining Order issued on September 11, 2007 is *DISSOLVED*.

SO ORDERED.

Quisumbing, Corona, Tinga, Velasco, Jr., Nachura, Leonardo-de Castro, and *Brion, JJ.,* concur.

Puno, C.J. and *Ynares-Santiago, J.*, join *J.* Azcuna in his separate concurring opinion.

Azcuna, J., concurs in a separate opinion.

Carpio, J., see dissenting opinion.

Austria-Martinez, J., joins Justice Carpio in his dissenting opinion.

Carpio Morales, J., see dissenting opinion.

Chico-Nazario, J., on official leave per Special Order No. 508 dated June 25, 2008.

SEPARATE CONCURRING OPINION

AZCUNA, *J.*:

I find the points raised by Justice Antonio T. Carpio in his dissenting opinion arguably sound, correct and almost unassailable as an abstract treatise in law. Nevertheless, under the facts and pursuant to Article VIII, Section 1 of the Constitution that defines

judicial power as the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, I am of the view that the desistance from the

DISSENTING OPINION

***CARPIO, J.*:**

I dissent on the ground that the ZTE Supply Contract is **void from the beginning** for being contrary to the Constitution, the Administrative Code of 1987, the Government Auditing Code of the Philippines, and the Government Procurement Reform Act. As such, the ZTE Supply Contract is legally non-existent. The Philippine Government's decision "not to continue with the ZTE National Broadband Network Project"[1] during the pendency of this case, even if deemed a cancellation of the ZTE Supply Contract, had no legal effect on the status of the contract, and did not moot this petition.

This case is of transcendental importance to the nation since it involves the constitutionality of a US$329.48 million (approximately ₱14.82 billion) government procurement contract awarded and signed **without an appropriation from Congress and without public bidding**. This case puts to the test the efficacy of constitutional and statutory proscriptions designed precisely to prevent such contracts. The Court has a duty to resolve the important issues in this case, including the novel question on the status of executive agreements that conflict with national law, to prevent a recurrence of government contracts that violate the Constitution and existing statutes.

Not only are the legal issues in this case "capable of repetition yet evading review."[2] The ZTE Supply Contract itself is capable of being resurrected. Public respondents merely stated that the Philippine Government would "not continue with the ZTE National

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[1] *Rollo*, p. 1093. Public respondents' Manifestation and Motion dated 26 October 2007.

[2] *Rufino v. Endriga*, G.R. No. 139554, 21 July 2006, 496 SCRA 13; *Manalo v. Calderon*, G.R. No. 178920, 15 October 2007, 536 SCRA 290.

Broadband Network Project," citing as basis the 1st Indorsement dated 24 October 2007 from the DOTC. Public respondents did not manifest that the ZTE Supply Contract had been mutually cancelled by the parties to the contract.

Equally important, private respondent ZTE Corporation has not manifested to this Court its consent to the discontinuance or cancellation of the ZTE Supply Contract. Indeed, private respondent ZTE Corporation has not wavered from its position that "the ZTE Supply Contract is entirely legal and proper."[3] It is axiomatic that one party to a bilateral contract cannot unilaterally declare a contract discontinued or cancelled. Clearly, this case is far from being moot.

Petitioner assails the ZTE Supply Contract as void from the beginning on two grounds. First, the contract has no appropriation from Congress, violating Section 29(2), Article VI of the Constitution. Second, the absence of public bidding violates the Government Procurement Reform Act.

In their Comment, public respondents attached the ZTE Supply Contract dated 21 April 2007, the Memorandum of Understanding on the Establishment of Philippines-China Economic Partnership dated 5 June 2006, and the letters between Philippine and Chinese officials relating to the National Broadband Network Project. These attachments mooted petitioner's prayer for copies of these documents, leaving as sole issue of this petition the legal status of the ZTE Supply Contract.

This *Petition for the Issuance of a Temporary Restraining Order and Writs of Prohibition and/or Permanent Injunction, and Mandamus* seeks, among others, to annul the ZTE Supply Contract and to prohibit public respondents from disbursing public funds to implement the contract. The Constitution and existing statutes prohibit public officers from disbursing public funds without the corresponding appropriation from Congress. Existing statutes also prohibit public officials from entering into procurement contracts without a certificate of appropriation and fund availability from

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[3] Private respondent ZTE Corporation's Comment, p. 8.

the proper accounting and auditing officials. It is the ministerial duty of public officials to not only desist from disbursing public funds without the corresponding appropriation from Congress, but also to refrain from signing and implementing procurement contracts without the requisite certificate of appropriation and fund availability. Indisputably, a petition for prohibition is a proper action to test the legality of such disbursement of public funds and the legality of the execution of such procurement contracts.[4]

From the admissions of respondents in their Consolidated Comment, the following facts are undisputed:

1. The ZTE Supply Contract, a procurement of goods and services for the Philippine Government, was signed on 21 April 2007 by DOTC Secretary Leandro R. Mendoza and ZTE Corporation Vice President Yu Yong;[5]

2. There was no public bidding in the award of the contract to ZTE Corporation, and the Chinese Government handpicked ZTE Corporation to supply the goods and services to the Philippine Government;[6]

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[4] Section 2, Rule 65 of the Rules of Court.

[5] *Rollo*, pp. 348-349. In their Consolidated Comment, pubic respondents attached as Annex "LL" a copy of the ZTE Supply Contract. Public respondents explained, "On April 21, 2007, Mendoza and ZTE Corporation Vice President Yu Yong signed a US$329 million supply contract for the NBN Project at the VIP room of the Haikou Meilan International Airport of the People's Republic of China."

[6] The fourth whereas clause of the ZTE Supply Contract (Annex "LL") states: "an Executive Agreement was entered into between the Republic of the Philippines and the People's Republic of China where the latter agreed to finance the National Broadband Network Project through a Loan Agreement with Export-Import Bank of China subject to the condition that the Equipment and Services to be procured from the proceeds of the loan come from ZTE Corporation." (*Id*. at 539) Public respondents also attached to their Consolidated Comment the 2 December 2006 letter (Annex "N") of Chinese Ambassador Li Jinjun to Presidential Chief of Staff Michael T. Defensor, stating: "It may interest Your Honorable to know that ZTE Corporation, a reputable and established telecommunications company in China, responded to this worthwhile undertaking and, consequently, the People's Republic of China through the Chinese Ministry of Commerce designated it as the NBN project's prime contractor." (*Id*. at 472)

3. The ZTE Supply Contract is to be financed by a loan from the Export-Import Bank of China to the Philippine Government;[7]

4. The Loan Agreement to finance the ZTE Supply Contract was not concluded before or after the signing of the ZTE Supply Contract;[8]

5. There is no appropriation law enacted by Congress to fund the ZTE Supply Contract;[9]

6. A certificate of appropriation and fund availability is not attached to the ZTE Supply Contract; [10] and

7. ZTE Corporation is publicly listed in the Hong Kong and Shenzhen stock exchanges.[11]

In addition, the 2006 and 2007 General Appropriations Acts[12] do not contain any appropriation for a foreign-assisted National Broadband Network Project, under which the ZTE Supply Contract would fall.

This case raises the following issues:

1. Whether the ZTE Supply Contract is void from the beginning in the absence of an appropriation by law to fund the contract, and in the absence of a certificate of appropriation and fund availability; and

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[7] *Id*. at 369, fourth whereas clause of the ZTE Supply Contract. In their Consolidated Comment, public respondents stated, "Among the above-enumerated requisites (including the conclusion of the loan agreement), only the issuance of a legal opinion from the DOJ had been complied with."

[8] *Id*. at 431. In their Consolidated Comment, public respondents stated: "At the outset, there is no need yet for a budget allocation as the loan agreement has yet to be concluded."

[9] *Id*.

[10] *Supra*, note 5. Annex "LL", which is a copy of the ZTE Supply Contract, does not have as attachment the certificate of appropriation and fund availability.

[11] *Rollo*, p. 339. Consolidated Comment of public respondents, footnote 14.

[12] Republic Act No. 9336 (2005 reenacted for 2006) and Republic Act No. 9401, respectively.

2. Whether the ZTE Supply Contract is void from the beginning in the absence of a public bidding.

The simple answer to each question is yes, the ZTE Supply Contract is void from the beginning. The absence of **any** of the three - an appropriation law, a certificate of appropriation and fund availability, and public bidding - renders the ZTE Supply Contract void from the beginning.

Absence of an Appropriation Law

The Constitution requires an appropriation law before public funds are spent for any purpose. Section 29(2), Article VI of the Constitution provides:

> No money shall be paid out of the Treasury except in pursuance of an appropriation made by law.[13]

The power of the purse – or the power of Congress to authorize payment from funds in the National Treasury – is lodged **exclusively** in Congress. One of the fundamental checks and balances finely crafted in the Constitution is that Congress authorizes the amount to be spent, while the Executive spends the amount so authorized. The Executive cannot authorize its own spending, and neither can Congress spend what it has authorized. The rationale of this basic check and balance is to prevent abuse of discretion in the expenditure of public funds.

Thus, the Executive branch cannot spend a single centavo of government receipts, whether from taxes, sales, donations, dividends, profits, loans, or from any other source, unless there is an appropriation law authorizing the expenditure. Any government expenditure without the corresponding appropriation from Congress is unconstitutional. There is no exception to this constitutional prohibition that "no money shall be paid out of the Treasury except in pursuance of an appropriation made by law." This constitutional prohibition is self-executory.

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[13] This provision originated from the Jones Law, or the Philippine Bill of 1901. Section 5 of the Jones Law provides: "That no money shall be paid out of the Treasury except in pursuance of an appropriation by law." This provision was carried over almost verbatim in the 1935, 1973 and 1987 Constitutions.

To further insure compliance with Section 29(2), Article VI of the Constitution, the Administrative Code of 1987 **expressly prohibits the entering into contracts** involving the expenditure of public funds unless two prior requirements are satisfied. ***First*, there must be an appropriation law authorizing the expenditure required in the contract**. ***Second*, there must be attached to the contract a certification by the proper accounting official and auditor that funds have been appropriated by law and such funds are available**. Failure to comply with any of these two requirements renders the contract void.

Thus, Sections 46, 47 and 48, Chapter 8, Subtitle B, Title I, Book V of the Administrative Code of 1987 provide:

SECTION 46. Appropriation Before Entering into Contract. — (1) **No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor**, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure; and

(2) Notwithstanding this provision, contracts for the procurement of supplies and materials to be carried in stock may be entered into under regulations of the Commission provided that when issued, the supplies and materials shall be charged to the proper appropriations account.

SECTION 47. Certificate Showing Appropriation to Meet Contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three (3) months, or banking transactions of government-owned or controlled banks, **no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current calendar year is available for expenditure on account thereof**, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract,

and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

SECTION 48. Void Contract and Liability of Officer. — **Any contract entered into contrary to the requirements of the two (2) immediately preceding sections shall be void**, and the officer or officers entering into the contract shall be liable to the Government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties. (Emphasis supplied)

Sections 85, 86 and 87 of the Government Auditing Code of the Philippines,[14] an earlier law, contain the same provisions.

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[14] Presidential Decree No. 1445. Sections 85, 86 and 87 of this Decree provide:

SECTION 85. Appropriation Before Entering into Contract. — (1) No contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor, the unexpended balance of which, free of other obligations, is sufficient to cover the proposed expenditure.

(2) Notwithstanding this provision, contracts for the procurement of supplies and materials to be carried in stock may be entered into under regulations of the Commission provided that when issued, the supplies and materials shall be charged to the proper appropriation account.

SECTION 86. Certificate Showing Appropriation to Meet Contract. — Except in the case of a contract for personal service, for supplies for current consumption or to be carried in stock not exceeding the estimated consumption for three months, or banking transactions of government-owned or controlled banks no contract involving the expenditure of public funds by any government agency shall be entered into or authorized unless the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof, subject to verification by the auditor concerned. The certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract, and the sum so certified shall not thereafter be available for expenditure for any other purpose until the obligation of the government agency concerned under the contract is fully extinguished.

SECTION 87. Void Contract and Liability of Officer. — Any contract entered into contrary to the requirements of the two immediately preceding

The Administrative Code of 1987 and the Government Auditing Code expressly mandate that **"[N]o contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor**." The law prohibits the **mere entering into a contract** without the corresponding appropriation from Congress. It does not matter whether the contract is subject to a condition as to its effectivity, such as a subsequent favorable legal opinion by the Department of Justice,[15] because even a contract with such condition is still a contract under the law.[16]

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sections shall be void, and the officer or officers entering into the contract shall be liable to the government or other contracting party for any consequent damage to the same extent as if the transaction had been wholly between private parties.

[15] *Rollo*, pp. 572-573. The ZTE Supply Contract (Annex "LL" of public respondents' Consolidated Comment), on the paragraph Conditions for the Effectivity of the Contract, provides:

The Effectivity of this Contract shall be subject to the fulfillment of the following conditions precedent:

Issuance of a Forward Obligation Authority (FOA) by the Department of Budget and Management (DBM) of the Government of the Philippines;

Conclusion of the Loan Agreement between Export-Import Bank of China and the Department of Finance (DOF) of the Government of the Republic of the Philippines;

Legal opinion on the procurement process by the Department of Justice of the Government of the Republic of the Philippines.

The ratification by the Government of the Republic of the Philippines and the People's Republic of China of the Executive Agreement evidenced by the letter dated 02 December 2006 of Chinese Ambassador Li Jinjun to Presidential Chief of Staff Michael T. Defensor relating to the NBN Project and the letter of NEDA Secretary dated 20 April 2007 addressed to Honorable Minister Bo XllI, Ministry of Commerce and Honorable Li Ruogu, Chairman and President, of the Export-Import Bank of China, People's Republic of China nominating the NBN Project.

[16] Article 1318 of the Civil Code provides: "There is no contract unless the following requisites concur: (1) Consent of the contracting parties; (2) Object certain which is the subject of the contract; (3) Cause of the obligation which is established." Hence, once the three requisites concur, a contract arises, regardless of any stipulation on conditional obligations.

Moreover, the Administrative Code of 1987 and the Government Auditing Code expressly mandate that **"[N]o contract involving the expenditure of public funds x x x shall be entered into or authorized unless the proper accounting official x x x shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and that the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure.**" The law prohibits not only the entering into the contract, but also authorizing the entering into the contract without the certification from the proper accounting official. This means that the certificate of appropriation and fund availability must be issued **before** the signing of the contract.

In addition, the Administrative Code of 1987 and the Government Auditing Code expressly require that the "**certificate signed by the proper accounting official and the auditor who verified it, shall be attached to and become an integral part of the proposed contract**." The certificate of appropriation and fund availability must be **attached to the "proposed contract**," again clearly showing that the certificate must be issued **before** the signing of the contract.

In several cases, the Court had the occasion to apply these provisions of the Administrative Code of 1987 and the Government Auditing Code of the Philippines. In these cases, the Court clearly ruled that the two requirements – the existence of appropriation and the attachment of the certification – are "**conditions *sine qua non* for the execution of government contracts**." In *COMELEC v. Quijano-Padilla,*[17] the Court ruled:

It is quite evident from the tenor of the language of the law that the existence of appropriations and the availability of funds are indispensable pre-requisites to or conditions *sine qua non* for the execution of government contracts. The obvious intent is to impose such conditions as *a priori* requisites to the validity

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[17] 438 Phil. 72 (2002). See also *Osmeña v. Commission on Audit*, G.R. No. 98355, 2 March 1994, 230 SCRA 585; *Agan, Jr. v. Phil. International Air Terminals Co., Inc.*, 450 Phil. 744 (2003).

of the proposed contract. Using this as our premise, we cannot accede to PHOTOKINA's contention that there is already a perfected contract. x x x

x x x x x x x x x

Petitioners are justified in refusing to formalize the contract with PHOTOKINA. Prudence dictated them not to enter into a contract not backed up by sufficient appropriation and available funds. Definitely, to act otherwise would be a futile exercise for the contract would inevitably suffer the vice of nullity. In *Osmeña vs. Commission on Audit*, this Court held:

> The Auditing Code of the Philippines (P.D. 1445) further provides that no contract involving the expenditure of public funds shall be entered into unless there is an appropriation therefor and the proper accounting official of the agency concerned shall have certified to the officer entering into the obligation that funds have been duly appropriated for the purpose and the amount necessary to cover the proposed contract for the current fiscal year is available for expenditure on account thereof. Any contract entered into contrary to the foregoing requirements shall be VOID.
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> Clearly then, the contract entered into by the former Mayor Duterte was void from the very beginning since the agreed cost for the project (₱8,368,920.00) was way beyond the appropriated amount (₱5,419,180.00) as certified by the City Treasurer. Hence, the contract was properly declared void and unenforceable in COA's 2nd Indorsement, dated September 4, 1986. The COA declared and we agree, that:
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> The prohibition contained in Sec. 85 of PD 1445 (Government Auditing Code) is explicit and mandatory. **Fund availability is, as it has always been, an indispensable prerequisite to the execution of any government contract involving the expenditure of public funds by all government agencies at all levels**. Such contracts are not to be considered as final or binding unless such a certification as to fund availability is issued (Letter of Instruction No. 767, s. 1978). Antecedent of advance appropriation is thus essential to government liability on contracts (*Zobel vs. City of Manila*, 47 Phil. 169). This contract being violative of the legal

requirements aforequoted, the same contravenes Sec. 85 of PD 1445 and is null and void by virtue of Sec. 87.

Verily, the contract, as expressly declared by law, is inexistent and void *ab initio*. This is to say that the proposed contract is without force and effect from the very beginning or from its incipiency, as if it had never been entered into, and hence, cannot be validated either by lapse of time or ratification. (Emphasis supplied)

The law expressly declares void a procurement contract that fails to comply with the two requirements, namely, an appropriation law funding the contract and a certification of appropriation and fund availability. The clear purpose of these requirements is to insure that government contracts are never signed unless supported by the corresponding appropriation law and fund availability.[18] **The ZTE Supply Contract does not comply with any of these two requirements**. Thus, the ZTE Supply Contract is void for violation of Sections 46, 47 and 48, Chapter 8, Subtitle B, Title I, Book V of the Administrative Code of 1987, as well as Sections 85, 86 and 87 of the Government Auditing Code of the Philippines. These provisions of both Codes implement Section 29(2), Article VI of the Constitution.

Public respondent National Economic and Development Authority is fully aware that all proceeds of loans and grants secured by the Philippine Government cannot be disbursed without an appropriation from Congress. Public respondent National Economic and Development Authority and its officials know, or ought to know by heart, that this is a fundamental requirement of the Constitution and existing statutes. The National Economic and Development Authority has succinctly summarized this fundamental rule in Section 5.1 of the Implementing Rules and Regulations for the Official Development Assistance (ODA) Act of 1996:

Section 5.1. General Principles on Budget - All expenditures, inclusive of counterpart and **proceeds of loans** and loans and grant funds, must be included in the annual national expenditure program to be submitted to Congress for approval. (Emphasis supplied)

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[18] *Melchor v. Commission on Audit*, G.R. No. 95398, 16 August 1991, 200 SCRA 704.

There can be no dispute that the proceeds of foreign loans, whether concluded or not, cannot be obligated in a procurement contract without a prior appropriation from Congress.

The Office of the Solicitor General (OSG), representing the public respondents, advances two arguments to justify the absence of appropriation for the ZTE Supply Contract. First, there is no need for an appropriation by law because the loan agreement has not been concluded. Second, the automatic appropriation for payment of foreign loans under Section 31 of Presidential Decree No. 1177[19] provides the appropriation cover to fund the ZTE Supply Contract. Thus, the OSG asserts:

> At the outset, there is no need yet for a budget allocation as the loan agreement has yet to be concluded. Assuming *arguendo* that one has already been executed, the appropriation therefor is covered by the Executive branch's power of automatic appropriation for payment of foreign loans contracted. x x x[20]

The OSG's first argument is an admission that when the ZTE Supply Contract was signed, there was no loan agreement, no loan proceeds, and no appropriation from Congress for the contract. This only drives the last nail deeper into the coffin of the ZTE Supply Contract because the absence of an appropriation from Congress makes the signing of the ZTE Supply Contract an unconstitutional and unlawful act.

The OSG's second argument betrays a lack of understanding of appropriations for payment of goods and services as distinguished from appropriations for repayment of loans. When the Executive branch secures a loan to fund a procurement of

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[19] Section 31 of Presidential Decree No. 1177 provides:

> SECTION 31. Automatic Appropriations. — All expenditures for (a) personnel retirement premiums, government service insurance, and other similar fixed expenditures, (b) **principal and interest on public debt**, (c) national government guarantees of obligations which are drawn upon, are automatically appropriated: provided, that no obligations shall be incurred or payments made from funds thus automatically appropriated except as issued in the form of regular budgetary allotments. (Emphasis supplied)

[20] *Rollo*, p. 431. Consolidated Comment of public respondents.

goods or services, the loan proceeds enter the National Treasury as part of the general funds of the government. Congress must appropriate by law the loan proceeds to fund the procurement of goods or services, otherwise the loan proceeds cannot be spent by the Executive branch. When the loan falls due, Congress must make another appropriation law authorizing the repayment of the loan out of the general funds in the National Treasury.[21] This appropriation for the *repayment of the loan* is what is covered by the automatic appropriation in Section 31 of PD No. 1177.[22] It is not the appropriation needed to fund a procurement contract. The OSG's arguments are clearly misplaced.

Absence of Public Bidding

The Government Procurement Reform Act requires public bidding in **all procurement** of infrastructure, goods and services. Section 10, Article IV of the Government Procurement Reform Act provides:

> Section 10. Competitive Bidding – **All procurement shall be done through Competitive Bidding**, except as provided for in Article XVI of this Act. (Emphasis supplied)

In addition, Section 4 of the Government Procurement Reform Act provides that the Act applies to government procurement "regardless of source of funds, whether local or foreign." Hence, the requirement of public bidding applies to foreign-funded contracts like the ZTE Supply Contract.

Respondents admit that there was no public bidding for the ZTE Supply Contract. Respondents do not claim that the ZTE Supply Contract falls under any of the exceptions to public bidding in Article XVI of the Government Procurement Reform Act. Instead, private respondent ZTE Corporation claims that the ZTE Supply Contract, **being part of an executive agreement**,

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[21] *Guingona, Jr. v. Carague*, G.R. No. 94571, 22 April 1991, 196 SCRA 221.

[22] See also Section 6 of Presidential Decree No. 81, and Section 1 of Presidential Decree No. 1967.

is exempt from public bidding under the last sentence of Section 4 of the Government Procurement Reform Act. Thus, private respondent ZTE Corporation argues:

> x x x Section 4 of RA 9184 itself expressly provides that executive agreements that deal on subject matters covered by said law shall be observed. Hence, the requirement of competitive bidding under Section 10 of the law is not applicable. Section 4 of RA 9184 provides:
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> > Section 4. Scope and Application. - This Act shall apply to the procurement of Infrastructure Projects, Goods and Consulting Services, regardless of source of funds, whether local or foreign, by all branches and instrumentalities of government, its departments, offices and agencies, including government-owned and/or controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed**.
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> x x x x x x x x x
>
> **There is no provision in the Executive Agreement that requires the conduct of competitive public bidding before the award of the NBN Project, or any project envisioned in the RP-China MNOU for that matter. The subsequent exchange of notes between China and the Philippines clearly shows that ZTE was chosen as the contractor for the NBN Project. This was formalized through the DTI-ZTE MOU and the ZTE Supply Contract**. (Boldfacing and underlining in the original)

Private respondent ZTE Corporation's argument will hold water if an executive agreement can amend the mandatory statutory requirement of public bidding in the Government Procurement Reform Act. In short, the issue turns on the **novel question** of whether an executive agreement can amend or repeal a prior law. The obvious answer is that an executive agreement cannot amend or repeal a prior law.

Admittedly, an executive agreement has the force and effect of law, just like implementing rules of executive agencies. However, just like implementing rules of executive agencies,

executive agreements cannot amend or repeal prior laws but must comply with the laws they implement.[23] Only a treaty, upon ratification by the Senate, acquires the status of a municipal law. Thus, a treaty may amend or repeal a prior law and *vice-versa*.[24] Hence, a treaty may change state policy embodied in a prior law.

In sharp contrast, an executive agreement, being an exclusive act of the Executive branch, does not have the status of a municipal law. Acting alone, the Executive has no law-making power. While the Executive does possess rule-making power, such power must be exercised consistent with the law it seeks to implement.

Consequently, an executive agreement cannot amend or repeal a prior law. An executive agreement must comply with state policy embodied in existing municipal law. This Court has declared:

> International agreements involving political issues or changes of national policy and those involving international arrangements of a permanent character usually take the form of treaties. **But international agreements embodying adjustments of detail carrying out well-established national policies and traditions and those involving arrangements of a more or less temporary nature usually take the form of executive agreements**.[25] (Emphasis supplied)

Executive agreements are intended to carry out **well-established national policies**, and these are found in statutes.

In the United States, from where we adopted the concept of executive agreements, the prevailing view is that **executive agreements**[26] **cannot alter existing law but must conform**

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[23] *Land Bank of the Philippines v. Court of Appeals*, 319 Phil. 246 (1995).

[24] *Secretary of Justice v. Lantion*, 379 Phil. 165 (2000).

[25] *Commissioner of Customs v. Eastern Sea Trading*, No. L-14279, 31 October 1961, 3 SCRA 351, reiterated in *Adolfo v. Court of First Instance of Zambales*, 145 Phil. 264 (1970).

[26] Made solely by the Executive, as distinguished from executive-legislative agreements that are embodied in ordinary legislation.

with all statutory requirements. The U.S. State Department has explained the distinction between treaties and executive agreements in this manner:

> x x x it may be desirable to point out here the well-recognized distinction between an executive agreement and a treaty. In brief, it is that **the former cannot alter the existing law and must conform to all statutory enactments**, whereas a treaty, if ratified by and with the advice and consent of two-thirds of the Senate, as required by the Constitution, itself becomes the supreme law of the land and takes precedence over any prior statutory enactments.[27] (Emphasis supplied)

As Professor Erwin Chemerinsksy states, "So long as the (U.S.) president is not violating another constitutional provision or a federal statute, there seems little basis for challenging the constitutionality of an executive agreement."[28] In the United States, while an executive agreement cannot alter a federal law, an executive agreement prevails over state law.[29]

Likewise, Professor Laurence H. Tribe states that an executive agreement cannot override a prior act of Congress even as it prevails over state law. Thus:

> x x x Although it seems clear that an unratified executive agreement, unlike a treaty, cannot override a prior act of Congress, executive agreements, even without Senate ratification, have the same weight as formal treaties in their effect upon conflicting state laws.[30]

Professor Tribe cited *United States v. Gary W. Capps, Inc.*,[31] where the Court of Appeals (4th Circuit) ruled that an unratified

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[27] Prof. Edwin Borchard (Justus S. Hotchkiss Professor of Law, Yale Law School), *Treaties and Executive Agreements – A Reply*, Yale Law Journal, June 1945, citing Current Information Series, No. 1, 3 July 1934, quoted in 5 Hackworth, Digest of International Law (1943) pp. 425-6.

[28] Constitutional Law: Principles and Polices, 2nd Edition (2002), p. 361.

[29] *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

[30] American Constitutional Law, Vol. 1, 3rd Edition (2000), p. 648.

[31] 204 F.2d 655 (4th Circuit, 1953).

executive agreement could not prevail over a conflicting federal law. The U.S. Supreme Court affirmed the appellate court's decision but on non-constitutional grounds.

Clearly, an executive agreement must comply with well-established state policies, and these state policies are laid down in statutes. The Government Procurement Reform Act has laid down a categorical state policy – "**All procurement shall be done through Competitive Bidding**," subject only to narrowly defined exceptions that respondents do not invoke here. Consequently, the executive agreement between China and the Philippines cannot exempt the ZTE Supply Contract from the state policy of public bidding.

Private respondent ZTE Corporation further claims that the ZTE Supply Contract is part of the executive agreement between China and the Philippines. This is plain error. An executive agreement is an agreement **between governments**. The Executive branch has defined an "international agreement," which includes an executive agreement, to refer to a contract or an understanding "**entered into between the Philippines and another government**."[32]

That the Chinese Government handpicked the ZTE Corporation to supply the goods and services to the Philippine Government does not make the ZTE Supply Contract an executive agreement. ZTE Corporation is not a government or even a government agency performing governmental or developmental functions like the Export-Import Bank of China or the Japan Bank for International Cooperation,[33] or a multilateral lending

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[32] Section 2(a) of Executive Order No. 459 dated 25 November 1997, entitled *Providing for the Guidelines in the Negotiation of International Agreements and its Ratification*, provides: "*International agreement* - shall refer to a contract or understanding, regardless of nomenclature, **entered into between the Philippines and another government** in written form and **governed by international law**, whether embodied in a single instrument or in two or more instruments." (Emphasis supplied)

[33] *Abaya v. Ebdane, Jr.*, G.R. No. 167919, 14 February 2007, 515 SCRA 720.

agency organized by governments like the World Bank.[34] ZTE Corporation is a business enterprise performing purely commercial functions. ZTE Corporation is publicly listed in the Hong Kong and Shenzhen stock exchanges, with individual and juridical stockholders that receive dividends from the corporation.

Moreover, an executive agreement is governed by international law.[35] However, the ZTE Supply Contract expressly provides that it shall be governed by Philippine law.[36] Thus, the ZTE Supply Contract is not an executive agreement but simply a commercial contract, which must comply with public bidding as mandated by the governing law, which is Philippine law.

Finally, respondents seek refuge in the second sentence of Section 4 of the Government Procurement Reform Act:

> Section 4. Scope and Application - This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, regardless of the source of funds, whether local or foreign, by all branches of the government, its departments, offices and agencies, including government-owned and/or-controlled corporations and local government units, subject to the provisions of Commonwealth Act No. 138. **Any treaty or international or executive agreement affecting the subject matter of this Act to which the Philippine government is a signatory shall be observed**. (Emphasis supplied)

Respondents argue that the second sentence of Section 4 allows an executive agreement to override the mandatory public bidding in Section 10 of the Government Procurement Reform Act.

Respondents' argument is flawed. First, an executive agreement, being an exclusive act of the Executive branch, cannot amend or repeal a mandatory provision of law requiring public bidding

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[34] *DBM-Procurement Service v. Kolonwel Trading*, G.R. Nos. 175608, 175616 and 175659, 8 June 2007, 524 SCRA 591.

[35] *Supra*, note 32.

[36] Article 33 of the ZTE Supply Contract provides: "The Contract shall be governed by and construed in accordance with the laws of the Republic of the Philippines."

in government procurement contracts. To construe otherwise the second sentence of Section 4 would constitute an undue delegation of legislative powers to the President, making such sentence unconstitutional. There are no standards prescribed in the Government Procurement Reform Act that would guide the President in exercising such alleged delegated legislative power. Thus, the second sentence of Section 4 cannot be construed to delegate to the President the legislative power to amend or repeal mandatory requirements in the Government Procurement Reform Act.

Second, under Section 10 of the Government Procurement Reform Act, the only exceptions to mandatory public bidding are those specified in Article XVI of the Act. These specified exceptions do not include purchases from foreign suppliers handpicked by foreign governments, or from suppliers owned or controlled by foreign governments. Moreover, Section 4 of the Government Procurement Reform Act mandates that the "Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, **regardless of source of funds, whether local or foreign** x x x."

Third, the second sentence of Section 4 should be read in conjunction with Section 4 of the Foreign Borrowings Act,[37] which provides:

> Section 4. In the contracting of any loan, credit or indebtedness under this Act, **the President of the Philippines may, when necessary, agree to waive or modify the application of any law granting preferences or imposing restrictions on international competitive bidding**, including among others, Act Numbered Four Thousand Two Hundred Thirty-Nine, Commonwealth Act Numbered One Hundred Thirty-Eight, the provisions of Commonwealth Act Numbered Five Hundred Forty-One, insofar as such provisions do not pertain to constructions primarily for national defense or security purposes, Republic Act Numbered Five Thousand One Hundred Eighty-Three: Provided, however, That as far as practicable, utilization of the services of qualified domestic firms in the prosecution of projects financed under this Act shall be encouraged: Provided, further, That in case where international competitive bidding shall be conducted

[37] Republic Act No. 4860, as amended.

preference of at least fifteen per centum shall be granted in favor of articles, materials, or supplies of the growth, production or manufacture of the Philippines: **Provided, finally, That the method and procedure in the comparison of bids shall be the subject of agreement between the Philippine Government and the lending institution**. (Emphasis supplied)

Likewise, Section 4 of the Government Procurement Reform Act should be read in conjunction with Section 11-A of the Official Development Assistance Act of 1996:[38]

Section 11-A. In the contracting of any loan, credit or indebtedness under this Act or any law, **the President of the Philippines may, when necessary, agree to waive or modify the application of any provision of law granting preferences in connection with, or imposing restrictions on, the procurement of goods or services**: Provided, however, That as far as practicable, utilization of the services of qualified Filipino citizens or corporations or associations owned by such citizens in the prosecution of projects financed under this Act shall be prepared on the basis of the standards set for a particular project: Provided, further, That the matter of preference in favor of articles, materials, or supplies of the growth, production or manufacture of the Philippines, including **the method or procedure in the comparison of bids for purposes therefor, shall be the subject of agreement between the Philippine Government and the lending institution**. (Emphasis supplied)

Consequently, as construed together, the executive agreements mentioned in the second sentence of Section 4 of the Government Procurement Reform Act should refer to executive agreements on **(1) the waiver or modification of preferences to local goods or domestic suppliers;**[39] **(2) the waiver or modification of restrictions on international competitive bidding; and (3) the method or procedure in the comparison of bids**.

The executive agreements cannot refer to the waiver of public bidding for two reasons. *First*, the law only allows the President to "waive or modify, the application of any law x x x imposing

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[38] Republic Act No. 8182, as amended.

[39] Commonwealth Act No. 138, otherwise known as the Flag Law.

restrictions on international competitive bidding." The law does not authorize the President to waive entirely public bidding but only the restrictions on public bidding. Thus, the President may **restrict** the public bidding to suppliers domiciled in the country of the creditor. This is the usual modification on restrictions imposed by creditor countries. *Second*, when the law speaks of executive agreements on the method or procedure **in the comparison of bids**, the obvious assumption is there will be competitive bidding. *Third*, there is no provision of law allowing waiver of public bidding outside of the well-defined exceptions in Article XVI of the Government Procurement Reform Act.

Respondents, while not raising this argument, cannot also rely on Section 1 of the Foreign Borrowings Act, which provides:

> Section 1. The President of the Philippines is hereby authorized, in behalf of the Republic of the Philippines, to contract such loans, credits, including supplier's credit, deferred payment arrangements, or indebtedness **as may be necessary and upon terms and conditions as may be agreed upon**, not inconsistent with this Act, with Governments of foreign countries with whom the Philippines has diplomatic or trade relations or which are members of the United Nations, their agencies, instrumentalities or financial institutions or with reputable international organizations or non-governmental national or international lending institutions or firms extending supplier's credit deferred payment arrangements x x x. (Emphasis supplied)

A solitary Department of Justice opinion[40] has ventured that the phrase "as may be necessary and upon terms and conditions as may be agreed upon" serves as statutory basis for the President to exempt foreign-funded government procurement contracts from public bidding. This is a mistake. This phrase means that the President has discretion to decide the **terms and conditions of the loan**, such as the rate of interest, the maturity period, amortization amounts, and similar matters. This phrase does not delegate to the President the legislative power to amend or

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[40] DOJ Opinion No. 143 dated 10 October 1991 issued by Acting Secretary Silvestre H. Bello III on the Municipal Telephone Project funded by a French Financial Protocol loan of 186.6 million French francs.

repeal mandatory provisions of law like compulsory public bidding of government procurement contracts. Otherwise, this phrase would constitute undue delegation of legislative power since there are no standards that would guide the President in exercising this alleged delegated legislative power.

What governs the waiver or modification of restrictions on public bidding is Section 4-A of the Foreign Borrowings Act, which authorizes the President to, "when necessary, agree to modify the application of any law x x x imposing restrictions on international competitive bidding." Section 4 is the specific provision of the Foreign Borrowings Act that deals with the President's authority to waive or modify restrictions on public bidding. Section 1 of the Act does not deal with the requirement of public bidding. Besides, if Section 1 is construed as granting the President full authority to waive or limit public bidding, Section 4 becomes a superfluous provision.

In any event, whatever doubt may have existed before has been erased by the enactment in 2003 of the Government Procurement Reform Act, which **reformed** the laws regulating government procurement. The following provisions of the Act clearly prescribe the rule that government procurement contracts shall be subject to mandatory public bidding:

> Section 3. Governing Principles on Government Procurement. - **All procurement** of the national government, its departments, bureaus, offices and agencies, including state universities and colleges, government-owned and/or controlled corporations, government financial institutions and local government units shall, in all cases, be governed by these principles:
>
> (a) **Transparency** in the procurement process x x x.
>
> (b) **Competitiveness** by extending equal opportunity to enable private contracting parties who are eligible and qualified to participate in **public bidding**.
>
> x x x x x x x x x.
>
> Section 4. Scope and Application. - This Act shall apply to the Procurement of Infrastructure Projects, Goods and Consulting Services, **regardless of source of funds, whether local or foreign**, by all branches and instrumentalities of government, its departments,

offices and agencies, including government-owned and/or controlled corporations and local government units, x x x.

Section 10. Competitive Bidding. - **All procurement shall be done through Competitive Bidding**, except as provided for in Article XVI of this Act. (Emphasis supplied)

The only exceptions to mandatory public bidding are procurements falling under any of the narrowly defined situations in Article XVI of the Act, which respondents do not invoke.

Foreign-funded projects of the government are not exempt from public bidding despite executive agreements entered into by the Philippines with creditor countries or lending institutions. In *Abaya v. Ebdane, Jr.*,[41] the Court cited Memorandum Circular No. 104 dated 21 August 1989[42] issued by the President:

x x x it is hereby clarified that foreign-assisted infrastructure projects may be exempted from the application of the pertinent provisions of the Implementing Rules and Regulations (IRR) of Presidential Decree (P.D.) No. 1594 relative to the method and procedure in the comparison of bids, which may be the subject of agreement between the infrastructure agency concerned and the lending institution. ***It should be made clear however that public bidding is still required and can only be waived pursuant to existing laws***. (Italicization in the original of the Memorandum Circular; boldfacing supplied)

Executive agreements with lending institutions have never been understood to allow exemptions from public bidding. What the executive agreements can modify are the methods or procedures in the comparison of bids, such as the adoption of the **competitive bidding procedures or guidelines** of the Japan Bank for International Cooperation[43] or the World Bank[44] on the method

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[41] *Supra*, note 33.

[42] Clarification on the Applicability of the Amended Implementing Rules and Regulations (IRR) of Presidential Decree No. 1595 relative to the Prosecution of Foreign-Assisted Projects.

[43] *Supra*, note 33.

[44] *Supra*, note 34.

or procedure in the evaluation or comparison of bids. It is self-evident that these procedures or guidelines require public bidding.

Even so-called tied loans from creditor countries cannot justify exemption from public bidding although the bidders may be limited to suppliers domiciled in the creditor countries. Such a geographic restriction on the domicile of suppliers can be the subject of an executive agreement as a modification of restrictions on international competitive bidding. A publication issued by public respondent National Economic and Development Authority summarizes the international practice on tied loans with respect to public bidding:

> The conditions imposed by the donor on the recipient with respect to ODA utilization provide another basis for differentiating ODA. In particular, **restriction of the geographic areas** where procurement of goods and services are eligible for ODA funding make ODA loan/grant tied or untied with respect to source of procurement. **Usually, bilateral ODA is tied to the donor country in terms of procurement. While competitive bidding is still practiced, qualified bidders for the supply of goods and services are confined to those firms which are owned or controlled by nationals of the donor country**. x x x[45] (Emphasis supplied)

Even for tied loans, the international practice still requires public bidding although the public bidding is restricted only among suppliers that are nationals of the creditor country. In the present case, there was no such public bidding because the Export-Import Bank of China simply handpicked ZTE Corporation as the supplier of the goods and services to the Philippine Government.

That the funding for the ZTE Supply Contract will come from a foreign loan does not negate the rationale for public bidding. **Filipino taxpayers will still pay for the loan with interest**. The need to safeguard public interest against anomalies exists in all government procurement contracts, regardless of

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[45] Romeo A. Reyes, *Official Development Assistance to the Philippines: A Study of Administrative Capacity and Performance*, published by National Economic and Development Authority, 1985.

the source of funding. Public bidding is the most effective means to prevent anomalies in the award of government contracts. Public bidding promotes transparency and honesty in the expenditure of public funds. Public bidding is accepted as the best means of securing the most advantageous price for the government, whether in procuring infrastructure, goods or services, or in disposing off government assets.

Even in a Build-Operate-Transfer project where the proponent provides all the capital with no government guarantee on project loans, the law requires public bidding in the form of a Swiss challenge.[46] With more reason should a project financed by a tied loan to the government be subject to public bidding. There is no sound reason why the Philippine government should allow its foreign creditor in an already tied loan to handpick the supplier of goods and services.

A tied loan, driven by a handpicked supplier, violates the principle of fair and open process in government procurement transactions. Such a tied loan, which arbitrarily reserves a contract to a pre-determined supplier, will likely lead to anomalies. This is contrary to the state policies enunciated in Sections 27 and 28, Article II of the Constitution:

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

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

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[46] Section 4-A, Republic Act No. 6957, as amended. A Swiss challenge is a form of public procurement in some (usually lesser developed) jurisdictions which requires a public authority (usually an agency of government) which has received an unsolicited bid for a public project (such as a port, road or railway) or services to be provided to government, to publish the bid and invite third parties to match or exceed it. x x x Some Swiss challenges also allow the entity which submitted the unsolicited bid itself then to match or better the best bid which comes out of the Swiss challenge process. It is a form of regulating public procurement. http://en.wikipedia.org/wiki/Swiss_challenge.

ZTE Supply Contract is Void from the Beginning

Contracts expressly prohibited or declared void by law are void from the beginning. Article 1409 of the Civil Code provides:

> Article 1409. The following contracts are **inexistent and void from the beginning**:
>
> x x x x x x x x x
>
> (7) Those **expressly prohibited** or **declared void by law**.
>
> x x x. (Emphasis supplied)

Sections 46 and 47, Chapter 8, Subtitle B, Title I, Book V of the Administrative Code of 1987 **expressly prohibit** the entering into procurement contracts that are not funded by an appropriation law and which do not have certificates of appropriation and fund availability. Section 48 of the same law **expressly declares such contracts void**. To repeat, Section 48 provides:

> SECTION 48. Void Contract and Liability of Officer. — **Any contract entered into contrary to the requirements of the two (2) immediately preceding sections shall be void**, x x x. (Emphasis supplied)

The ZTE Supply Contract, which is not funded by an appropriation law and does not have a certificate of appropriation and fund availability, is not only void, but also void from the beginning under Article 1409 of the Civil Code. As the Court held in *COMELEC v. Quijano-Padilla,*[47] which involved a procurement contract without the requisite appropriation law and certificate of appropriation and fund availability:

> Verily, the contract, as expressly declared by law, is **inexistent and void *ab initio***. This is to say that the proposed contract is **without force and effect from the very beginning or from its incipiency**, as if it had never been entered into, and hence, cannot be validated either by lapse of time or ratification. (Emphasis supplied)

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[47] *Supra*, note 17.

A contract void from the beginning is legally non-existent. As such, it cannot be annulled because to annul a contract assumes a voidable contract.[48] A cancellation of a contract void from the beginning has no legal effect because the contract is legally non-existent. Any cancellation may simply be construed as an acknowledgment or admission that the contract is void from the beginning. A contract void from the beginning can only be declared as such, that is, void from the beginning.

Thus, the discontinuance or cancellation of the ZTE Supply Contract by the Philippine Government, apart from being unilateral, had no legal effect and did not moot this petition. The members of this Court have the sworn duty to uphold the system of checks and balances that is so essential to our democratic system of government. In the present case, the members of this Court must uphold the check and balance in the appropriation and expenditure of public funds as embodied in Section 29(2), Article VI of the Constitution and the statutes insuring its compliance. If our democratic institutions are to be strengthened, this Court must not shirk from its primordial duty to preserve and uphold the Constitution.

It is time to put an end to government procurement contracts, amounting to tens of billions of pesos, exceeding even the annual budget of the Judiciary, that are awarded and signed without an appropriation from Congress, and without the required public bidding. This Court must categorically declare the ZTE Supply Contract void from the beginning.

Accordingly, I vote to **GRANT** the petition and to **DECLARE** the ZTE Supply Contract **VOID** from the beginning.

DISSENTING OPINION

CARPIO MORALES, *J.*:

The majority opinion, acting on the October 26, 2007 Manifestation and Motion of the Office of the Solicitor General,

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[48] Article 1390 of the Civil Code provides that voidable contracts "are binding, unless they are annulled by a proper action in court." Of course, voidable contracts can also be annulled by mutual agreement of the parties.

resolved to dismiss the subject petitions on two grounds, namely, these petitions have become moot in light of the declaration of the President that the government would no longer pursue the ZTE-National Broadband Network project and, even assuming it were not moot, the resolution of the same involves settling factual issues which requires reception of evidence.

I respectfully dissent.

I believe these petitions warrant a decision on the merits despite the aforementioned declaration of the President. I share Justice Carpio's opinion that these petitions should not be dismissed on the ground of mootness. *David v. Arroyo*[1] instructs:

> The moot and academic principle is not a magical formula that can automatically dissuade the courts in resolving a case. Courts will decide cases, otherwise moot and academic, if: first, there is a grave violation of the Constitution; second, the exceptional character of the situation and the paramount public interest is involved; third, when the constitutional issue raised requires formulation of controlling principles to guide the bench, the bar, and the public; and fourth, the case is capable of repetition yet evading review. (Underscoring supplied)

The reasons underlined above in *David* are just as applicable in the present case as they were, not only in *David*, but also in *Province of Batangas v. Romulo*[2] and *Manalo v.*

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[1] G.R. Nos. 171396, 171409, 171485, 171483, 171400, 171489 & 171424, May 3, 2006, 489 SCRA 160.

[2] G.R. No. 152774, May 27, 2004: "Granting *arguendo* that, as contended by the respondents, the resolution of the case had already been overtaken by supervening events as the IRA, including the LGSEF, for 1999, 2000 and 2001, had already been released and the government is now operating under a new appropriations law, still, there is compelling reason for this Court to resolve the substantive issue raised by the instant petition. Supervening events, whether intended or accidental, cannot prevent the Court from rendering a decision if there is a grave violation of the Constitution. Even in cases where supervening events had made the cases moot, the Court did not hesitate to resolve the legal or constitutional issues raised to formulate controlling principles to guide the bench, bar and public.

Calderon,[3] where the Court similarly decided the case on the merits, supervening events that would have ordinarily rendered the same moot notwithstanding.

The legal issues raised in the present case, **by their very nature**, are just as important, if not even more so, and are as susceptible of recurrence as those involved in the above-cited cases. These issues also call for the formulation of controlling principles for the guidance of all concerned. That the contract subject of the present petitions has been cancelled is, therefore, not an excuse for the Court not to decide the petitions on the merits.

Respecting the second ground cited by the majority, namely, that the present petitions call for the reception of evidence and may not, for that reason, be entertained by this Court, I believe that the admissions, both explicit and implicit, of respondents in their Consolidated Comment — pointed out by Justice Carpio in his Dissenting Opinion — suffice for this Court to render the substantial factual issues as established without need of further evidence.

For these reasons, I dissent from the Resolution of the majority dismissing the subject petitions on the therein proffered grounds.

"Another reason justifying the resolution by this Court of the substantive issue now before it is the rule that courts will decide a question otherwise moot and academic if it is "capable of repetition, yet evading review." For the GAAs in the coming years may contain provisos similar to those now being sought to be invalidated, and yet, the question may not be decided before another GAA is enacted. It, thus, behooves this Court to make a categorical ruling on the substantive issue now." (Underscoring supplied)

[3] G.R. No. 178920. October 15, 2007, penned by Justice Ruben T. Reyes. *Manalo* involved the *habeas corpus* petition filed by the police officers implicated in the burning of an elementary school in Batangas at the height of the May 2007 elections. This Court decided the case on the merits notwithstanding the recall by the PNP of the restrictive custody orders against petitioners therein, Citing *David v. Arroyo*, the Court ruled thus: ". . . Every bad, unusual incident where police officers figure in generates public interest and people watch what will be done or not done to them. Lack of disciplinary steps taken against them erode public confidence in the police institution. As petitioners themselves assert, the restrictive custody of policemen under investigation is an existing practice, hence, the issue is bound to crop up every now and then. The matter is capable of repetition or susceptible of recurrence. It better be resolved now for the education and guidance of all concerned. (Underscoring supplied)

agreement in question renders the matter academic and moot, leaving no actual controversy calling for the exercise of judicial power. The resolution of the issue in these proceedings would, therefore, partake of the nature of an advisory opinion which this Court is not allowed to render.

Furthermore, the so-called supply or procurement contract is clearly an incomplete agreement and cannot stand alone without the companion and yet-to-be-agreed loan agreement. As such, desistance at this stage from further pursuing the project on the part of one party effectively prevents the contract from materializing.

I, therefore, vote to **DISMISS** the petition for being moot and academic, without prejudice to a proper case to settle an actual controversy involving rights that are legally demandable and enforceable, if there be any, arising from the incomplete agreement.

FIRST DIVISION

[A.C. No. 7129. July 16, 2008]

FIL-GARCIA, INC., represented by its President, Filomeno Garcia, *complainant, vs.* **ATTY. FERNANDO CRESENTE C. HERNANDEZ,** *respondent.*

SYLLABUS

1. LEGAL ETHICS; CODE OF PROFESSIONAL RESPONSIBILITY; OBLIGATION TO SERVE CLIENT WITH COMPETENCE AND DILIGENCE, VIOLATED; RESPONDENT LAWYER'S BELATED FILING OF CLIENT'S PETITION FOR REVIEW IN CASE AT BAR.— Respondent's conduct relative to the belated filing of complainant's petition for review on *certiorari*

falls short of his obligation to serve his client with competence and diligence under Canon 18 of the Code of Professional Responsibility. Respondent's act of filing three (3) successive motions for extension of time to file the petition on the careless assumption that each motion will be granted by the Court, and without taking care of informing himself of the Court's action thereon, constitutes inexcusable negligence. Moreover, respondent knowingly referred to Rule 65 in the petition he belatedly filed as an afterthought in his desperate attempt to salvage the appeal.

2. ID.; ID.; OBLIGATION NOT TO NEGLECT ENTRUSTED LEGAL MATTER OR BE LIABLE THEREFOR.— Rule 18.03 of the Code of Professional Responsibility enjoins a lawyer not to "neglect a legal matter entrusted to him, and his negligence in connection therewith shall render him liable." Every case a lawyer accepts deserves his full attention, skill and competence, regardless of its importance and whether he accepts it for a fee or for free. He must constantly keep in mind that his actions or omissions or nonfeasance would be binding upon his client. Thus, he is expected to be acquainted with the rudiments of law and legal procedure, and a client who deals with him has the right to expect not just a good amount of professional learning and competence but also a whole-hearted fealty to the client's cause.

3. ID.; ID.; ID.; MOVANT FOR EXTENSION OF TIME MUST EXERCISE DILIGENCE TO INFORM HIMSELF OF THE COURT'S ACTION ON HIS MOTION BY TIMELY INQUIRY THEREOF.— While pressure of work or some other unavoidable reasons may constrain a lawyer to file a motion for extension of time to file pleadings, he should not presume that his motion for extension of time will be granted. Well-settled is the rule that motions for extension of time to file a pleading are not granted as a matter of course but lie in the sound discretion of the court. It is thus incumbent on any movant for extension to exercise due diligence to inform himself as soon as possible of the Court's action on his motion, by timely inquiry from the Clerk of Court. Should he neglect to do so, he runs the risk of time running out on him, for which he will have nobody but himself to blame.

4. ID.; ID.; LAWYER SHOULD KEEP CLIENT INFORMED NOT ONLY OF THE STATUS OF THE CASE BUT ALSO IF HE

CANNOT CONTINUE REPRESENTING CLIENT; PROPER PENALTY IN CASE AT BAR.— A lawyer who finds it impracticable to continue representing a client should inform the latter of his predicament and ask that he be allowed to withdraw from the case to enable the client to engage the services of another counsel who can study the situation and work out a solution. To make matters worse, it took respondent seven (7) months from the time he received a copy of the Court's resolution denying complainant's petition to inform complainant of the same. Under Rule 18.04 of the Code of Professional Responsibility, a lawyer "shall keep the client informed of the status of his case and shall respond within a reasonable time to the client's request for information." The IBP Board of Governors correctly imposed the penalty of suspension from the practice of law for six (6) months considering that respondent humbly admitted his fault in not immediately informing complainant of the status of the case.

APPEARANCES OF COUNSEL

Bernardo F. Ligsay for complainant.

D E C I S I O N

PUNO, *C.J.*:

Before the Court is an administrative complaint filed by complainant Fil-Garcia, Inc., represented by its President and General Manager, Filomeno T. Garcia, against respondent Atty. Fernando Cresente C. Hernandez charging the latter of malpractice, gross misconduct and for violation of his oath as a lawyer.

The facts are of record.

Sometime in 1990, complainant entered into an agreement with Magdalena T. Villasi (Villasi) for the completion of the construction of a condominium building owned by the latter located in Quezon City. During the progress of the construction, controversy arose between complainant and Villasi regarding the billing and payments. On March 11, 1991, complainant filed an action for recovery of sum of money with damages against

Villasi before the Regional Trial Court (RTC) of Quezon City, Branch 77. At that stage, complainant was represented by Atty. Bernardo F. Ligsay (Atty. Ligsay). On June 26, 1996, the RTC rendered judgment in favor of complainant and against Villasi. The dispositive portion of the Decision[1] states:

WHEREFORE, judgment is hereby rendered:

1. ordering the defendant to pay plaintiff the sum of ₱2,865,000.00 as actual damages and unpaid accomplishment billings;

2. ordering the defendant to pay plaintiff the amount of ₱500,000.00 representing the value of unused building materials;

3. ordering the defendant to pay plaintiff the amount of ₱100,000.00 as moral damages and ₱100,000 as attorney's fees.

SO ORDERED.[2]

Aggrieved by the RTC's decision, Villasi filed an appeal to the Court of Appeals (CA). On November 20, 2000, the CA granted Villasi's appeal and reversed the decision of the RTC. The dispositive portion of the Decision[3] states:

WHEREFORE, premises considered, the present appeal is hereby GRANTED and the appealed decision in Civil Case No. Q-91-8187 is hereby REVERSED and SET ASIDE and judgment is hereby rendered ordering the plaintiff-appellee to return to defendant-appellant the sum of ₱ 1,244,543.33 as overpayment under their contract, and the further sum of ₱ 425,004.00 representing unpaid construction materials obtained by it from defendant-appellant. Plaintiff-appellee is likewise hereby declared liable for the payment of liquidated damages in the sum equivalent to 1/10 of 1% of the contract price for each day of delay computed from March 6, 1991.

No pronouncement as to costs.

SO ORDERED.[4]

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[1] *Rollo*, pp. 242-249.

[2] *Id.* at 249.

[3] *Id.* at 251-258.

[4] *Id.* at 257-258.

On December 14, 2000, complainant filed a Motion for Reconsideration.[5] This time, complainant engaged the legal services of a new counsel in the person of respondent.

In its April 27, 2001 Resolution,[6] the CA denied complainant's motion for reconsideration and noted the appearance of respondent as counsel for complainant in substitution of Atty. Ligsay. Respondent received a copy of the resolution on May 8, 2001. Thus, he had until May 23, 2001 within which to file an appeal in accordance with Rule 45 in relation to Rule 56 of the Rules of Court.

However, instead of filing an appeal within the reglementary period, respondent filed three (3) successive motions for extension of time with the Court.

On May 22, 2001, respondent filed a Motion for Extension of Time to File Appeal by *Certiorari*.[7] In his motion, he alleged that he was engaged as counsel by a mayoralty candidate and a senatorial candidate which required his presence in the canvassing of votes. Due to the "enormous time pressure from these commitments,"[8] respondent prayed for an extension of thirty (30) days or until June 21, 2001 to file complainant's appeal.

On June 21, 2001, respondent filed a Second Motion for Extension of Time to File Appeal by *Certiorari*.[9] He alleged that "[he] fell ill"[10] and that "[h]e sought medical consultation, which revealed that he needs extended bed rest."[11] He prayed for an extension of twenty (20) days or until July 11, 2001 to file the appeal.

On July 11, 2001, respondent filed a Third Motion for Extension of Time to File Appeal by *Certiorari*,[12] alleging that "[he] severely

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[5] *Id.* at 260-267.

[6] *Id.* at 269.

[7] *Id.* at 113-115.

[8] *Id.* at 114.

[9] *Id.* at 123-127.

[10] *Id.* at 124.

[11] *Id.*

[12] *Id.* at 324-327.

underestimated the time needed to complete the petition because he had to work on other equally urgent legal matters, which were unattended to during his illness."[13] He prayed for an extension of ten (10) days or until July 21, 2001 to file the appeal.

Thereafter, respondent filed complainant's Petition for Review on *Certiorari* dated July 21, 2001.[14]

On August 6, 2001, respondent received a copy of the Court's Resolution[15] dated July 2, 2001 denying his first motion for extension of time, *viz*:

> **G.R. No. 147960 (*Fil-Garcia Construction, Inc., represented by its President-General Manager Filomeno Garcia vs. Magdalena T. Villasi*).-** Petitioner's motion for extension of thirty (30) days from 22 May 2001 within which to file petition for review on *certiorari* is DENIED for petitioner's failure to show that it has not lost the fifteen (15)-day reglementary period within which to appeal pursuant to Section 2, Rule 45 of the 1997 Rules of Civil Procedure, as amended, in view of the lack of statement of material dates of receipt of the assailed judgment of the Court of Appeals and of filing of the motion for reconsideration of said judgment.[16]

Hence, on August 17, 2001, respondent filed a Motion for Reconsideration[17] of the above resolution.

On August 20, 2001, the Court issued a Resolution[18] denying respondent's second and third motions for extension of time considering that the first motion for extension had already been denied in the resolution dated July 2, 2001. On September 28, 2001, respondent filed a Motion for Reconsideration[19] of the resolution.

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[13] *Id.* at 325.

[14] *Id.* at 274.

[15] *Id.* at 270.

[16] *Id.*

[17] *Id.* at 368-372.

[18] *Id.* at 271.

[19] *Id.* at 370-377.

On October 1, 2001, the Court issued a Resolution[20] denying respondent's motion for reconsideration of the resolution dated July 2, 2001 and complainant's petition for review on *certiorari*, *viz*:

G.R. No. 147960 ***(Fil-Garcia Construction, Inc., represented by its President-General Manager, Filomeno Garcia v. Magdalena T. Villasi)*** – Acting on petitioner's motion for reconsideration of the resolution of 02 July 2001 which denied its motion for extension of time to file petition for review on *certiorari* for lack of showing that it has not lost the 15-day period to appeal due to lack of statement of the dates of receipt of assailed judgment of the Court of Appeals and of filing of motion for reconsideration of said judgment, the Court Resolves to DENY the motion with FINALITY, no compelling reason having been adduced to warrant the reconsideration sought. Respondent's comment and opposition to said motion is NOTED.

In accordance with Rule 45 in relation to Rule 56 and other pertinent provisions of the 1997 Rules of Civil Procedure, as amended, governing appeals by *certiorari* to the Supreme Court, only petitions which are accompanied by or comply strictly with the requirements specified therein shall be entertained. On the basis thereof, the Court further Resolves to DENY the petition for review on *certiorari* for petitioner's failure to:

a) take the appeal within the reglementary period of fifteen (15) days in accordance with Section 2, Rule 45 in relation to Section 5(a), Rule 56, in view of the denial of the first, second and third motions for extension of time to file said petition in the resolution of 02 July 2001 and 20 August 2001; and

b) state the material date of filing of the motion for reconsideration of the assailed Court of Appeals decision pursuant to Sections 4 (b) and 5, Rule 45 in relation to Section 5 (d), Rule 56.[21]

On November 21, 2001, the Court issued a Resolution[22] denying with finality respondent's motion for reconsideration of the resolution dated August 20, 2001.

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[20] *Id.* at 272.

[21] *Id*.

[22] *Id.* at 380.

On November 27, 2001, the Court issued an Entry of Judgment[23] rendering the decision of the CA final and executory.

As admitted by respondent, he received a copy of the Court's resolution dated October 1, 2001 denying complainant's appeal on **November 15, 2001**.[24] However, respondent forwarded a copy of the same to complainant's office only on **June 16, 2002**.[25]

Feeling aggrieved by the fate of its appeal, complainant filed a Complaint[26] for disbarment before the Integrated Bar of the Philippines (IBP) on April 21, 2004. Complainant alleged that respondent's act of filing three (3) motions for extension of time within which to file the appeal and his wrong choice in the mode of appeal in the petition that he belatedly filed exemplify gross incompetence and caused serious prejudice to complainant. Complainant also alleged that the lapse of seven (7) months from the time the resolution dated October 1, 2001 was received by respondent before he informed complainant of the same constitutes inexcusable negligence.

On June 16, 2004, respondent filed his Answer.[27]

In his answer, respondent alleged that the filing of a motion for extension of time to file petition for review is allowed under Section 2, Rule 45 of the Rules of Court provided that the same is filed and the docket and other lawful fees and deposit of cost are paid within the reglementary period. Hence, respondent contends that he exercised due prudence when he filed his first motion for extension of time. Moreover, he was in the honest belief that the allegation of the date of receipt of the resolution denying the motion for reconsideration would suffice considering that the pertinent rules do not require that a motion for extension of time must contain a statement of material dates. Respondent

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[23] *Id.* at 287.

[24] *Id.* at 5, 109.

[25] *Id*.

[26] *Id.* at 1-93.

[27] *Id.* at 99-127.

claims that the filing of several motions and within the reglementary period to do so clearly speaks of due diligence of the legal matter entrusted to him. He argues that the filing of his motions for extension of time was based on meritorious grounds and the denial of the same was based solely on the ground that his first motion was wanting of material dates.

As to complainant's allegation on his erroneous mode of appeal, respondent claims that it is speculative at this point since the determination of the same is better left to the Court.

Lastly, respondent admits that he failed to immediately inform complainant of the development of the case. However, the said omission was not deliberate nor prompted by malice or intent to injure the complainant but was brought about by "the sudden unexpected technicalities that besieged the appeal of the case to the Supreme Court"[28] which caused him dismay and made it "hard"[29] for him to inform complainant of the same.

After a mandatory conference, Commissioner Milagros V. San Juan, the investigating commissioner of the IBP Committee on Bar Discipline, submitted her report and recommended to the IBP Board of Governors that respondent be disbarred from the practice of law.

The Board, in its Resolution[30] No. XVII-2006-04 dated January 28, 2006, adopted and approved with modification the Report and Recommendation of Commissioner San Juan. It reduced the penalty of disbarment to suspension for six (6) months; hence, the transmittal of the case and its records to this Court for final resolution pursuant to Rule 139-B, Section 12(b) of the Rules of Court, *viz*:

Review and Decisions by the Board of Governors.- x x x (b) If the Board, by the vote of a majority of its total membership, determines that the respondent should be suspended from the practice of law or disbarred, it shall issue a resolution setting forth its findings

[28] *Id.* at 109.

[29] *Id*.

[30] Notice of Resolution signed by Ma. Teresa M. Trinidad, IBP National Secretary.

and recommendations which, together with the whole record of the case, shall forthwith be transmitted to the Supreme Court for final action.

After a careful review of the records and evidence, we find no cogent reason to deviate from the findings and the recommendation of the IBP Board of Governors. Respondent's conduct relative to the belated filing of complainant's petition for review on *certiorari* falls short of his obligation to serve his client with competence and diligence under Canon 18 of the Code of Professional Responsibility.

Respondent's act of filing three (3) successive motions for extension of time to file the petition on the careless assumption that each motion will be granted by the Court, and without taking care of informing himself of the Court's action thereon, constitutes inexcusable negligence. Moreover, respondent knowingly referred to Rule 65 in the petition he belatedly filed as an afterthought in his desperate attempt to salvage the appeal.

Rule 18.03 of the Code of Professional Responsibility enjoins a lawyer not to "neglect a legal matter entrusted to him, and his negligence in connection therewith shall render him liable." Every case a lawyer accepts deserves his full attention, skill and competence, regardless of its importance and whether he accepts it for a fee or for free.[31] He must constantly keep in mind that his actions or omissions or nonfeasance would be binding upon his client. Thus, he is expected to be acquainted with the rudiments of law and legal procedure, and a client who deals with him has the right to expect not just a good amount of professional learning and competence but also a whole-hearted fealty to the client's cause.[32]

While pressure of work or some other unavoidable reasons may constrain a lawyer to file a motion for extension of time to file pleadings, he should not presume that his motion for extension of time will be granted. Well-settled is the rule that motions for extension of time to file a pleading are not granted as a matter

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[31] *Barbuco v. Beltran*, A.C. No. 5092, August 11, 2004, 436 SCRA 57, 61.

[32] RUBEN E. AGPALO, *LEGAL AND JUDICIAL ETHICS*, 209 (2002) *citing Torres v. Orden*, 330 SCRA 1 (2000).

of course but lie in the sound discretion of the court. It is thus incumbent on any movant for extension to exercise due diligence to inform himself as soon as possible of the Court's action on his motion, by timely inquiry from the Clerk of Court. Should he neglect to do so, he runs the risk of time running out on him, for which he will have nobody but himself to blame.[33]

As noted by Commissioner San Juan, respondent alleged in his answer that he anticipated that he could not file the petition within the reglementary period due to his prior commitments for the municipal canvassing of votes of a mayoralty candidate. However, this fact was not called to the attention of the complainant. In doing so, complainant could have engaged the services of another lawyer who can file the petition in time.[34]

A lawyer who finds it impracticable to continue representing a client should inform the latter of his predicament and ask that he be allowed to withdraw from the case to enable the client to engage the services of another counsel who can study the situation and work out a solution.[35]

To make matters worse, it took respondent seven (7) months from the time he received a copy of the Court's resolution denying complainant's petition to inform complainant of the same.[36] Under Rule 18.04 of the Code of Professional Responsibility, a lawyer "shall keep the client informed of the status of his case and shall respond within a reasonable time to the client's request for information."

Finally, the IBP Board of Governors correctly imposed the penalty of suspension from the practice of law for six (6) months considering that respondent humbly admitted his fault in not immediately informing complainant of the status of the case.[37]

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[33] *Diman v. Hon. Alumbres*, 359 Phil. 796, 803 (1998).

[34] Report and Recommendation dated August 2, 2005 in CBD Case No. 04-1230 by Commissioner Milagros V. San Juan, pp. 4-5.

[35] *Supra* note 32 at 225-226, *citing Ventura v. Santos*, 59 Phil. 123 (1933).

[36] *Rollo*, p. 109.

[37] *Id.* at 110.

IN VIEW WHEREOF, the January 28, 2006 Resolution of the IBP Board of Governors in CBD Case No. 04-1230 is *AFFIRMED*.

Let a copy of this Decision be attached to the personal record of respondent with the Office of the Bar Confidant. Likewise, let copies of this Decision be furnished the Integrated Bar of the Philippines and all its chapters, and to all the courts in the land.

SO ORDERED.

Carpio, Corona, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

FIRST DIVISION

[A.M. No. MTJ-06-1646. July 16, 2008]

ANTONIETA LAO, *complainant, vs.* **JUDGE ODELON S. MABUTIN and Acting Clerk of Court and Interpreter EFREN F. VARELA, both of Municipal Trial Court, Catbalogan, Samar,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CIVIL PROCEDURE; APPEAL FROM LOWER COURTS TO THE REGIONAL TRIAL COURT (RTC); DUTY OF THE CLERK OF COURT.— Section 6, Rule 40 of the Rules of Court provides: SEC. 6. *Duty of the clerk of court.* — [Within] **fifteen (15) days** from the perfection of the appeal, the clerk of court or the branch clerk of court of the lower court shall transmit the original record or the record on appeal, together with the transcript and exhibits, which he shall certify as complete, to the proper Regional Trial Court. A copy of his letter of transmittal of the records to the appellate court shall be furnished the parties.

2. ID.; ID.; ID.; ID.; TRANSMITTAL OF RECORDS; VIOLATION IN CASE AT BAR NOT EXCUSED BY HEAVY WORKLOAD,

LATE FOLLOW-UP, AND GOOD FAITH.— Lao's appeal was perfected when she filed the notice of appeal on 29 July 2002. Following Section 6, Clerk of Court Varela should have transmitted the records of Civil Case No. 789 to the RTC *within 15 days* from 29 July 2002. Varela transmitted the records of Civil Case No. 789 to the RTC only on 4 December 2003 and only after Lao made follow-ups. Had Lao not made any follow-up, Varela would have failed to transmit the records of the case to the RTC indefinitely. Even granting that (1) he had a heavy workload; (2) Lao only made the follow-ups during the latter part of 2003; and (3) the oversight was unintentional, Varela would still be liable. First, having a heavy workload is not a valid excuse. Otherwise, every government employee charged with dereliction of duty would proffer such a convenient excuse to escape liability, to the great prejudice of the public. Second, Rule 40 of the Rules of Court does not require litigants to make any follow-up with the clerk of court. As acting clerk of court, Varela should have transmitted the records of Civil Case No. 789 of the RTC within 15 days from 29 July 2002 even without any follow-up from Lao. Third, good faith or lack of intention to be negligent is a lame, invalid, and unacceptable excuse. Good faith, at most, is only a mitigating circumstance.

3. POLITICAL LAW; ADMINISTRATIVE LAW; COURT EMPLOYEES; SIMPLE NEGLECT OF DUTY; ELUCIDATED; PROPER PENALTY IN CASE AT BAR.— Simple neglect of duty is the failure to give attention to a task expected of a court employee. It signifies a disregard of a duty resulting from carelessness or indifference. It is a less grave offense punishable by suspension of one month and one day to six months for the first offense and dismissal for the second offense. In *Tudtud v. Caayon,* the Court penalized a clerk of court for failing to transmit the records of a case for more than one year and five months. The Court finds acting clerk of court Efren F. Varela, Municipal Trial Court, Judicial Region VIII, Catbalogan, Samar, **GUILTY of SIMPLE NEGLECT OF DUTY.** Accordingly, the Court **SUSPENDS** him for one month and one day and **STERNLY WARNS** him that a repetition of the same or similar offense shall be dealt with more severely.

4. ID.; ID.; JUDGES; UNDUE DELAY IN TRANSMITTING RECORDS OF A CASE; NOT EXCUSED BY NO FOLLOW-UP MADE TO THE JUDGE, LACK OF MANPOWER, GOOD FAITH, AND HEAVY WORKLOAD.— Judge Mabutin

is liable for undue delay in transmitting the records of a case. Although the transmittal of the records of Civil Case No. 789 was primarily the concern of Varela, making sure that the 12 August 2002 order was properly and promptly carried out was the responsibility of Judge Mabutin. Judicial duties include tasks relevant to the court's operations. Rule 3.08 of the Code of Judicial Conduct mandates judges to diligently discharge administrative responsibilities, maintain professional competence in court management, and facilitate the performance of the administrative functions of court personnel. Rule 3.09 mandates judges to organize and supervise the court personnel to ensure the prompt and efficient dispatch of business. The records of Civil Case No. 789 were transmitted to the RTC only after more than one year and four months and only after Lao made follow-ups. Clearly, an oversight was committed. Being the one charged with the proper and efficient management of the MTC, Judge Mabutin is ultimately responsible for the mistakes of his court personnel. Even granting that (1) the follow-ups were not made to him; (2) the MTC lacked manpower; (3) the oversight was unintentional; and (4) he rendered work even on days he was on leave, Judge Mabutin would still be liable. First, Rule 40 of the Rules of Court does not require litigants to make any follow-up. Judge Mabutin should have made sure that his 12 August 2002 order was properly carried out even without any follow-up from Lao. Second, even if the MTC was understaffed, Judge Mabutin still had to comply with the 15-day period in transmitting the records of cases to the RTC. He should have devised ways of ensuring a prompt and efficient dispatch of business in the MTC. Moreover, Judge Mabutin failed to show that the transmittal of the records of Civil Case No. 789 within 15 days was impossible due to lack of manpower. Third, good faith, at most, is only a mitigating circumstance. It does not exculpate Judge Mabutin from administrative liability. Fourth, having a heavy workload cannot be used as a convenient excuse to escape administrative liability.

5. ID.; ID.; ID.; PENALTY; PROPER PENALTY IN CASE AT BAR.— Undue delay in transmitting the records of a case is a less serious offense punishable by suspension from office without salary and other benefits for not less than one nor more than three months or a fine of more than ₱10,000 but not exceeding ₱20,000. In *Bellena v. Perello*, the Court penalized

a judge for failing to transmit the records of a case for almost nine months. The public's faith in the judiciary depends largely on the proper and prompt disposition of matters pending before the courts. In *Office of the Court Administrator v. Garcia-Blanco,* the Court held that any delay in the administration of justice, no matter how brief, deprives litigants of their right to a speedy disposition of their case. It undermines the public's faith in the judiciary. A delay of more than one year and four months in transmitting the records of a case is unreasonably long. The Court finds Judge Odelon S. Mabutin, Municipal Trial Court, Judicial Region VIII, Catbalogan, Samar, **GUILTY** of **UNDUE DELAY IN TRANSMITTING THE RECORDS OF A CASE.** Accordingly, the Court **FINES** him ₱11,000 and **STERNLY WARNS** him that a repetition of the same or similar offense shall be dealt with more severely.

R E S O L U T I O N

CARPIO, *J.*:

This is a complaint for (1) simple neglect of duty filed by Antonieta Lao (Lao) against acting clerk of court Efren F. Varela (Varela), Municipal Trial Court (MTC), Judicial Region VIII, Catbalogan, Samar; and (2) undue delay in transmitting the records of a case filed by Lao against Judge Odelon S. Mabutin (Judge Mabutin) of the MTC.

Lao was the plaintiff in a civil case[1] for forcible entry against a certain Nimfa Rosal (Rosal). The case was docketed as Civil Case No. 789 and was pending before Judge Mabutin. On 17 June 2002, Judge Mabutin decided Civil Case No. 789 in favor of Rosal and, on 16 July 2002, Lao received a copy of the decision.

Feeling aggrieved, Lao filed a notice of appeal[2] with Judge Mabutin on 29 July 2002. In an order[3] dated 12 August 2002, Judge Mabutin gave due course to the appeal:

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[1] Docketed as Civil Case No. 789, entitled "*Antonieta Lao v. Nimfa Rosal.*"

[2] *Rollo*, p. 4.

[3] *Id*. at 5.

Considering that the notice has been filed within the reglementary period, the appeal sought for is hereby given due course. Let the entire records of [the] case with its pages numbered together with the transcript of stenographic notes and the exhibits be forwarded to the Regional Trial Court of Catbalogan, Samar for purposes of the appeal.

Despite follow-ups from Lao, Varela and Judge Mabutin failed to transmit the records of Civil Case No. 789 to the Regional Trial Court (RTC) for more than one year and four months. Lao alleged that every time she made a follow-up, Varela told her that the records of the case were still to be retrieved from the files.

In an affidavit-complaint[4] dated 17 March 2004 and filed with the Office of the Court Administrator (OCA), Lao charged Varela and Judge Mabutin with simple neglect of duty and undue delay in transmitting the records of a case, respectively. In its 1st Indorsement[5] dated 2 June 2004, the OCA directed Varela and Judge Mabutin to comment on the affidavit-complaint.

In his comment[6] dated 15 July 2004, Varela stated that (1) his workload was heavy; (2) Lao made the follow-ups only during the latter part of 2003; and (3) the oversight was unintentional. In his comment[7] dated 15 July 2004, Judge Mabutin stated that (1) the follow-ups were not made to him; (2) the MTC lacked manpower; (3) the oversight was unintentional; (4) he was not lacking in his supervision over Varela; and (5) he rendered work even on days he was on leave.

In its Report[8] dated 14 June 2006, the OCA found Varela and Judge Mabutin liable for the unjustified and long delay in the transmittal of the records of Civil Case No. 789. The OCA recommended that (1) the case be re-docketed as a regular administrative matter; (2) Varela be suspended for one month and one day; and (3) Judge Mabutin be fined ₱11,000.

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[4] *Id*. at 1-3.

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

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

[7] *Id*. at 28-34.

[8] *Id*. at 130-132.

In a Resolution dated 7 August 2006, the Court re-docketed the case as a regular administrative matter and directed Varela and Judge Mabutin to manifest if they were willing to submit the case for decision based on the pleadings already filed. In his letter dated 20 July 2007, Varela adopted his 15 July 2004 comment as his manifestation. In his manifestation dated 18 September 2006, Judge Mabutin stated his willingness to submit the case for decision based on the pleadings already filed and reiterated that he was not lacking in his supervision over Varela and that he rendered work even on days he was on leave.

The Court agrees with the OCA.

Varela is liable for simple neglect of duty. Section 6, Rule 40 of the Rules of Court provides:

> SEC. 6. *Duty of the clerk of court*. — Within **fifteen (15) days** from the perfection of the appeal, the clerk of court or the branch clerk of court of the lower court shall transmit the original record or the record on appeal, together with the transcripts and exhibits, which he shall certify as complete, to the proper Regional Trial Court. A copy of his letter of transmittal of the records to the appellate court shall be furnished the parties. (Emphasis ours)

Lao's appeal was perfected when she filed the notice of appeal on 29 July 2002.[9] Following Section 6, Varela should have transmitted the records of Civil Case No. 789 to the RTC *within 15 days* from 29 July 2002. Varela transmitted the records of Civil Case No. 789 to the RTC only on 4 December 2003 and only after Lao made follow-ups. Had Lao not made any follow-up, Varela would have failed to transmit the records of the case to the RTC indefinitely.

Even granting that (1) he had a heavy workload; (2) Lao only made the follow-ups during the latter part of 2003; and (3) the oversight was unintentional, Varela would still be liable. First, having a heavy workload is not a valid excuse. Otherwise, every government employee charged with dereliction of duty would proffer such a convenient excuse to escape liability, to the great prejudice of the public.[10] Second, Rule 40 of the Rules of Court does not

[9] RULES OF COURT, Rule 41, Section 9.

[10] *De Leon-Dela Cruz v. Recacho*, A.M. No. P-06-2122, 17 July 2007,

require litigants to make any follow-up with the clerk of court. As acting clerk of court, Varela should have transmitted the records of Civil Case No. 789 to the RTC within 15 days from 29 July 2002 even without any follow-up from Lao. Third, good faith or lack of intention to be negligent is a lame, invalid, and unacceptable excuse.[11] Good faith, at most, is only a mitigating circumstance.[12]

Simple neglect of duty is the failure to give attention to a task expected of a court employee. It signifies a disregard of a duty resulting from carelessness or indifference.[13] It is a less grave offense punishable by suspension of one month and one day to six months for the first offense and dismissal for the second offense.[14] In *Tudtud v. Caayon*,[15] the Court penalized a clerk of court for failing to transmit the records of a case for more than one year and five months.

Judge Mabutin is liable for undue delay in transmitting the records of a case. Although the transmittal of the records of Civil Case No. 789 was primarily the concern of Varela, making sure that the 12 August 2002 order was properly and promptly carried out was the responsibility of Judge Mabutin.[16]

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527 SCRA 622, 631; *Seangio v. Parce*, A.M. No. P-06-2252, 9 July 2007, 527 SCRA 24, 35; *Laguio, Jr. v. Amante-Casicas*, A.M. No. P-05-2092, 10 November 2006, 506 SCRA 705, 711; *Salvador v. Serrano*, A.M. No. P-062104, 31 January 2006, 481 SCRA 55, 71; *Office of the Court Administrator v. Bernardino*, A.M. No. P-97-1258, 31 January 2005, 450 SCRA 88, 110-111.

[11] *Re: Report on the Judicial Audit Conducted in the Regional Trial Court, Branch 134, Makati City*, A.M. No. P-06-2172, 6 December 2006, 510 SCRA 14, 19; *Re: Audit Report on Attendance of Court Personnel of Regional Trial Court, Branch 32, Manila*, A.M. No. P-04-1838, 31 August 2006, 500 SCRA 351, 361.

[12] Revised Uniform Rules on Administrative Cases in the Civil Service, Section 53.

[13] *Laguio, Jr. v. Amante-Casicas*, *supra* note 10, at 710.

[14] Revised Uniform Rules on Administrative Cases in the Civil Service, Section 52(B)(1).

[15] A.M. No. P-02-1567, 28 March 2005, 454 SCRA 10, 16.

[16] *Bellena v. Perello*, A.M. No. RTJ-04-1846, 31 January 2005, 450 SCRA 122, 131-133.

Judicial duties include tasks relevant to the court's operations.[17] Rule 3.08 of the Code of Judicial Conduct mandates judges to diligently discharge administrative responsibilities, maintain professional competence in court management, and facilitate the performance of the administrative functions of court personnel. Rule 3.09 mandates judges to organize and supervise the court personnel to ensure the prompt and efficient dispatch of business. The records of Civil Case No. 789 were transmitted to the RTC only after more than one year and four months and only after Lao made follow-ups. Clearly, an oversight was committed. Being the one charged with the proper and efficient management of the MTC, Judge Mabutin is ultimately responsible for the mistakes of his court personnel.[18]

Even granting that (1) the follow-ups were not made to him; (2) the MTC lacked manpower; (3) the oversight was unintentional; and (4) he rendered work even on days he was on leave, Judge Mabutin would still be liable. First, Rule 40 of the Rules of Court does not require litigants to make any follow-up. Judge Mabutin should have made sure that his 12 August 2002 order was properly carried out even without any follow-up from Lao. Second, even if the MTC was understaffed, Judge Mabutin still had to comply with the 15-day period in transmitting the records of cases to the RTC. He should have devised ways of ensuring a prompt and efficient dispatch of business in the MTC. Moreover, Judge Mabutin failed to show that the transmittal of the records of Civil Case No. 789 within 15 days was impossible due to lack of manpower. Third, good faith, at most, is only a mitigating circumstance.[19] It does not exculpate Judge Mabutin from administrative liability. Fourth, having a heavy workload cannot be used as a convenient excuse to escape administrative liability.[20]

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[17] New Code of Judicial Conduct for the Philippine Judiciary, Canon 6, Section 2.

[18] *Galanza v. Trocino*, A.M. No. RTJ-07-2057, 7 August 2007, 529 SCRA 200, 210.

[19] Revised Uniform Rules on Administrative Cases in the Civil Service, Section 53.

[20] *De Leon-Dela Cruz v. Recacho*, *supra* note 10, at 631; *Seangio v.Parce*,

Undue delay in transmitting the records of a case is a less serious offense[21] punishable by suspension from office without salary and other benefits for not less than one nor more than three months or a fine of more than ₱10,000 but not exceeding ₱20,000.[22] In *Bellena v. Perello*,[23] the Court penalized a judge for failing to transmit the records of a case for almost nine months.

The public's faith in the judiciary depends largely on the proper and prompt disposition of matters pending before the courts.[24] In *Office of the Court Administrator v. Garcia-Blanco*,[25] the Court held that any delay in the administration of justice, no matter how brief, deprives litigants of their right to a speedy disposition of their case. It undermines the public's faith in the judiciary. A delay of more than one year and four months in transmitting the records of a case is unreasonably long.

WHEREFORE, the Court finds acting clerk of court Efren F. Varela, Municipal Trial Court, Judicial Region VIII, Catbalogan, Samar, *GUILTY* of *SIMPLE NEGLECT OF DUTY*. Accordingly, the Court *SUSPENDS* him for one month and one day and *STERNLY WARNS* him that a repetition of the same or similar offense shall be dealt with more severely.

The Court finds Judge Odelon S. Mabutin, Municipal Trial Court, Judicial Region VIII, Catbalogan, Samar, *GUILTY* of *UNDUE DELAY IN TRANSMITTING THE RECORDS OF A CASE*. Accordingly, the Court *FINES* him ₱11,000 and *STERNLY WARNS* him that a repetition of the same or similar offense shall be dealt with more severely.

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supra note 10, at 35; *Laguio, Jr. v. Amante-Casicas*, *supra* note 10, at 711; *Salvador v. Serrano*, *supra* note 10, at 71; *Office of the Court Administrator v. Bernardino*, *supra* note 10, at 110-111.

[21] RULES OF COURT, Rule 140, Section 9.

[22] RULES OF COURT, Rule 140, Section 11(B) (2).

[23] *Supra* note 16, at 134.

[24] *Vda. De Castro v. Cawaling*, A.M. No. MTJ-02-1465, 6 February 2006, 481 SCRA 535, 538.

[25] A.M. No. RTJ-05-1941, 25 April 2006, 488 SCRA 109, 121.

Puno, C.J. (Chairperson), Corona, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

FIRST DIVISION

[G.R. No. 130115. July 16, 2008]

FELIX TING HO, JR., MERLA TING HO BRADEN, JUANA TING HO & LYDIA TING HO BELENZO, *petitioners, vs.* **VICENTE TENG GUI,** *respondent.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; STATE POLICIES; NATURAL RESOURCES; LANDS OF THE PUBLIC DOMAIN CANNOT BE ACQUIRED BY CHINESE CITIZENS; RELEVANT RULING, CITED.— Our fundamental law cannot be any clearer. The right to acquire lands of the public domain is reserved for Filipino citizens or corporations at least sixty percent of the capital of which is owned by Filipinos. Thus, in ***Krivenko v. Register of Deeds,*** the Court enunciated that: **…Perhaps the effect of our construction is to preclude aliens, admitted freely into the Philippines from owning sites where they may build their homes. But if this is the solemn mandate of the Constitution, we will not attempt to compromise it even in the name of amity or equity.** We are satisfied, however, that aliens are not completely excluded by the Constitution from the use of lands for residential purposes. Since their residence in the Philippines is temporary, they may be granted temporary rights such as a lease contract which is not forbidden by the Constitution. Should they desire to remain here forever and share our fortunes and misfortunes, Filipino citizenship is not impossible to acquire. In the present case, the father of petitioners and respondent was a Chinese citizen; therefore, he was disqualified from acquiring and owning real property in the Philippines. In fact, he was only occupying the subject lot by virtue of the permission granted him by the then U.S. Naval Reservation Office of Olongapo, Zambales. As correctly found by the CA, the deceased Felix Ting Ho was never the owner of the subject lot in light of the constitutional

proscription and the respondent did not at any instance act as the dummy of his father.

2. ID.; ID.; ID.; ID.; ID.; THE CONSTITUTIONAL PROHIBITION AGAINST ALIENS FROM OWNING LANDS OF PUBLIC DOMAIN IS ABSOLUTE; DOCTRINE OF IMPLIED TRUST, REJECTED.— Nonetheless, petitioners invoke equity considerations and claim that the ruling of the RTC that an implied trust was created between respondent and their father with respect to the subject lot should be upheld. This contention must fail because the prohibition against an alien from owning lands of the public domain is absolute and not even an implied trust can be permitted to arise on equity considerations. In the case of ***Muller v. Muller***, wherein the respondent, a German national, was seeking reimbursement of funds claimed by him to be given in trust to his petitioner wife, a Philippine citizen, for the purchase of a property in Antipolo, the Court, in rejecting the claim, ruled that: Respondent was aware of the constitutional prohibition and expressly admitted his knowledge thereof to this Court. He declared that he had the Antipolo property titled in the name of the petitioner because of the said prohibition. His attempt at subsequently asserting or claiming a right on the said property cannot be sustained. **The Court of Appeals erred in holding that an implied trust was created and resulted by operation of law in view of petitioner's marriage to respondent. Save for the exception provided in cases of hereditary succession, respondent's disqualification from owning lands in the Philippines is absolute. Not even an ownership in trust is allowed**. Besides, where the purchase is made in violation of an existing statute and in evasion of its express provision, no trust can result in favor of the party who is guilty of the fraud. To hold otherwise would allow circumvention of the constitutional prohibition. Invoking the principle that a court is not only a court of law but also a court of equity, is likewise misplaced. It has been held that equity as a rule will follow the law and will not permit that to be done indirectly which, because of public policy, cannot be done directly.

3. CIVIL LAW; LAND REGISTRATION; EFFECT OF REGISTRATION OF PATENT AND ISSUANCE OF CERTIFICATE OF TITLE TO THE PATENTEE. — The respondent became the owner of Lot No. 418, Ts-308 when

he was granted Miscellaneous Sales Patent No. 7457 on January 3, 1978, by the Secretary of Natural Resources "By Authority of the President of the Philippines," and when Original Certificate of Title No. P-1064 was correspondingly issued in his name. The grant of the miscellaneous sales patent by the Secretary of Natural Resources, and the corresponding issuance of the original certificate of title in his name, show that the respondent possesses all the qualifications and none of the disqualifications to acquire alienable and disposable lands of the public domain. These issuances bear the presumption of regularity in their performance in the absence of evidence to the contrary. Under the law, a certificate of title issued pursuant to any grant or patent involving public land is as conclusive and indefeasible as any other certificate of title issued to private lands in the ordinary or cadastral registration proceeding. The effect of the registration of a patent and the issuance of a certificate of title to the patentee is to vest in him an incontestable title to the land, in the same manner as if ownership had been determined by final decree of the court, and the title so issued is absolutely conclusive and indisputable, and is not subject to collateral attack.

4. ID.; SALES; FOR A SIMULATED SALE TO BE CONSIDERED AS A VALID DONATION, POSITIVE PROOF IS REQUIRED.— The Court holds that the reliance of the trial court on the provisions of Article 1471 of the Civil Code to conclude that the simulated sales were a valid donation to the respondent is misplaced because its finding was based on a **mere assumption** when the law requires positive proof. The respondent was unable to show, and the records are bereft of any evidence, that the simulated sales of the properties were intended by the deceased to be a donation to him. Thus, the Court holds that the two-storey residential house, two-storey residential building and *sari-sari* store form part of the estate of the late spouses Felix Ting Ho and Leonila Cabasal, entitling the petitioners to a four-fifths (4/5) share thereof.

APPEARANCES OF COUNSEL

Mario O. Leyco & Segundo E. Mangohig for petitioners.

Alreuela M. Bundang Ortiz & Edmundo S. Legaspi for respondent.

D E C I S I O N

PUNO, *C.J.*:

This is a Petition for Review on *Certiorari*[1] assailing the Decision[2] of the Court of Appeals (CA) in CA-G.R. CV No. 42993 which reversed and set aside the Decision of the Regional Trial Court (RTC) of Olongapo City, Branch 74, in Civil Case No. 558-0-88.

The instant case traces its origin to an action for partition filed by petitioners Felix Ting Ho, Jr., Merla Ting Ho Braden, Juana Ting Ho and Lydia Ting Ho Belenzo against their brother, respondent Vicente Teng Gui, before the RTC, Branch 74 of Olongapo City. The controversy revolves around a parcel of land, and the improvements established thereon, which, according to petitioners, should form part of the estate of their deceased father, Felix Ting Ho, and should be partitioned equally among each of the siblings.

In their complaint before the RTC, petitioners alleged that their father Felix Ting Ho died intestate on June 26, 1970, and left upon his death an estate consisting of the following:

a) A commercial land consisting of 774 square meters, more or less, located at Nos. 16 and 18 Afable St., East Bajac-Bajac, Olongapo City, covered by Original Certificate of Title No. P-1064 and Tax Declaration No. 002-2451;

b) A two-storey residential house on the aforesaid lot;

c) A two-storey commercial building, the first floor rented to different persons and the second floor, Bonanza Hotel, operated by the defendant also located on the above described lot; and

d) A *sari-sari* store (formerly a bakery) also located on the above described lot.[3]

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] *Rollo,* pp. 49-62; penned by Associate Justice Eduardo G. Montenegro, concurred in by Associate Justices Antonio M. Martinez and Celia Lipana-Reyes.

[3] *Id.* at 78.

According to petitioners, the said lot and properties were titled and tax declared under trust in the name of respondent Vicente Teng Gui for the benefit of the deceased Felix Ting Ho who, being a Chinese citizen, was then disqualified to own public lands in the Philippines; and that upon the death of Felix Ting Ho, the respondent took possession of the same for his own exclusive use and benefit to their exclusion and prejudice.[4]

In his answer, the respondent countered that on October 11, 1958, Felix Ting Ho sold the commercial and residential buildings to his sister-in-law, Victoria Cabasal, and the bakery to his brother-in-law, Gregorio Fontela.[5] He alleged that he acquired said properties from the respective buyers on October 28, 1961 and has since then been in possession of subject properties in the concept of an owner; and that on January 24, 1978, Original Certificate of Title No. P-1064 covering the subject lot was issued to him pursuant to a miscellaneous sales patent granted to him on January 3, 1978.[6]

The undisputed facts as found by the trial court (RTC), and affirmed by the appellate court (CA), are as follows:

> [T]he plaintiffs and the defendant are all brothers and sisters, the defendant being the oldest. They are the only legitimate children of the deceased Spouses Felix Ting Ho and Leonila Cabasal. Felix Ting Ho died on June 26, 1970 while the wife Leonila Cabasal died on December 7, 1978. The defendant Vicente Teng Gui is the oldest among the children as he was born on April 5, 1943. The father of the plaintiffs and the defendant was a Chinese citizen although their mother was Filipino. That sometime in 1947, the father of the plaintiffs and defendant, Felix Ting Ho, who was already then married to their mother Leonila Cabasal, occupied a parcel of land identified to (sic) as Lot No. 18 Brill which was thereafter identified as Lot No. 16 situated at Afable Street, East Bajac-Bajac, Olongapo City, by virtue of the permission granted him by the then U.S. Naval Reservation Office, Olongapo, Zambales. The couple thereafter introduced improvements on the land. They built a house of strong material at 16 Afable Street which is a commercial and residential

[4] *Id.* at 78-79.

[5] *Id.* at 79.

[6] *Id.* at 80.

house and another building of strong material at 18 Afable Street which was a residential house and a bakery. The couple, as well as their children, lived and resided in the said properties until their death. The father, Felix Ting Ho had managed the bakery while the mother managed the *sari-sari* store. **Long before the death of Felix Ting Ho, who died on June 26, 1970, he executed on October 11, 1958 a Deed of Absolute Sale of a house of strong material located at 16 Afable Street, Olongapo, Zambales, specifically described in Tax Dec. No. 5432, in favor of Victoria Cabasal his sister-in-law (Exh. C).** This Deed of Sale cancelled the Tax Dec. of Felix Ting Ho over the said building (Exh. C-1) and the building was registered in the name of the buyer Victoria Cabasal, as per Tax Dec. No. 7579 (Exh. C-2). **On the same date, October 11, 1958 the said Felix Ting Ho also sold a building of strong material located at 18 Afable Street, described in Tax Dec. No. 5982, in favor of Gregorio Fontela, of legal age, an American citizen, married (Exh. D).** This Deed of Sale, in effect, cancelled Tax Dec. No. 5982 and the same was registered in the name of the buyer Gregorio Fontela, as per Tax Dec. No. 7580 (Exh. D-2). **In turn Victoria Cabasal and her husband Gregorio Fontela sold to Vicente Teng Gui on October 28, 1961 the buildings which were bought by them from Felix Ting Ho and their tax declarations for the building they bought (Exhs. C-2 and D-2) were accordingly cancelled and the said buildings were registered in the name of the defendant Vicente Teng Gui (Exhs. C-3 and D-3).** On October 25, 1966 the father of the parties Felix Ting Ho executed an Affidavit of Transfer, Relinquishment and Renouncement of Rights and Interest including Improvements on Land in favor of his eldest son the defendant Vicente Teng Gui. On the basis of the said document the defendant who then chose Filipino citizenship filed a miscellaneous sales application with the Bureau of Lands. **Miscellaneous Sales Patent No. 7457 of the land which was then identified to be Lot No. 418, Ts-308 consisting of 774 square meters was issued to the applicant Vicente Teng Gui and accordingly on the 24th of January, 1978 Original Certificate of Title No. P-1064 covering the lot in question was issued to the defendant Vicente Teng Gui.** Although the buildings and improvements on the land in question were sold by Felix Ting Ho to Victoria Cabasal and Gregorio Fontela in 1958 and who in turn sold the buildings to the defendant in 1961 the said Felix Ting Ho and his wife remained in possession of the properties as Felix Ting Ho continued to manage the bakery while the wife Leonila Cabasal continued to manage the *sari-sari* store.

During all the time that the alleged buildings were sold to the spouses Victoria Cabasal and Gregorio Fontela in 1958 and the subsequent sale of the same to the defendant Vicente Teng Gui in October of 1961 the plaintiffs and the defendant continued to live and were under the custody of their parents until their father Felix Ting Ho died in 1970 and their mother Leonila Cabasal died in 1978.[7] (Emphasis supplied)

In light of these factual findings, the RTC found that Felix Ting Ho, being a Chinese citizen and the father of the petitioners and respondent, resorted to a series of simulated transactions in order to preserve the right to the lot and the properties thereon in the hands of the family. As stated by the trial court:

After a serious consideration of the testimonies given by both one of the plaintiffs and the defendant as well as the documentary exhibits presented in the case, the Court is inclined to believe that Felix Ting Ho, the father of the plaintiffs and the defendant, and the husband of Leonila Cabasal thought of preserving the properties in question by transferring the said properties to his eldest son as he thought that he cannot acquire the properties as he was a Chinese citizen. To transfer the improvements on the land to his eldest son the defendant Vicente Teng Gui, he first executed simulated Deeds of Sales in favor of the sister and brother-in-law of his wife in 1958 and after three (3) years it was made to appear that these vendees had sold the improvements to the defendant Vicente Teng Gui who was then 18 years old. The Court finds that these transaction (sic) were simulated and that no consideration was ever paid by the vendees.

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With regards (sic) to the transfer and relinquishment of Felix Ting Ho's right to the land in question in favor of the defendant, the Court believes, that although from the face of the document it is stated in absolute terms that without any consideration Felix Ting Ho was transferring and renouncing his right in favor of his son, the defendant Vicente Teng Gui, still the Court believes that the transaction was one of implied trust executed by Felix Ting Ho for the benefit of his family…[8]

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[7] *Id.* at 53-55.

[8] *Id.* at 84-85.

Notwithstanding such findings, the RTC considered the Affidavit of Transfer, Relinquishment and Renouncement of Rights and Interests over the land as a donation which was accepted by the donee, the herein respondent. With respect to the properties in the lot, the trial court held that although the sales were simulated, pursuant to Article 1471 of the New Civil Code[9] it can be assumed that the intention of Felix Ting Ho in such transaction was to give and donate such properties to the respondent. As a result, it awarded the entire conjugal share of Felix Ting Ho in the subject lot and properties to the respondent and divided only the conjugal share of his wife among the siblings. The dispositive portion of the RTC decision decreed:

> WHEREFORE, judgment is hereby rendered in favor of the plaintiffs and against the defendant as the Court orders the partition and the adjudication of the subject properties, Lot 418, Ts-308, specifically described in original Certificate of Title No. P-1064 and the residential and commercial houses standing on the lot specifically described in Tax Decs. Nos. 9179 and 9180 in the name of Vicente Teng Gui in the following manner, to wit: To the defendant Vicente Teng Gui is adjudicated an undivided six-tenth (6/10) of the aforementioned properties and to each of the plaintiffs Felix Ting Ho, Jr., Merla Ting-Ho Braden, Juana Ting and Lydia Ting Ho-Belenzo each an undivided one-tenth (1/10) of the properties…[10]

From this decision, both parties interposed their respective appeals. The petitioners claimed that the RTC erred in awarding respondent the entire conjugal share of their deceased father in the lot and properties in question contrary to its own finding that an implied trust existed between the parties. The respondent, on the other hand, asserted that the RTC erred in not ruling that the lot and properties do not form part of the estate of Felix Ting Ho and are owned entirely by him.

On appeal, the CA reversed and set aside the decision of the RTC. The appellate court held that the deceased Felix Ting Ho

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[9] Article 1471 of the Civil Code provides:

> Art. 1471. If the price is simulated, the sale is void, but the act may be shown to have been in reality a donation, or some other act or contract.

[10] *Rollo,* p. 86.

was never the owner and never claimed ownership of the subject lot since he is disqualified under Philippine laws from owning public lands, and that respondent Vicente Teng Gui was the rightful owner over said lot by virtue of Miscellaneous Sales Patent No. 7457 issued in his favor, *viz*:

> **The deceased Felix Ting Ho, plaintiffs' and defendant's late father, was never the owner of the subject lot, now identified as Lot No. 418, Ts-308 covered by OCT No. P-1064 (Exh. A; Record, p. 104). As stated by Felix Ting Ho no less in the "Affidavit of Transfer, Relinquishment and Renouncement of Rights and Interest" *etc*. (Exh. B: Record, p. 107), executed on October 25, 1966 he, the late Felix Ting Ho, was merely a possessor or occupant of the subject lot "by virtue of a permission granted… by the then U.S. Naval Reservation Office, Olongapo, Zambales".** The late Felix Ting Ho was never the owner and never claimed ownership of the land. (Emphasis supplied)
>
> The affidavit, Exhibit B, was subscribed and sworn to before a Land Investigator of the Bureau of Lands and in the said affidavit, the late Felix Ting Ho expressly acknowledged that because he is a Chinese citizen he is not qualified to purchase public lands under Philippine laws for which reason he thereby transfers, relinquishes and renounces all his rights and interests in the subject land, including all the improvements thereon to his son, the defendant Vicente Teng Gui, who is of legal age, single, Filipino citizen and qualified under the public land law to acquire lands.
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> x x x x x x x x x
>
> **Defendant Vicente Teng Gui acquired the subject land by sales patent or purchase from the government and not from his father, the late Felix Ting Ho.** It cannot be said that he acquired or bought the land in trust for his father because on December 5, 1977 when the subject land was sold to him by the government and on January 3, 1978 when Miscellaneous Sales Patent No. 7457 was issued, the late Felix Ting Ho was already dead, having died on June 6, 1970 (TSN, January 10, 1990, p. 4).[11]

Regarding the properties erected over the said lot, the CA held that the finding that the sales of the two-storey commercial and residential buildings and *sari-sari* store to Victoria Cabasal

[11] *Id.* at 55-57 (emphasis supplied).

and Gregorio Fontela and subsequently to respondent were without consideration and simulated is supported by evidence, which clearly establishes that these properties should form part of the estate of the late spouses Felix Ting Ho and Leonila Cabasal.

Thus, while the appellate court dismissed the complaint for partition with respect to the lot in question, it awarded the petitioners a four-fifths (4/5) share of the subject properties erected on the said lot. The dispositive portion of the CA ruling reads as follows:

> WHEREFORE, premises considered, the decision appealed from is REVERSED and SET ASIDE and NEW JUDGMENT rendered:
>
> 1. DISMISSING plaintiff-appellants' complaint with respect to the subject parcel of land, identified as Lot No. 418, Ts-308, covered by OCT No. P-1064, in the name of plaintiff-appellants [should be defendant-appellant];
>
> 2. DECLARING that the two-storey commercial building, the two-storey residential building and *sari-sari* store (formerly a bakery), all erected on the subject lot No. 418, Ts-308, form part of the estate of the deceased spouses Felix Ting Ho and Leonila Cabasal, and that plaintiff-appellants are entitled to four-fifths (4/5) thereof, the remaining one-fifth (1/5) being the share of the defendant-appellant;
>
> 3. DIRECTING the court *a quo* to partition the said two-storey commercial building, two-storey residential building and *sari-sari* store (formerly a bakery) in accordance with Rule 69 of the Revised Rules of Court and pertinent provisions of the Civil Code;
>
> 4. Let the records of this case be remanded to the court of origin for further proceedings;
>
> 5. Let a copy of this decision be furnished the Office of the Solicitor General; and
>
> 6. There is no pronouncement as to costs.
>
> SO ORDERED.[12]

Both petitioners and respondent filed their respective motions for reconsideration from this ruling, which were summarily denied

[12] *Rollo*, pp. 60-61.

by the CA in its Resolution[13] dated August 5, 1997. Hence, this petition.

According to the petitioners, the CA erred in declaring that Lot No. 418, Ts-308 does not form part of the estate of the deceased Felix Ting Ho and is owned alone by respondent. Respondent, on the other hand, contends that he should be declared the sole owner not only of Lot No. 418, Ts-308 but also of the properties erected thereon and that the CA erred in not dismissing the complaint for partition with respect to the said properties.

The primary issue for consideration is whether both Lot No. 418, Ts-308 and the properties erected thereon should be included in the estate of the deceased Felix Ting Ho.

We affirm the CA ruling.

With regard to Lot No. 418, Ts-308, Article XIII, Section 1 of the 1935 Constitution states:

> Section 1. **All agricultural timber, and mineral lands of the public domain**, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy and other natural resources of the Philippines **belong to the State, and their disposition, exploitation, development, or utilization shall be limited to citizens of the Philippines or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens,** subject to any existing right, grant, lease, or concession at the time of the inauguration of the Government established under this Constitution… (Emphasis supplied*)*

Our fundamental law cannot be any clearer. The right to acquire lands of the public domain is reserved for Filipino citizens or corporations at least sixty percent of the capital of which is owned by Filipinos. Thus, in ***Krivenko v. Register of Deeds*****,**[14] the Court enunciated that:

> …**Perhaps the effect of our construction is to preclude aliens, admitted freely into the Philippines from owning sites where**

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[13] CA Records, p. 235.

[14] 79 Phil. 461 (1947).

they may build their homes. But if this is the solemn mandate of the Constitution, we will not attempt to compromise it even in the name of amity or equity. We are satisfied, however, that aliens are not completely excluded by the Constitution from the use of lands for residential purposes. Since their residence in the Philippines is temporary, they may be granted temporary rights such as a lease contract which is not forbidden by the Constitution. Should they desire to remain here forever and share our fortunes and misfortunes, Filipino citizenship is not impossible to acquire.[15]

In the present case, the father of petitioners and respondent was a Chinese citizen; therefore, he was disqualified from acquiring and owning real property in the Philippines. In fact, he was only occupying the subject lot by virtue of the permission granted him by the then U.S. Naval Reservation Office of Olongapo, Zambales. As correctly found by the CA, the deceased Felix Ting Ho was never the owner of the subject lot in light of the constitutional proscription and the respondent did not at any instance act as the dummy of his father.

On the other hand, the respondent became the owner of Lot No. 418, Ts-308 when he was granted Miscellaneous Sales Patent No. 7457 on January 3, 1978, by the Secretary of Natural Resources "By Authority of the President of the Philippines," and when Original Certificate of Title No. P-1064 was correspondingly issued in his name. The grant of the miscellaneous sales patent by the Secretary of Natural Resources, and the corresponding issuance of the original certificate of title in his name, show that the respondent possesses all the qualifications and none of the disqualifications to acquire alienable and disposable lands of the public domain. These issuances bear the presumption of regularity in their performance in the absence of evidence to the contrary.

Registration of grants and patents involving public lands is governed by Section 122 of Act No. 496, which was subsequently amended by Section 103 of Presidential Decree No. 1529, *viz:*

Sec. 103. **Certificate of title pursuant to patents**.—Whenever public land is by the Government alienated, granted or conveyed to any person, the same shall be brought forthwith under the operation

[15] *Id.* at 474 (emphasis supplied).

of this Decree. It shall be the duty of the official issuing the instrument of alienation, grant, patent or conveyance in behalf of the Government to cause such instrument to be filed with the Register of Deeds of the province or city where the land lies, and to be there registered like other deeds and conveyance, whereupon a certificate of title shall be entered as in other cases of registered land, and an owner's duplicate issued to the grantee. The deeds, grant, patent or instrument of conveyance from the Government to the grantee shall not take effect as a conveyance or bind the land, but shall operate only as a contract between the Government and the grantee and as evidence of authority to the Register of Deeds to make registration. It is the act of registration that shall be the operative act to affect and convey the land, and in all cases under this Decree registration shall be made in the office of the Register of Deeds of the province or city where the land lies. The fees for registration shall be paid by the grantee. **After due registration and issuance of the certificate of title, such land shall be deemed to be registered land to all intents and purposes under this Decree.**[16] (Emphasis supplied)

Under the law, a certificate of title issued pursuant to any grant or patent involving public land is as conclusive and indefeasible as any other certificate of title issued to private lands in the ordinary or cadastral registration proceeding. The effect of the registration of a patent and the issuance of a certificate of title to the patentee is to vest in him an incontestable title to the land, in the same manner as if ownership had been determined by final decree of the court, and the title so issued is absolutely conclusive and indisputable, and is not subject to collateral attack.[17]

Nonetheless, petitioners invoke equity considerations and claim that the ruling of the RTC that an implied trust was created between respondent and their father with respect to the subject lot should be upheld.

This contention must fail because the prohibition against an alien from owning lands of the public domain is absolute and not even an implied trust can be permitted to arise on equity considerations.

[16] Property Registration Decree, P.D. No. 1529, § 103.

[17] This rule does not apply where the land covered by a patent issued by the Government had previously been determined in a registration proceeding and adjudicated in favor of a private individual other than the patentee, which situation is not present in this case.

In the case of ***Muller v. Muller*,**[18] wherein the respondent, a German national, was seeking reimbursement of funds claimed by him to be given in trust to his petitioner wife, a Philippine citizen, for the purchase of a property in Antipolo, the Court, in rejecting the claim, ruled that:

> Respondent was aware of the constitutional prohibition and expressly admitted his knowledge thereof to this Court. He declared that he had the Antipolo property titled in the name of the petitioner because of the said prohibition. His attempt at subsequently asserting or claiming a right on the said property cannot be sustained.
>
> **The Court of Appeals erred in holding that an implied trust was created and resulted by operation of law in view of petitioner's marriage to respondent. Save for the exception provided in cases of hereditary succession, respondent's disqualification from owning lands in the Philippines is absolute. Not even an ownership in trust is allowed.** Besides, where the purchase is made in violation of an existing statute and in evasion of its express provision, no trust can result in favor of the party who is guilty of the fraud. To hold otherwise would allow circumvention of the constitutional prohibition.
>
> Invoking the principle that a court is not only a court of law but also a court of equity, is likewise misplaced. It has been held that equity as a rule will follow the law and will not permit that to be done indirectly which, because of public policy, cannot be done directly...[19]

Coming now to the issue of ownership of the properties erected on the subject lot, the Court agrees with the finding of the trial court, as affirmed by the appellate court, that the series of transactions resorted to by the deceased were simulated in order to preserve the properties in the hands of the family. The records show that during all the time that the properties were allegedly sold to the spouses Victoria Cabasal and Gregorio Fontela in 1958 and the subsequent sale of the same to respondent in 1961, the petitioners and respondent, along with their parents, remained in possession and continued to live in said properties.

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[18] G.R. No. 149615, August 29, 2006, 500 SCRA 65.

[19] *Id.* at 68.

However, the trial court concluded that:

> In fairness to the defendant, although the Deeds of Sale executed by Felix Ting Ho regarding the improvements in favor of Victoria Cabasal and Gregorio Fontela and the subsequent transfer of the same by Gregorio Fontela and Victoria Cabasal to the defendant are all simulated, yet, **pursuant to Article 1471 of the New Civil Code it can be assumed that the intention of Felix Ting Ho in such transaction was to give and donate the improvements to his eldest son the defendant Vicente Teng Gui**...[20]

Its finding was based on Article 1471 of the Civil Code, which provides that:

> Art. 1471. If the price is simulated, the sale is void, but the act may be shown to have been in reality a donation, or some other act or contract.[21]

The Court holds that the reliance of the trial court on the provisions of Article 1471 of the Civil Code to conclude that the simulated sales were a valid donation to the respondent is misplaced because its finding was based on a **mere assumption** when the law requires positive proof.

The respondent was unable to show, and the records are bereft of any evidence, that the simulated sales of the properties were intended by the deceased to be a donation to him. Thus, the Court holds that the two-storey residential house, two-storey residential building and *sari-sari* store form part of the estate of the late spouses Felix Ting Ho and Leonila Cabasal, entitling the petitioners to a four-fifths (4/5) share thereof.

IN VIEW WHEREOF, the petition is *DENIED*. The assailed Decision dated December 27, 1996 of the Court of Appeals in CA-G.R. CV No. 42993 is hereby *AFFIRMED*.

SO ORDERED.

Carpio, Corona, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

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[20] *Rollo*, pp. 85-86 (emphasis supplied).

[21] Civil Code, Art. 1471.

FIRST DIVISION

[G.R. No. 150931. July 16, 2008]

DR. CECILIA DE LOS SANTOS, *petitioner, vs.* **DR. PRISCILA BAUTISTA VIBAR,** *respondent.*

SYLLABUS

1. CIVIL LAW; GUARANTY; CIRCUMSTANCES BINDING A PARTY AS A GUARANTOR; CASE AT BAR.— Cecilia denies that she had actual knowledge of the guaranty. However, Priscila points to the promissory note and Cecilia's actions as the best evidence to prove that Cecilia signed as guarantor. The promissory note indicates that Cecilia signed as a witness, as manifested by the typewritten format. However, the word "guarantor" as handwritten beside Cecilia's name makes Cecilia a guarantor. From the records of the case and the evidence presented, we are convinced that the insertion was made with the express consent of Cecilia. Firstly, Cecilia's act of "nodding her head" signified her assent to the insertion of the word "guarantor." The word "guarantor" could have been inserted by Cecilia herself, or by someone authorized by Cecilia. In either case, Cecilia would be bound as guarantor. In this case, Cecilia, by nodding her head, authorized de Leon, who prepared the promissory note, to insert the word "guarantor." Since de Leon made the insertion only after Atty. Bautista had raised the need for Cecilia to be a guarantor, a positive or negative reaction was expected from Cecilia, who responded by giving her nod of approval. Otherwise, Cecilia should have immediately expressed her objection to the insertion of the word "guarantor." Cecilia's act of nodding her head showed her consent to be a guarantor. Secondly, Priscila would not have extended a loan to de Leon without the representations of Cecilia. Cecilia arranged for de Leon and Priscila to meet so that de Leon could borrow money from Priscila. Cecilia vouched for de Leon's capacity to pay. As a friend and common link between the borrower and lender, Cecilia took active part in the first loan of ₱100,000 and even signed as guarantor. On the second promissory note, the word "guarantor" again appears, admitted by both Cecilia and Priscila as an insertion made by de Leon at the time of signing. The first loan of ₱100,000, which Cecilia

guaranteed, was paid from the proceeds of the second loan. As shown by the intervention of Atty. Bautista in bringing up the need for Cecilia to act as guarantor, Priscila would not have granted the second bigger loan of ₱500,000 without the guaranty of Cecilia. It was only natural for Priscila to commit to the second bigger loan subject at least to the same guarantee as the first smaller loan. Thirdly, Cecilia claimed ignorance of the guaranty only after this case was filed. However, the records show that Cecilia had several meetings with Priscila and the latter's counsel before the demand letters were sent. In these meetings, Cecilia acknowledged her liability as guarantor but simply claimed that she had no money to pay Priscila. In fact, Cecilia made an initial payment of ₱15,000 as partial compliance of her obligation as guarantor. This only shows that Cecilia never denied her liability to Priscila as guarantor until this case was filed in court. Lastly, Cecilia wrote a letter to the Register of Deeds of Baguio City inquiring on the status of the property mentioned in the promissory note as a mortgage security for de Leon's loan.

2. ID.; ESTOPPEL *IN PAIS*; DOCTRINE APPLICABLE. — Here, Cecilia clearly stated that she "appears to be a guarantor" in the promissory note. This serves as a written admission that Cecilia knew she was a guarantor. During the trial, Cecilia did not impugn the letter or its contents. In fact, Cecilia submitted this letter in evidence. Cecilia wrote the Register of Deeds to protect her interest, hoping that the property covered by TCT No. T-47375 could answer for de Leon's loan and save her from personally paying as guarantor. This explains Cecilia's letter admitting that she appears as a guarantor in the promissory note. We agree with the Court of Appeals that estoppel *in pais* arose in this case. Generally, estoppel is a doctrine that prevents a person from adopting an inconsistent position, attitude, or action if it will result in injury to another. One who, by his acts, representations or admissions, or by his own silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, can no longer deny the existence of such fact as it will prejudice the latter. Cecilia's conduct in the course of the negotiations and contract signing shows that she consented to be a guarantor of the loan as witnessed by everyone present. Her act of "nodding her head," and at the same time even smiling, expressed her voluntary assent to the insertion of the word

"guarantor" after her signature. It is the same as saying that she agreed to the insertion. Also, Cecilia's acts of making the partial payment of ₱15,000 and writing the letter to the Register of Deeds sustain the ruling that Cecilia affirmed her obligation as de Leon's guarantor to the loan. Thus, Cecilia is now estopped from denying that she is a guarantor.

3. REMEDIAL LAW; EVIDENCE; DOCUMENTS; HANDWRITTEN WORD PREVAILS OVER THE TYPEWRITTEN WORD.— It is axiomatic that the written word "guarantor" prevails over the typewritten word "witness." In case of conflict, the written word prevails over the printed word. Section 15 of Rule 130 provides: Sec. 15. *Written words control printed*. - When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter. The rationale for this rule is that the written words are the latest expression of the will of the parties. Thus, in this case, the latest expression of Cecilia's will is that she signed the promissory note as guarantor.

APPEARANCES OF COUNSEL

Divinagracia Singson Roa for petitioner.
Castillo Lamantan Pantaleon & San Jose for respondent.

D E C I S I O N

CARPIO, *J.*:

The Case

Before the Court is a petition for review on *certiorari*[1] assailing the Decision[2] dated 29 June 2001 and Resolution[3] dated 21 November 2001 of the Court of Appeals in CA-G.R. CV No. 66605.

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[1] Under Rule 45 of the 1997 Revised Rules of Civil Procedure.

[2] *Rollo*, pp. 56-64. Penned by Associate Justice Presbitero J. Velasco, Jr. (now a member of this Court) with Associate Justices Bienvenido L. Reyes and Sergio L. Pestaño, concurring.

[3] *Id*. at 66-68. Penned by Associate Justice Sergio L. Pestaño with Associate Justices Bienvenido L. Reyes and Amelita G. Tolentino, concurring.

The Facts

Petitioner Cecilia de los Santos (Cecilia) and respondent Priscila Bautista Vibar (Priscila) were former co-workers in the Medical Department of the Social Security System. They were close and trusted friends for 33 years.

Sometime in 1994, Cecilia introduced Jose de Leon (de Leon) to Priscila. De Leon needed money and borrowed ₱100,000 from Priscila. De Leon issued a promissory note dated 2 June 1994 and bound himself to pay the loan three months from date with a monthly interest rate of 3%.[4] Cecilia signed as a guarantor of de Leon's loan.

On 28 June 1995, de Leon asked Priscila for another loan. Together with Cecilia and Avelina Conte, de Leon went to Priscila's house. Priscila and her sister, Atty. Josefina Bautista (Atty. Bautista), were present in the same gathering. After some discussion, they all agreed that the outstanding ₱100,000 loan together with the accrued interest would be deducted from the new loan of ₱500,000.[5]

De Leon signed a typewritten promissory note, which he brought with him, acknowledging the debt of ₱500,000 payable within 12 months from 28 August 1995, at a fixed monthly interest rate of 3% and a penalty of 2% per month in case of default.[6] Then, Cecilia signed as a witness under the phrase "signed in the presence of." However, Atty. Bautista brought up the need for Cecilia to sign as guarantor. Thereupon, de Leon, in his own handwriting, inserted the word "guarantor" besides Cecilia's name, as Cecilia nodded her head to what de Leon was doing. De Leon also added the phrase, "as security for this loan this TCT No. T-47375, Registry of Baguio City, is being submitted by way of mortgage."

On maturity date, de Leon failed to pay any of the monthly installments. Priscila made several verbal demands on de Leon

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[4] Records, p. 114.

[5] *Rollo*, p. 141.

[6] *Id*. at 109.

for payment but to no avail. Priscila's counsel then sent de Leon a demand letter dated 17 July 1996 asking for payment of the principal loan with interest and penalties.[7] De Leon failed to respond. On 4 September 1996, Priscila's counsel again sent a demand letter not only to de Leon as principal debtor, but also to Cecilia.[8] Cecilia was being made to answer for de Leon's debt as the latter's guarantor. Cecilia then remitted to Priscila ₱15,000 to pay one month's interest on the loan.[9] However, this was the only payment Cecilia made to Priscila as Cecilia claimed she had no money to pay the full amount of the loan.

After several failed attempts to collect the loan, Priscila filed with the Registry of Deeds of Baguio City an adverse claim on the property registered under TCT No. T-47375. However, the Register of Deeds denied the registration of Priscila's claim on several grounds:[10]

(a) the issue involved is a money claim which does not fall within Section 70 of Presidential Decree No. 1529;[11]

(b) the annexes were not marked;

(c) the family names of Jose and Evangeline, registered owners, do not tally with those on the title;[12] and

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[7] Records, pp. 7-8.

[8] *Id*. at 9.

[9] *Rollo*, pp. 201, 230-231.

[10] Records, p. 112.

[11] Presidential Decree No. 1529, Amending and Codifying the Law Relative to Registration of Property and for Other Purposes.

x x x x x x x x x

Sec. 70.*Adverse claim*. — Whoever claims any part or interest in registered land adverse to the registered owner, arising subsequent to the date of the original registrations, may, if no other provision is made in this Decree for registering the same, make a statement in writing setting forth fully his alleged right or interest, and how or under whom acquired, a reference to the number of the certificate of title of the registered owner, the name of the registered owner, and a description of the land in which the right or interest is claimed.

[12] The Transfer Certificate of Title (TCT) contains the names of the registered owners as Evangeline Lina Dellon and Joel Dellon. Records, p. 115.

(d) there is no statement that there is no other provision in the Property Registration Decree for registering the same.

On 20 November 1996, Priscila filed an action for recovery of money with the Regional Trial Court of Quezon City, Branch 100, against de Leon and Cecilia.[13] De Leon did not file an answer and the trial court declared him in default. Cecilia, on the other hand, filed an answer denying that she signed as guarantor of de Leon's loan.

On 26 November 1999, the trial court ruled in favor of Cecilia and dismissed the complaint for insufficiency of evidence.[14] On 12 January 2000, Priscila filed a Motion for Reconsideration on the grounds that the trial court erred in (a) dismissing the complaint against de Leon despite his being declared in default; and (b) finding that Cecilia was not a guarantor of de Leon's loan.

In an Order dated 8 February 2000,[15] the trial court modified its decision and ruled that de Leon acted fraudulently or in bad faith in refusing to pay his debt to Priscila. However, the trial court affirmed its decision dismissing the complaint against Cecilia. The trial court ruled that there was no express consent given by Cecilia binding her as guarantor. The dispositive portion of the Order provides:

WHEREFORE, in view of the foregoing, the Decision of the Court dated November 26, 1999, is hereby amended as follows:

WHEREFORE, judgment is hereby rendered in favor of plaintiff Dra. Priscila Vibar and against defendant Jose de Leon, and hereby orders the latter to pay the plaintiff the following amounts:

(1) ₱500,000.00 representing the total amount of the loan extended with interest at 3% per month and penalty of 2% per month (due to default) from July 17, 1996 until the obligation is fully paid;
(2) ₱30,000.00 representing moral damages;
(3) ₱20,000.00 representing attorney's fees; and
(4) costs of suit.

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[13] Docketed as Civil Case No. Q-96-29504.

[14] *Rollo*, pp. 70-72.

[15] *Id*. at 74-76.

Further, the Court hereby DISMISSES the instant complaint against defendant Dra. Cecilia de los Santos for insufficiency of evidence. No pronouncement as to costs.

SO ORDERED.

Priscila filed an appeal with the Court of Appeals, docketed as CA-G.R. CV No. 66605.

The Ruling of the Court of Appeals

On 29 June 2001, the appellate court affirmed the trial court's ruling against de Leon but modified the same with respect to Cecilia.[16] The appellate court declared Cecilia as guarantor of de Leon's loan. The relevant portions of the Decision state:

x x x The conduct of defendant-appellee de los Santos during the signing, however, belies her intention to act merely as a witness. It cannot be gainsaid that she did not react when she heard Atty. Bautista's protest about her signing the promissory note in the capacity only of a witness and not as a guarantor. Neither did defendant-appellee de los Santos object when defendant-appellee de Leon got back the promissory note and wrote the word "guarantor" after her signature in full view of all those present, including defendant-appellee de los Santos. In fact, said appellee nodded, signifying approval, when defendant-appellee de Leon placed the word "guarantor" after her signature on the promissory note.

x x x x x x x x x

In this factual milieu, if defendant-appellee de los Santos intended only to sign as a witness, she should have reacted when the word "guarantor" was written on the note in her presence. She should have expressed her strong and firm objections to such imposition of liability. But defendant-appellee de los Santos kept mum. Such silence can lead to no other conclusion that she has impliedly given her consent to be the guarantor of de Leon's loan.

Moreover, defendant-appellee de los Santos is estopped from claiming otherwise. Estoppel *in pais* arises x x x.

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[16] *Id*. at 56-64.

Moreover, one can imply from defendant-appellee de los Santos' letter dated May 5, 1996 addressed to the Register of Deeds, City of Baguio that defendant-appellee de los Santos agreed to be bound as guarantor x x x.

It is significant to note that she made no statement therein repudiating her having signed the same in the capacity of a guarantor, contrary to what she now claims in her defense. Her failure to correct or refute such statement reinforces the claim that indeed she guaranteed payment of the loan in question, and that writing was to her interest considering her liabilities under the note as guarantor.

x x x Thus, defendant-appellee de los Santos can be compelled to pay plaintiff-appellant Vibar the judgment debt if it remains unsatisfied after execution is enforced against the properties of the principal debtor, defendant-appellee Jose de Leon. x x x

Cecilia filed a Motion for Reconsideration which the appellate court denied in a Resolution dated 21 November 2001.[17]

Hence, this petition.

The Issue

The main issue for resolution is whether Cecilia is liable as guarantor of de Leon's loan from Priscila.

Cecilia contends that she is not liable as guarantor. Her behavior, as when she allegedly "kept mum" or "nodded her head and smiled," was not an implied consent as guarantor. She insists that the law is clear that a guaranty is not presumed and that there must be a concrete positive act of acceptance or consent to the guaranty. Thus, without such knowledge or consent, there is no estoppel *in pais*.

Priscila, on the other hand, maintains that from the totality of Cecilia's acts, she consented to be bound as guarantor of de Leon's loan. Her nod of approval and non-objection to the insertion of the word "guarantor" at the signing of the second promissory note show that she agreed to be a guarantor, just like in the first promissory note. Even after discovering that the loan was unpaid and already overdue, Cecilia did not contest

[17] *Id*. at 66-68.

that she was a guarantor and even paid partially to Priscila. Instead, Cecilia claimed she had no money to pay the entire loan. It was only after the case was filed that Cecilia challenged the insertions in the promissory note. Hence, Priscila insists that Cecilia is estopped from denying that she is a guarantor.

The Court's Ruling

The issue before us is a question of fact, the determination of which is beyond this Court's power of review for it is not a trier of facts.[18] However, there are instances when questions of fact may be reviewed by this Court, as when the findings of the Court of Appeals are contrary to those of the trial court.[19] In the present case, the trial court and the Court of Appeals made conflicting findings of fact. Thus, a review of such factual findings is in order.

Here, the controversy centers on whether there exists a contract of guaranty to hold Cecilia liable for the loan of de Leon, the principal debtor. The trial court found that Cecilia had no knowledge of, and did not consent to, the guaranty. On the other hand, the appellate court ruled that Cecilia's conduct during the signing of the promissory note and her non-objection to the insertion of the word "guarantor" show that she acted as guarantor. Cecilia's nodding of her head upon the insertion of the word "guarantor" signified her consent to be a guarantor.

We rule that Cecilia was a guarantor of de Leon's loan.

Cecilia denies that she had actual knowledge of the guaranty. However, Priscila points to the promissory note and Cecilia's actions as the best evidence to prove that Cecilia signed as guarantor. The promissory note indicates that Cecilia signed as a witness, as manifested by the typewritten format. However, the word "guarantor" as handwritten beside Cecilia's name makes Cecilia a guarantor. From the records of the case and the evidence

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[18] *Nicolas v. Desierto*, G.R. No. 154668, 16 December 2004, 447 SCRA 154.

[19] *Ong v. Bogñalbal*, G.R. No. 149140, 12 September 2006, 501 SCRA 490, citing *The Insular Life Assurance Company, Ltd. v. Court of Appeals*, G.R. No. 126850, 28 April 2004, 428 SCRA 79.

presented, we are convinced that the insertion was made with the express consent of Cecilia.

Firstly, Cecilia's act of "nodding her head" signified her assent to the insertion of the word "guarantor." The word "guarantor" could have been inserted by Cecilia herself, or by someone authorized by Cecilia. In either case, Cecilia would be bound as guarantor. In this case, Cecilia, by nodding her head, authorized de Leon, who prepared the promissory note, to insert the word "guarantor." Since de Leon made the insertion only after Atty. Bautista had raised the need for Cecilia to be a guarantor, a positive or negative reaction was expected from Cecilia, who responded by giving her nod of approval. Otherwise, Cecilia should have immediately expressed her objection to the insertion of the word "guarantor." Cecilia's act of nodding her head showed her consent to be a guarantor.

Secondly, Priscila would not have extended a loan to de Leon without the representations of Cecilia. Cecilia arranged for de Leon and Priscila to meet so that de Leon could borrow money from Priscila. Cecilia vouched for de Leon's capacity to pay. As a friend and common link between the borrower and lender, Cecilia took active part in the first loan of ₱100,000 and even signed as guarantor. On the second promissory note, the word "guarantor" again appears, admitted by both Cecilia and Priscila as an insertion made by de Leon at the time of signing. The first loan of ₱100,000, which Cecilia guaranteed, was paid from the proceeds of the second loan. As shown by the intervention of Atty. Bautista in bringing up the need for Cecilia to act as guarantor, Priscila would not have granted the second bigger loan of ₱500,000 without the guaranty of Cecilia. It was only natural for Priscila to commit to the second bigger loan subject at least to the same guarantee as the first smaller loan.

Thirdly, Cecilia claimed ignorance of the guaranty only after this case was filed. However, the records show that Cecilia had several meetings with Priscila and the latter's counsel before the demand letters were sent.[20] In these meetings, Cecilia acknowledged her liability as guarantor but simply claimed that

[20] *Rollo*, pp. 204-209.

she had no money to pay Priscila.[21] In fact, Cecilia made an initial payment of ₱15,000 as partial compliance of her obligation as guarantor. This only shows that Cecilia never denied her liability to Priscila as guarantor until this case was filed in court.

Lastly, Cecilia wrote a letter to the Register of Deeds of Baguio City inquiring on the status of the property mentioned in the promissory note as a mortgage security for de Leon's loan.[22] The letter states:

May 5, 1996

The Register of Deeds
City of Baguio

Sir:

This is relative to a "Promissory Note" dated June 28, 1995 x x x.

In the aforestated "Promissory Note," the undersigned appears to be a "Guarantor" and it is a condition therein that "as security for this loan this TCT No. 47375, Registry of Baguio City, is being submitted, by way of mortgage". However, information has been received that said registered owners, individually or collectively, have executed and filed with your Office an "affidavit of loss" of said duplicate owner's copy. If such information is correct, may I request for a "certification" to said effect, and possibly, a certified true copy of such document.

x x x x x x x x x

Here, Cecilia clearly stated that she "appears to be a guarantor" in the promissory note. This serves as a written admission that Cecilia knew she was a guarantor. During the trial, Cecilia did not impugn the letter or its contents. In fact, Cecilia submitted this letter in evidence.[23] Cecilia wrote the Register of Deeds to

[21] *Id*. at 215.

[22] *Id*. at 437.

[23] *Id*. at 466.

protect her interest, hoping that the property covered by TCT No. T-47375 could answer for de Leon's loan and save her from personally paying as guarantor. This explains Cecilia's letter admitting that she appears as a guarantor in the promissory note.

It is axiomatic that the written word "guarantor" prevails over the typewritten word "witness." In case of conflict, the written word prevails over the printed word. Section 15 of Rule 130 provides:

> Sec. 15. *Written words control printed*. - When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter.

The rationale for this rule is that the written words are the latest expression of the will of the parties. Thus, in this case, the latest expression of Cecilia's will is that she signed the promissory note as guarantor.

We agree with the Court of Appeals that estoppel *in pais* arose in this case. Generally, estoppel is a doctrine that prevents a person from adopting an inconsistent position, attitude, or action if it will result in injury to another.[24] One who, by his acts, representations or admissions, or by his own silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, can no longer deny the existence of such fact as it will prejudice the latter.[25]

Cecilia's conduct in the course of the negotiations and contract signing shows that she consented to be a guarantor of the loan as witnessed by everyone present. Her act of "nodding her head," and at the same time even smiling, expressed her voluntary assent to the insertion of the word "guarantor" after her signature. It is the same as saying that she agreed to the insertion. Also, Cecilia's acts of making the partial payment of ₱15,000 and writing the letter to the Register of Deeds sustain the ruling that

[24] Black's Law Dictionary, 1996.

[25] *Rimasug v. Martin*, G.R. No. 160118, 22 November 2005, 475 SCRA 703, citing *Ganzon v. Court of Appeals*, 434 Phil. 626 (2002).

Cecilia affirmed her obligation as de Leon's guarantor to the loan. Thus, Cecilia is now estopped from denying that she is a guarantor.

WHEREFORE, we *DENY* the petition. We *AFFIRM* the 29 June 2001 Decision and 21 November 2001 Resolution of the Court of Appeals in CA-G.R. CV No. 66605. Costs againts petitioner.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

FIRST DIVISION

[G.R. No. 158230. July 16, 2008]

REPUBLIC OF THE PHILIPPINES, represented by the DIRECTOR OF LANDS, *petitioner, vs.* **REGISTER OF DEEDS OF ROXAS CITY, ELIZABETH LEE, and PACITA YU-LEE,** *respondents.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; STATE POLICIES; NATURAL RESOURCES; THE CONSTITUTIONAL PROHIBITION AGAINST AN ALIEN FROM ACQUIRING LANDS DOES NOT APPLY WHEN THE SUBJECT LAND WAS TRANFERRED BY SUCCESSION TO THE HEIRS OF AN ALIEN VENDEE.— Petitioner argues that since the sale of Lot No. 398 to Lee Liong was void, Lot No. 398 never became part of the deceased Lee Liong's estate. Hence, Lot No. 398 could not be transmitted by succession to Lee Liong's surviving heirs and eventually to private respondents. We do not subscribe to petitioner's position. The circumstances of this case are similar to the case of *De Castro v. Teng Queen Tan*, wherein a residential lot

was sold to a Chinese citizen. Upon the death of the alien vendee, his heirs entered into an extrajudicial settlement of the estate of the deceased and the subject land was transferred to a son who was a naturalized Filipino. Subsequently, the vendor of the lot filed a suit for annulment of sale for alleged violation of the Constitution prohibiting the sale of land to aliens. Independently of the doctrine of *in pari delicto*, the Court sustained the sale, holding that while the vendee was an alien at the time of the sale, the land has since become the property of a naturalized Filipino citizen who is constitutionally qualified to own land. Similarly, in this case, upon the death of the original vendee who was a Chinese citizen, his widow and two sons extrajudicially settled his estate, including Lot No. 398. When the two sons died, Lot No. 398 was transferred by succession to their respective spouses, herein private respondents who are Filipino citizens.

2. CIVIL LAW; PUBLIC LANDS; REVERSION; REVERSION PROCEEDINGS NOT VIABLE WHEN THE LAND HAD ALREADY BEEN TRANSFERRED TO FILIPINO CITIZENS. — We now discuss whether reversion proceedings is still viable considering that Lot No. 398 has already been transfered to Filipino citizens. In the reconstitution case of *Lee v. Republic of the Philippines* involving Lot No. 398, this Court explained that the OSG may initiate an action for reversion or escheat of lands which were sold to aliens disqualified from acquiring lands under the Constitution. However, in the case of Lot No. 398, the fact that it was already transferred to Filipinos militates against escheat proceedings, thus: Although ownership of the land cannot revert to the original sellers, because of the doctrine of *pari delicto*, the Solicitor General may initiate an action for reversion or escheat of the land to the State, subject to other defenses, as hereafter set forth. **In this case, subsequent circumstances militate against escheat proceedings because the land is now in the hands of Filipinos. The original vendee, Lee Liong, has since died and the land has been inherited by his heirs and subsequently their heirs, petitioners herein [Elizabeth Lee and Pacita Yu Lee]. Petitioners are Filipino citizens, a fact the Solicitor General does not dispute.** The constitutional proscription on alien ownership of lands of the public or private domain was intended to protect lands from falling in the hands of non-Filipinos. In this case, however, there would be no more public policy violated since the land is in the hands of Filipinos qualified

to acquire and own such land. "If land is invalidly transferred to an alien who subsequently becomes a citizen or transfers it to a citizen, the flaw in the original transaction is considered cured and the title of the transferee is rendered valid." Thus, the subsequent transfer of the property to qualified Filipinos may no longer be impugned on the basis of invalidity of the initial transfer. The objective of the constitutional provision to keep our lands in Filipino hands has been achieved. In this case, the reversion proceedings was initiated only after almost 40 years from the promulgation of the case of *Dinglasan v. Lee Bun Ting*, where the Court held that the sale of Lot No. 398 was null and void for violating the constitutional prohibition on the sale of land to an alien. If petitioner had commenced reversion proceedings when Lot No. 398 was still in the hands of the original vendee who was an alien disqualified to hold title thereto, then reversion of the land to the State would undoubtedly be allowed. However, this is not the case here. When petitioner instituted the action for reversion of title in 1995, Lot No. 398 had already been transferred by succession to private respondents who are Filipino citizens. Since Lot No. 398 has already been transferred to Filipino citizens, the flaw in the original transaction is considered cured.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Patrocinio S. Palanog for private respondents.

D E C I S I O N

CARPIO, *J.*:

The Case

This is a petition for review[1] of the Decision[2] dated 12 July 2002 and the Resolution dated 9 May 2003 of the Court of Appeals in CA-G.R. CV No. 53890.

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] Penned by Associate Justice Rebecca de Guia-Salvador with Associate Justices Godardo A. Jacinto and Eloy R. Bello, Jr., concurring.

The Facts

In March 1936, Lee Liong, a Chinese citizen, bought Lot No. 398 from Vicenta Arcenas, Francisco, Carmen Ramon, Mercedes, Concepcion, Mariano, Jose, and Manuel, all surnamed Dinglasan. Lot No. 398, with an area of 1,574 square meters, is located at the corner of Roxas Avenue and Pavia Street in Roxas City. In February 1944, Lee Liong died intestate and was survived by his widow Ang Chia, and his sons Lee Bing Hoo and Lee Bun Ting. On 30 June 1947, the surviving heirs of Lee Liong extrajudicially settled the estate of the deceased and partitioned among themselves Lot No. 398. When Lee Bing Hoo and Lee Bun Ting died, Lot No. 398 was transferred by succession to their respective wives, Elizabeth Lee (Elizabeth) and Pacita Yu-Lee (Pacita).

In the 1956 case of *Dinglasan v. Lee Bun Ting*,[3] involving Lot No. 398, the Court held that even if the sale of the property was null and void for violating the constitutional prohibition on the sale of land to an alien, still the doctrine of *in pari delicto* barred the sellers from recovering the title to the property. Eleven years later, in the case of *Lee Bun Ting v. Judge Aligaen*,[4] the Court ordered the trial court to dismiss the complaint of the Dinglasans for the recovery of Lot No. 398. Applying the doctrine of *res judicata*, the Court held that the case was a mere relitigation of the same issues previously adjudged with finality in the *Dinglasan* case, involving the same parties or their privies and concerning the same subject matter.

On 7 September 1993, Elizabeth and Pacita (private respondents) filed a petition for reconstitution of title of Lot No. 398 because the records of the Register of Deeds, Roxas City were burned during the war. On 3 October 2001, the Court held that the trial court's order of reconstitution was void for lack of factual support because it was based merely on the plan and technical description approved by the Land Registration Authority.[5]

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[3] 99 Phil. 427 (1956).

[4] 167 Phil. 164 (1977).

[5] *Lee v. Republic of the Philippines*, 418 Phil. 793 (2001).

Meanwhile, on 26 January 1995, petitioner Republic of the Philippines (petitioner), through the Office of the Solicitor General (OSG), filed with the Regional Trial Court of Roxas City a Complaint[6] for Reversion of Title against private respondents and the Register of Deeds of Roxas City, praying that (1) the sale of Lot No. 398 to Lee Liong be set aside for being null and void *ab initio*; and (2) Lot No. 398 be reverted to the public domain for the State's disposal in accordance with law.

In their Answer, private respondents invoked as affirmative defenses: (1) prescription; (2) private ownership of Lot No. 398; and (3) Lee Liong's being a buyer in good faith and for value. Furthermore, private respondents claimed that as Filipino citizens, they are qualified to acquire Lot No. 398 by succession.

The Register of Deeds of Roxas City did not file an answer.

On 7 May 1996, the trial court rendered a decision ordering the reversion of Lot No. 398 to the State.

On appeal, the Court of Appeals rendered its Decision[7] dated 12 July 2002, reversing the trial court's decision and declaring private respondents as the absolute and lawful owners of Lot No. 398. Petitioner moved for reconsideration, which the Court of Appeals denied in its Resolution[8] dated 9 May 2003.

Hence, this petition for review.

The Ruling of the Trial Court

The trial court ordered the reversion of Lot No. 398 to the State. The trial court held that private respondents could not have acquired a valid title over Lot No. 398 because the sale of the lot to their predecessor-in-interest Lee Liong was null and void. Being an innocent purchaser in good faith and for value did not cure Lee Liong's disqualification as an alien who is prohibited from acquiring land under the Constitution. The trial court further held that prescription cannot be invoked against the State as regards an action for reversion or reconveyance of land to the State.

[6] Records, pp. 1-4.

[7] *Rollo*, pp. 35-43.

[8] *Id*. at 45-46.

The Ruling of the Court of Appeals

The Court of Appeals agreed with the trial court that the State is not barred by prescription. However, the Court of Appeals held that the trial court erred in ordering the reversion of Lot No. 398 to the State. Although the sale of Lot No. 398 to Lee Liong violated the constitutional prohibition on aliens acquiring land, the Court of Appeals noted that Lot No. 398 had already been acquired by private respondents through succession. The transfer of Lot No. 398 to private respondents, who are Filipino citizens qualified to acquire lands, can no longer be impugned on the basis of the invalidity of the initial transfer. The flaw in the original transaction is considered cured and the title of the transferee is deemed valid considering that the objective of the constitutional proscription against alien ownership of lands, that is to keep our lands in Filipino hands, has been achieved.

The Issue

Petitioner raises the lone issue that:

THE COURT OF APPEALS GRAVELY ERRED WHEN IT REVERSED AND SET ASIDE THE APPEALED DECISION AND DECLARED PRIVATE RESPONDENTS THE ABSOLUTE AND LAWFUL OWNERS AND POSSESSORS OF LOT NO. 398 OF ROXAS CITY CADASTRE CONSIDERING THAT LEE LIONG, WHO IS AN ALIEN, AND THUS, CONSTITUTIONALLY PROHIBITED TO OWN REAL PROPERTY IN THE PHILIPPINES, ACQUIRED NO RIGHT OR TITLE OVER SUBJECT LOT WHICH HE COULD HAVE TRANSMITTED BY SUCCESSION TO PRIVATE RESPONDENTS' PREDECESSORS-IN-INTEREST.

The Ruling of the Court

The petition is without merit.

Petitioner argues that since the sale of Lot No. 398 to Lee Liong was void, Lot No. 398 never became part of the deceased Lee Liong's estate. Hence, Lot No. 398 could not be transmitted by succession to Lee Liong's surviving heirs and eventually to private respondents.

We do not subscribe to petitioner's position. The circumstances of this case are similar to the case of *De Castro v. Teng Queen Tan*,[9] wherein a residential lot was sold to a Chinese citizen. Upon the death of the alien vendee, his heirs entered into an extrajudicial settlement of the estate of the deceased and the subject land was transferred to a son who was a naturalized Filipino. Subsequently, the vendor of the lot filed a suit for annulment of sale for alleged violation of the Constitution prohibiting the sale of land to aliens. Independently of the doctrine of *in pari delicto*, the Court sustained the sale, holding that while the vendee was an alien at the time of the sale, the land has since become the property of a naturalized Filipino citizen who is constitutionally qualified to own land.

Similarly, in this case, upon the death of the original vendee who was a Chinese citizen, his widow and two sons extrajudicially settled his estate, including Lot No. 398. When the two sons died, Lot No. 398 was transferred by succession to their respective spouses, herein private respondents who are Filipino citizens.

We now discuss whether reversion proceedings is still viable considering that Lot No. 398 has already been transfered to Filipino citizens. In the reconstitution case of *Lee v. Republic of the Philippines*[10] involving Lot No. 398, this Court explained that the OSG may initiate an action for reversion or escheat of lands which were sold to aliens disqualified from acquiring lands under the Constitution. However, in the case of Lot No. 398, the fact that it was already transferred to Filipinos militates against escheat proceedings, thus:

> Although ownership of the land cannot revert to the original sellers, because of the doctrine of *pari delicto*, the Solicitor General may initiate an action for reversion or escheat of the land to the State, subject to other defenses, as hereafter set forth.
>
> **In this case, subsequent circumstances militate against escheat proceedings because the land is now in the hands of Filipinos. The original vendee, Lee Liong, has since died and the land has been inherited by his heirs and subsequently their heirs,**

[9] 214 Phil. 68 (1984).

[10] 418 Phil. 793 (2001).

petitioners herein [Elizabeth Lee and Pacita Yu Lee]. Petitioners are Filipino citizens, a fact the Solicitor General does not dispute.

The constitutional proscription on alien ownership of lands of the public or private domain was intended to protect lands from falling in the hands of non-Filipinos. In this case, however, there would be no more public policy violated since the land is in the hands of Filipinos qualified to acquire and own such land. "If land is invalidly transferred to an alien who subsequently becomes a citizen or transfers it to a citizen, the flaw in the original transaction is considered cured and the title of the transferee is rendered valid." Thus, the subsequent transfer of the property to qualified Filipinos may no longer be impugned on the basis of invalidity of the initial transfer. The objective of the constitutional provision to keep our lands in Filipino hands has been achieved.[11] (Emphasis supplied)

In this case, the reversion proceedings was initiated only after almost 40 years from the promulgation of the case of *Dinglasan v. Lee Bun Ting*,[12] where the Court held that the sale of Lot No. 398 was null and void for violating the constitutional prohibition on the sale of land to an alien. If petitioner had commenced reversion proceedings when Lot No. 398 was still in the hands of the original vendee who was an alien disqualified to hold title thereto, then reversion of the land to the State would undoubtedly be allowed. However, this is not the case here. When petitioner instituted the action for reversion of title in 1995, Lot No. 398 had already been transferred by succession to private respondents who are Filipino citizens.

Since Lot No. 398 has already been transferred to Filipino citizens, the flaw in the original transaction is considered cured.[13] As held in *Chavez v. Public Estates Authority*:[14]

Thus, the Court has ruled consistently that where a Filipino citizen sells land to an alien who later sells the land to a Filipino, the invalidity

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[11] *Id*. at 802.

[12] *Supra* note 3.

[13] *Halili v. CA*, 350 Phil. 906 (1998); *United Church Board for World Ministries v. Sebastian*, No. L-34672, 30 March 1988, 159 SCRA 446.

[14] 451 Phil. 1 (2003).

of the first transfer is corrected by the subsequent sale to a citizen. Similarly, where the alien who buys the land subsequently acquires Philippine citizenship, the sale was validated since the purpose of the constitutional ban to limit land ownership to Filipinos has been achieved. In short, **the law disregards the constitutional disqualification of the buyer to hold land if the land is subsequently transferred to a qualified party, or the buyer himself becomes a qualified party.**[15] (Emphasis supplied)

Clearly, since Lot No. 398 has already been transferred to private respondents who are Filipino citizens, the prior invalid sale to Lee Liong can no longer be assailed. Hence, reversion proceedings will no longer prosper since the land is now in the hands of Filipino citizens.

WHEREFORE, we *DENY* the petition. We *AFFIRM* the Decision dated 12 July 2002 and the Resolution dated 9 May 2003 of the Court of Appeals in CA-G.R. CV No. 53890.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

FIRST DIVISION

[G.R. No. 161317. July 16, 2008]

CRISTITA ALEGRIA, joined by her husband Bibiano Alegria, PRAXEDES BANQUERIGO, joined by her husband Rolando Cabunilas, EDUARDO DRILON, joined by his wife Turtillana Drilon, ESTERLORE DRILON, joined by her husband Jerry Drilon, JUANITA DRILON, joined by her husband Demetrio Drilon,

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[15] *Id*. at 47.

CEFERINA FORASTEROS, ARITA MANSING, joined by her husband Apolonio Mansing, and GAVINA OLLENA, *petitioners, vs.* **EUSTAQUIA DRILON and Spouses ALFREDO and FREDESWENDA YBIOSA,** *respondents.*

SYLLABUS

1. CIVIL LAW; PUBLIC LANDS; REVERSION; IT IS ONLY THE STATE WHICH IS THE PROPER PARTY TO FILE AN ACTION FOR RECONVEYANCE OF PUBLIC LANDS.— In point is *De la Peña v. Court of Appeals,* which likewise involved an action for reconveyance and annulment of title on the ground that the free patent and title over a parcel of land were allegedly obtained through fraud. Like the present case, the petitioner in *De la Peña* claimed that private respondent fraudulently stated in his application for free patent that "the land applied for is not claimed or occupied by any other person." The Court ruled that petitioner had no standing to file the case since reconveyance is a remedy granted only to the owner of the property alleged to be erroneously titled in another's name. In such instances, it is the State which is the proper party to file suit, thus: Persons who have not obtained title to public lands could not question the titles legally issued by the State. In such cases, the real party-in-interest is the Republic of the Philippines to whom the property would revert if it is ever established, after appropriate proceedings, that the free patent issued to the grantee is indeed vulnerable to annulment on the ground that the grantee failed to comply with the conditions imposed by the law. Not being an applicant, much less a grantee, petitioner cannot ask for reconveyance. Further, Section 101 of Commonwealth Act No. 141 provides that actions for reversion of public lands fraudulently awarded must be instituted by the Solicitor General in the name of the Republic of the Philippines.

2. ID.; ID.; ID.; ACTUAL OCCUPANTS AND TILLERS OF PUBLIC LANDS WHO ARE NOT EVEN APPLICANTS FOR FREE PATENTS HAVE NO LEGAL PERSONALITY TO FILE A CASE FOR RECONVEYANCE.— Petitioners, x x x, argue that although it is only the government that may institute reversion proceedings, they as persons whose rights are affected by the assailed sale may pray for the declaration of nullity of

the sale. Petitioners invoke *Arsenal v. IAC* and claim that under the ruling of the Court, the sale of a homestead land within the prohibited period is void, and that third persons affected by the void contract may set up its nullity. Petitioners' reliance on *Arsenal* is misplaced. *Arsenal* involved the double sale of a homestead property. The homestead grantee sold the property during the prohibited period. Afterwards, the grantee again sold the same property, and title to the homestead property was issued to the second buyer. The first buyer sought to annul the title of the second buyer. The second buyer merely raised the nullity of the first sale but did not seek to annul the title of the homestead grantee for selling the property within the prohibited period. The factual circumstances of the present case are clearly different from *Arsenal*. Here, petitioners filed an action for reconveyance on the ground that titles to the properties were obtained through fraud. Moreover, petitioners seek to have the titles of the Drilons annulled for selling the properties during the prohibited period. As found by the trial court, petitioners have not shown any proof of title over the properties. They are not even applicants for free patent over the properties. Since petitioners failed to show proof that they have title to the properties, the trial and appellate courts correctly ruled that petitioners have no legal personality to file a case for reconveyance of Lot Nos. 3658 and 3660.

APPEARANCES OF COUNSEL

Alfredo A. Orquillas, Jr. for petitioners.
Reuben A. Espancho for respondents.

R E S O L U T I O N

CARPIO, *J.*:

Before this Court is a petition for review[1] assailing the Decision[2] dated 27 February 2003 and Resolution dated 20 November 2003 of the Court of Appeals in CA-G.R. CV No. 70671. The

[1] Under Rule 45 of the Rules of Court.

[2] Penned by Justice Mercedes Gozo-Dadole and concurred in by Associate Justices B.A. Adefuin Dela Cruz and Mariano C. Del Castillo.

Court of Appeals dismissed the petition for *certiorari* filed by Cristita Alegria, *et al.* (petitioners) questioning the Decision of the Regional Trial Court, Dumaguete City, Branch 40 (trial court) in Civil Case No. 11821.

Petitioners claim they are the actual occupants and tillers of two parcels of land identified as Lot No. 3658 and Lot No. 3660, Cad. 141, with an area of 1,986 and 3,703 square meters, respectively, located in Ajong, Sibulan, Negros Oriental.

On 4 June 1992, Gabriel Drilon, husband of respondent Eustaquia Drilon, applied for the issuance of titles by Free Patent over the properties. On 10 September 1993, Katibayan ng Orihinal na Titulo Blg. Fv.-36316 with Patente Blg. 074620-92-985, and Titulo Blg. Fv.-36315 with Patente Blg. 074620-92-986 were issued for Lot Nos. 3658 and 3660, respectively, in the name of Gabriel Drilon. On 8 October 1993, spouses Drilon sold the properties to respondent spouses Alfredo and Fredeswenda Ybiosa (spouses Ybiosa).

Sometime in 1996, Eustaquia Drilon[3] and spouses Ybiosa demanded that petitioners vacate Lot Nos. 3658 and 3660. This prompted petitioners to file, on 23 January 1997, an action for reconveyance and declaration of nullity of the sale of Lot No. 3658 and Lot No. 3660.

In their complaint, petitioners alleged that Gabriel Drilon obtained the free patents through fraud. According to petitioners, Gabriel Drilon made it appear in his application for free patent that he had continuously occupied and cultivated Lot Nos. 3658 and 3660.

Petitioners further claimed that the sale of Lot Nos. 3658 and 3660 on 8 October 1993 was void because the sale was made within five years from the issuance of the patents. Petitioners alleged that spouses Ybiosa were in bad faith when they bought the properties as they were fully aware that petitioners were actually and continuously occupying, cultivating and claiming portions of the properties.

In a decision dated 26 February 2001, the trial court dismissed the complaint. The dispositive portion of the decision reads:

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[3] Gabriel Drilon passed away in 1993.

WHEREFORE, the petition for reconveyance, declaration of nullity of sale of parcels of land and damages filed by plaintiffs against the defendants is hereby DISMISSED for lack of merit.

SO ORDERED.[4]

The trial court ruled that although the title to the properties was secured by Gabriel Drilon without disclosing that allegedly third parties were in possession of the properties applied for, petitioners were unable to establish their claim over Lot Nos. 3658 and 3660.

On appeal, the Court of Appeals affirmed the decision of the trial court, thus:

WHEREFORE**,** premises considered, the Decision dated February 26, 2001 of the Regional Trial Court of Dumaguete City, Seventh Judicial Region, Branch 40, in Civil Case No. 11821, is hereby AFFIRMED. Costs against the appellants.

SO ORDERED.[5]

The appellate court ruled that it is only the State, as the owner of the property allegedly taken by Gabriel Drilon through misrepresentation, which can assail the sale made by spouses Drilon to spouses Ybiosa. Petitioners, although occupants of the properties, have no legal personality to assail the patents issued to Gabriel Drilon as well as the sale of the properties to spouses Ybiosa.

Hence, this petition.

Petitioners raise the following issues:

1. Whether the sale of Lot Nos. 3658 and 3660 by spouses Drilon to spouses Ybiosa is valid; and

2. Whether petitioners may question the validity of the sale and ask for reconveyance of the properties.[6]

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[4] *Rollo*, p. 77.

[5] *Id*. at 105.

[6] *Id*. at 190.

The petition is without merit.

Before the Court can rule on the validity of the sale made by spouses Drilon to spouses Ybiosa, it is first necessary to resolve whether petitioners have the right to question the validity of the sale and ask for reconveyance of the properties.

We rule in the negative.

Section 2, Rule 3 of the Rules of Court provides that every action must be prosecuted or defended in the name of the real party-in-interest, or in the name of one who stands to be benefited or injured by the judgment in the suit. A suit filed by one who is not a real party-in-interest must be dismissed.

In *Caro v. Sucaldito,*[7] the Court held that an applicant for a free patent cannot be considered a party-in-interest with personality to file an action for reconveyance. Citing *Spouses Tankiko v. Cezar,*[8] the Court stated:

> [O]nly the State can file a suit for reconveyance of a public land. Therefore, not being the owners of the land but mere applicants for sales patents thereon, respondents have no personality to file the suit. Neither will they be directly affected by the judgment in such suit.[9]

In point is *De la Peña v. Court of Appeals,*[10] which likewise involved an action for reconveyance and annulment of title on the ground that the free patent and title over a parcel of land were allegedly obtained through fraud. Like the present case, the petitioner in *De la Peña* claimed that private respondent fraudulently stated in his application for free patent that "the land applied for is not claimed or occupied by any other person." The Court ruled that petitioner had no standing to file the case since reconveyance is a remedy granted only to the owner of the property alleged to be erroneously titled in another's name.

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[7] G.R. No. 157536, 16 May 2005, 458 SCRA 595.

[8] 362 Phil. 184 (1999).

[9] *Supra* note 7, at 606.

[10] G.R. No. 81827, 28 March 1994, 231 SCRA 456.

In such instances, it is the State which is the proper party to file suit, thus:

> Persons who have not obtained title to public lands could not question the titles legally issued by the State. In such cases, the real party-in-interest is the Republic of the Philippines to whom the property would revert if it is ever established, after appropriate proceedings, that the free patent issued to the grantee is indeed vulnerable to annulment on the ground that the grantee failed to comply with the conditions imposed by the law. Not being an applicant, much less a grantee, petitioner cannot ask for reconveyance.[11]

Further, Section 101 of Commonwealth Act No. 141 provides that actions for reversion of public lands fraudulently awarded must be instituted by the Solicitor General in the name of the Republic of the Philippines:

> Section 101. All actions for the reversion to the government of lands of the public domain or improvements thereon shall be instituted by the Solicitor General or the officer acting in his stead, in the proper courts, in the name of the Commonwealth of the Philippines.

Thus, in *Garingan v. Garingan,*[12] the Court held that only the State may file a case for cancellation of title due to the grantee's violation of the conditions imposed by law:

> A certificate of title issued pursuant to a homestead patent partakes of the nature of a certificate issued in a judicial proceeding, as long as the land disposed of is really a part of the disposable land of the public domain and becomes indefeasible and incontrovertible after one year from issuance. x x x. **The only instance when a certificate of title covering a tract of land, formerly a part of the patrimonial property of the State, could be cancelled, is for failure on the part of the grantee to comply with the conditions imposed by law, and in such case the proper party to bring the action would be the Government to which the property would revert**.[13]

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[11] *Id*. at 462.

[12] G.R. No. 144095, 12 April 2005, 455 SCRA 480.

[13] *Id*. at 498, citing *The Director of Lands v. De Luna, et al.,* 110 Phil. 28 (1960). Emphasis supplied.

Petitioners, however, argue that although it is only the government that may institute reversion proceedings, they as persons whose rights are affected by the assailed sale may pray for the declaration of nullity of the sale.

Petitioners invoke *Arsenal v. IAC*[14] and claim that under the ruling of the Court, the sale of a homestead land within the prohibited period is void, and that third persons affected by the void contract may set up its nullity.[15] In *Arsenal*, the Court stated:

> The above provisions of law are clear and explicit. A contract which purports to alienate, transfer, convey or encumber any homestead within the prohibitory period of five years from the date of the issuance of the patent is void from its execution. In a number of cases, this Court has held that such provision is mandatory (*De los Santos v. Roman Catholic Church of Midsayap*, 94 Phil. 405).
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> Under the provisions of the Civil Code, a void contract is inexistent from the beginning. It cannot be ratified neither can the right to set up the defense of its illegality be waived. (Art. 1409, Civil Code).
>
> To further distinguish this contract from the other kinds of contract, a commentator has stated that:
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> The right to set up the nullity of a void or non-existent contract is not limited to the parties as in the case of annullable or voidable contracts; it is extended to third persons who are directly affected by the contract. (Tolentino, Civil Code of the Philippines, Vol. IV, p. 604, [1973]).
>
> Any person may invoke the inexistence of the contract whenever juridical effects founded thereon are asserted against him. (*Id*. p. 595).

Concededly, the contract of sale executed between the respondents Palaos and Suralta in 1957 is void. It was entered into three (3) years and eight (8) months after the grant of the homestead patent to the respondent Palaos in 1954.

Being void, the foregoing principles and rulings are applicable. Thus, it was erroneous for the trial court to declare that the benefit

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[14] 227 Phil. 36 (1986).

[15] *Rollo*, pp. 190-191.

of the prohibition in the Public Land Act "does not inure to any third party." Such a sweeping declaration does not find support in the law or in precedents. **A third person who is directly affected by a void contract may set up its nullity. In this case, it is precisely the petitioners' interest in the disputed land which is in question**.[16]

Petitioners' reliance on *Arsenal* is misplaced. *Arsenal* involved the double sale of a homestead property. The homestead grantee sold the property during the prohibited period. Afterwards, the grantee again sold the same property, and title to the homestead property was issued to the second buyer. The first buyer sought to annul the title of the second buyer. The second buyer merely raised the nullity of the first sale but did not seek to annul the title of the homestead grantee for selling the property within the prohibited period.

The factual circumstances of the present case are clearly different from *Arsenal*. Here, petitioners filed an action for reconveyance on the ground that titles to the properties were obtained through fraud. Moreover, petitioners seek to have the titles of the Drilons annulled for selling the properties during the prohibited period. As found by the trial court, petitioners have not shown any proof of title over the properties. They are not even applicants for free patent over the properties.

Since petitioners failed to show proof that they have title to the properties, the trial and appellate courts correctly ruled that petitioners have no legal personality to file a case for reconveyance of Lot Nos. 3658 and 3660.

WHEREFORE, we *DENY* the petition for lack of merit. We *AFFIRM* the Decision dated 27 February 2003 and Resolution dated 20 November 2003 of the Court of Appeals in CA-G.R. CV No. 70671. Costs against petitioners.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Azcuna, and *Leonardo-de Castro, JJ.,* concur.

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[16] *Supra* note 13, at 46-47. Emphasis supplied.

EN BANC

[G.R. No. 170516. July 16, 2008]

AKBAYAN CITIZENS ACTION PARTY ("AKBAYAN"), PAMBANSANG KATIPUNAN NG MGA SAMAHAN SA KANAYUNAN ("PKSK"), ALLIANCE OF PROGRESSIVE LABOR ("APL"), VICENTE A. FABE, ANGELITO R. MENDOZA, MANUEL P. QUIAMBAO, ROSE BEATRIX CRUZ-ANGELES, CONG. LORENZO R. TANADA III, CONG. MARIO JOYO AGUJA, CONG. LORETA ANN P. ROSALES, CONG. ANA THERESIA HONTIVEROS-BARAQUEL, and CONG. EMMANUEL JOEL J. VILLANUEVA, *petitioners, vs.* **THOMAS G. AQUINO, in his capacity as Undersecretary of the Department of Trade and Industry (DTI) and Chairman and Chief Delegate of the Philippine Coordinating Committee (PCC) for the Japan-Philippines Economic Partnership Agreement, EDSEL T. CUSTODIO, in his capacity as Undersecretary of the Department of Foreign Affairs (DFA) and Co-Chair of the PCC for the JPEPA, EDGARDO ABON, in his capacity as Chairman of the Tariff Commission and lead negotiator for Competition Policy and Emergency Measures of the JPEPA, MARGARITA SONGCO, in her capacity as Assistant Director-General of the National Economic Development Authority (NEDA) and lead negotiator for Trade in Services and Cooperation of the JPEPA, MALOU MONTERO, in her capacity as Foreign Service Officer I, Office of the Undersecretary for International Economic Relations of the DFA and lead negotiator for the General and Final Provisions of the JPEPA, ERLINDA ARCELLANA, in her capacity as Director of the Board of Investments and lead negotiator for Trade in Goods (General Rules) of the JPEPA, RAQUEL ECHAGUE, in her capacity as lead negotiator for Rules of Origin of the JPEPA, GALLANT SORIANO, in his official**

capacity as Deputy Commissioner of the Bureau of Customs and lead negotiator for Customs Procedures and Paperless Trading of the JPEPA, MA. LUISA GIGETTE IMPERIAL, in her capacity as Director of the Bureau of Local Employment of the Department of Labor and Employment (DOLE) and lead negotiator for Movement of Natural Persons of the JPEPA, PASCUAL DE GUZMAN, in his capacity as Director of the Board of Investments and lead negotiator for Investment of the JPEPA, JESUS MOTOOMULL, in his capacity as Director for the Bureau of Product Standards of the DTI and lead negotiator for Mutual Recognition of the JPEPA, LOUIE CALVARIO, in his capacity as lead negotiator for Intellectual Property of the JPEPA, ELMER H. DORADO, in his capacity as Officer-in-Charge of the Government Procurement Policy Board Technical Support Office, the government agency that is leading the negotiations on Government Procurement of the JPEPA, RICARDO V. PARAS, in his capacity as Chief State Counsel of the Department of Justice (DOJ) and lead negotiator for Dispute Avoidance and Settlement of the JPEPA, ADONIS SULIT, in his capacity as lead negotiator for the General and Final Provisions of the JPEPA, EDUARDO R. ERMITA, in his capacity as Executive Secretary, and ALBERTO ROMULO, in his capacity as Secretary of the DFA,* *respondents.*

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* In the case title as indicated in the petition, only the name of Usec. Thomas G. Aquino appears in the portion for "Respondents," to wit: "HON. THOMAS G. AQUINO, in his capacity as Chairman and Chief Delegate of the Philippine Coordinating Committee for the Japan-Philippines Economic Partnership Agreement, *et al*." (Underscoring supplied) The other respondents are enumerated in the body of the petition. (*Rollo*, pp. 20-23) The Court *motu proprio* included the names of these other respondents in the case title to conform to Sec. 1, par. 2, Rule 7 of the Rules of Civil Procedure, as well as the capacities in which they are being sued. Moreover, it inserted therein that respondent Usec. Aquino, as stated in the petition, is also being sued in his capacity as DTI Undersecretary.

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN; EVERY CITIZEN HAS A LEGAL STANDING TO FILE A PETITITON ANCHORED THEREON.— In a petition anchored upon the right of the people to information on matters of public concern, which is a public right by its very nature, petitioners need not show that they have any legal or special interest in the result, it being sufficient to show that they are citizens and, therefore, part of the general public which possesses the right. As the present petition is anchored on the right to information and petitioners are all suing in their capacity as citizens and groups of citizens including petitioners-members of the House of Representatives who additionally are suing in their capacity as such, the standing of petitioners to file the present suit is grounded in jurisprudence.

2. ID.; ID.; ID.; ID.; JAPAN-PHILIPPINES ECONOMIC PARTNERSHIP AGREEMENT (JPEPA) IS A MATTER OF PUBLIC CONCERN.— To be covered by the right to information, the information sought must meet the threshold requirement that it be a matter of public concern. *Apropos* is the teaching of *Legaspi v. Civil Service Commission*: In determining whether or not a particular information is of public concern there is no rigid test which can be applied. 'Public concern' like 'public interest' is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public. From the nature of the JPEPA as an international trade agreement, it is evident that the Philippine and Japanese offers submitted during the negotiations towards its execution are matters of public concern. This, respondents do not dispute. They only claim that diplomatic negotiations are covered by the doctrine of **executive privilege,** thus constituting an exception to the right to information and the policy of full public disclosure.

3. ID.; ID.; ID.; ID.; THE RIGHT TO INFORMATION OR THE POLICY OF FULL PUBLIC DISCLOSURE IS NOT

ABSOLUTE.— It is well-established in jurisprudence that neither the right to information nor the policy of full public disclosure is absolute, there being matters which, albeit of public concern or public interest, are recognized as privileged in nature. The types of information which may be considered privileged have been elucidated in *Almonte v. Vasquez*, *Chavez v. PCGG*, *Chavez v. Public Estate's Authority*, and most recently in *Senate v. Ermita* where the Court reaffirmed the validity of the doctrine of executive privilege in this jurisdiction and dwelt on its scope.

4. ID.; ID.; ID.; ID.; JPEPA NEGOTIATIONS CONSIDERED AS PRIVILEGED DIPLOMATIC NEGOTIATIONS; REASONS, DISCUSSED; RULING IN *PMPF V. MANGLAPUS*, APPLIED.— The privileged character of diplomatic negotiations has been recognized in this jurisdiction. In discussing valid limitations on the right to information, the Court in *Chavez v. PCGG* held that "information on inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest." Even earlier, the same privilege was upheld in *People's Movement for Press Freedom (PMPF) v. Manglapus* wherein the Court discussed the reasons for the privilege in more precise terms. In *PMPF v. Manglapus*, the therein petitioners were seeking information from the President's representatives on the state of the then on-going negotiations of the RP-US Military Bases Agreement. The Court denied the petition, stressing that "**secrecy of negotiations with foreign countries is not violative** of the constitutional provisions of freedom of speech or of the press nor **of the freedom of access to information.**" x x x Applying the principles adopted in *PMPF v. Manglapus*, it is clear that while the final text of the JPEPA may not be kept perpetually confidential – since there should be "ample opportunity for discussion before [a treaty] is approved" – the offers exchanged by the parties during the negotiations continue to be privileged even after the JPEPA is published. It is reasonable to conclude that the Japanese representatives submitted their offers with the understanding that "**historic confidentiality**" would govern the same. Disclosing these offers could impair the ability of the Philippines to deal not only with Japan but with other foreign governments **in future negotiations**. A ruling that Philippine offers in treaty negotiations should now be open to public

scrutiny would discourage future Philippine representatives from frankly expressing their views during negotiations. While, on first impression, it appears wise to deter Philippine representatives from entering into compromises, it bears noting that treaty negotiations, or any negotiation for that matter, normally involve a process of *quid pro quo*, and **oftentimes negotiators have to be willing to grant concessions in an area of lesser importance in order to obtain more favorable terms in an area of greater national interest.** *Apropos* are the following observations of Benjamin S. Duval, Jr.: "x x x **[T]hose involved in the practice of negotiations appear to be in agreement that publicity leads to "grandstanding," tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation.** As Sissela Bok points out, if "negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to 'play to the gallery . . .'' In fact, **the public reaction may leave them little option.** It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace." Indeed, by hampering the ability of our representatives to compromise, we may be jeopardizing higher national goals for the sake of securing less critical ones. Diplomatic negotiations, therefore, are recognized as privileged in this jurisdiction, the JPEPA negotiations constituting no exception. It bears emphasis, however, that such privilege is only **presumptive**. For as *Senate v. Ermita* holds, recognizing a type of information as privileged does not mean that it will be considered privileged in all instances. Only after a consideration of the context in which the claim is made may it be determined if there is a public interest that calls for the disclosure of the desired information, strong enough to overcome its traditionally privileged status.

5. ID.; ID.; ID.; ID.; NOT ALL PRIVILEGED INFORMATION ARE FOUNDED ON NATIONAL SECURITY; OTHER KINDS OF PRIVILEGED INFORMATION, DISCUSSED.— While there certainly are privileges grounded on the necessity of safeguarding national security such as those involving military secrets, not all are founded thereon. One example is **the "informer's privilege,"** or the privilege of the Government

not to disclose the identity of a person or persons who furnish information of violations of law to officers charged with the enforcement of that law. The suspect involved need not be so notorious as to be a threat to national security for this privilege to apply in any given instance. Otherwise, the privilege would be inapplicable in all but the most high-profile cases, in which case not only would this be contrary to long-standing practice. It would also be highly prejudicial to law enforcement efforts in general. Also illustrative is the **privilege accorded to presidential communications**, which are presumed privileged without distinguishing between those which involve matters of national security and those which do not, the rationale for the privilege being that x x x [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. x x x In the same way that the privilege for judicial deliberations does not depend on the nature of the case deliberated upon, so presidential communications are privileged whether they involve matters of national security. It bears emphasis, however, that the privilege accorded to presidential communications is **not absolute**, one significant qualification being 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**." This qualification applies whether the privilege is being invoked in the context of a judicial trial or a congressional investigation conducted in aid of legislation. Closely related to the "presidential communications" privilege is the **deliberative process privilege** recognized in the United States. As discussed by the U.S. Supreme Court in *NLRB v. Sears, Roebuck & Co*, deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Notably, the privileged status of such documents rests, **not on the need to protect national security** but, on the "obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," the objective of the privilege being to enhance the quality of agency decisions. **The diplomatic negotiations privilege**

bears a close resemblance to the deliberative process and presidential communications privilege. It may be readily perceived that the rationale for the confidential character of diplomatic negotiations, deliberative process, and presidential communications is similar, if not identical. The earlier discussion on *PMPF v. Manglapus* shows that the privilege for diplomatic negotiations is meant to encourage a frank exchange of exploratory ideas between the negotiating parties by shielding such negotiations from public view. Similar to the privilege for presidential communications, the diplomatic negotiations privilege seeks, through the same means, to protect the independence in decision-making of the President, particularly in its capacity as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." And, as with the deliberative process privilege, the privilege accorded to diplomatic negotiations arises, not on account of the content of the information *per se*, but because the information is part of a process of deliberation which, in pursuit of the public interest, must be presumed confidential. The decision of the U.S. District Court, District of Columbia in *Fulbright & Jaworski v. Department of the Treasury* enlightens on the close relation between diplomatic negotiations and deliberative process privileges. The plaintiffs in that case sought access to notes taken by a member of the U.S. negotiating team during the U.S.-French **tax treaty** negotiations. Among the points noted therein were the issues to be discussed, positions which the French and U.S. teams took on some points, the draft language agreed on, and articles which needed to be amended. Upholding the confidentiality of those notes, Judge Green ruled, thus: "**Negotiations between two countries to draft a treaty represent a true example of a deliberative process. Much give-and-take must occur for the countries to reach an accord.** A description of the negotiations at any one point would not provide an onlooker a summary of the discussions which could later be relied on as law. It would not be "working law" as the points discussed and positions agreed on would be subject to change at any date until the treaty was signed by the President and ratified by the Senate. **The policies behind the deliberative process privilege support non-disclosure. Much harm could accrue to the negotiations process if these notes were revealed. Exposure of the pre-agreement positions of the French negotiators might well offend foreign governments and would lead to less candor**

by the U. S. in recording the events of the negotiations process. As several months pass in between negotiations, this lack of record could hinder readily the U. S. negotiating team. Further disclosure would reveal prematurely adopted policies. If these policies should be changed, public confusion would result easily. **Finally, releasing these snapshot views of the negotiations would be comparable to releasing drafts of the treaty, particularly when the notes state the tentative provisions and language agreed on. As drafts of regulations typically are protected by the deliberative process privilege, drafts of treaties** should **be accorded the same protection." Clearly, the privilege accorded to diplomatic negotiations follows as a logical consequence from the privileged character of the deliberative process.**

6. ID.; ID.; ID.; ID.; THE PRIVILEGE FOR DIPLOMATIC NEGOTIATIONS MAY BE INVOKED NOT ONLY AGAINST CITIZENS' DEMANDS FOR INFORMATION, BUT ALSO IN THE CONTEXT OF LEGISLATIVE INVESTIGATIONS.— While indeed the petitioners in *PMPF v. Manglapus* consisted only of members of the mass media, it would be incorrect to claim that the doctrine laid down therein has no bearing on a controversy such as the present, where the demand for information has come from members of Congress, not only from private citizens. **The privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances.** The probability of the claim succeeding in the new context might differ, but to say that the privilege, as such, has no validity at all in that context is another matter altogether. The Court's statement in *Senate v. Ermita* that "presidential refusals to furnish information may be actuated by any of at least three distinct kinds of considerations [state secrets privilege, informer's privilege, and a generic privilege for internal deliberations], and may be asserted, **with differing degrees of success,** in the context of either judicial or legislative investigations," implies that a privilege, once recognized, may be invoked under different procedural settings. That this principle holds true particularly with respect to diplomatic negotiations may be inferred from *PMPF v. Manglapus* itself, where the Court held that it is the President alone who negotiates treaties, and not even the Senate or the House of Representatives, unless

asked, may intrude upon that process. Clearly, the privilege for diplomatic negotiations may be invoked not only against citizens' demands for information, but also in the context of legislative investigations.

7. ID.; ID.; ID.; ID.; THE PRIVILEGE FOR DIPLOMATIC NEGOTIATIONS ON THE JPEPA MAY BE INVOKED AT ALL STAGES OF THE NEGOTIATION PROCESS; REASON.— Petitioners admit that "diplomatic negotiations on the JPEPA are entitled to a reasonable amount of confidentiality so as not to jeopardize the diplomatic process." They argue, however, that the same is privileged "only at certain stages of the negotiating process, after which such information must necessarily be revealed to the public." They add that the duty to disclose this information was vested in the government when the negotiations moved from the formulation and exploratory stage to the firming up of definite propositions or official recommendations, citing *Chavez v. PCGG* and *Chavez v. PEA*. The following statement in *Chavez v. PEA*, however, suffices to show that the doctrine in both that case and *Chavez v. PCGG* with regard to the duty to disclose "definite propositions of the government" does not apply to diplomatic negotiations: "We rule, therefore, that the constitutional right to information includes official information on on-going negotiations before a final contract. **The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order.** x x x "It follows from this ruling that even definite propositions of the government may not be disclosed if they fall under "recognized exceptions." The privilege for diplomatic negotiations is clearly among the recognized exceptions, for the footnote to the immediately quoted ruling cites *PMPF v. Manglapus* itself as an authority.

8. ID.; ID.; ID.; ID.; CRITERIA IN DETERMINING WHETHER THERE IS SUFFICIENT PUBLIC INTEREST TO OVERCOME THE PRIVILEGE, DISCUSSED; RELEVANT RULINGS, CITED.— The criteria to be employed in determining whether there is a sufficient public interest in favor of disclosure may be gathered from cases such as *U.S. v. Nixon, Senate Select Committee on Presidential Campaign*

Activities v. Nixon, and *In re Sealed Case. U.S. v. Nixon*, which involved a claim of the presidential communications privilege against the subpoena *duces tecum* of a district court in a *criminal* case, emphasized the need to balance such claim of privilege against the constitutional duty of courts to ensure a fair administration of *criminal* justice. Similarly, *Senate Select Committee v. Nixon*, which involved a claim of the presidential communications privilege against the subpoena *duces tecum* of a Senate committee, spoke of the need to balance such claim with the duty of Congress to perform its *legislative* functions. 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. 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.** x x x *In re Sealed Case* involved a claim of the deliberative process and presidential communications privileges against a subpoena *duces tecum* of a grand jury. On the claim of deliberative process privilege, the court stated: The deliberative process privilege is a *qualified* privilege and **can be overcome by *a sufficient showing of need.* This need determination is to be made flexibly on a case-by-case, ad hoc basis.** "[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," **taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees.** x x x

9. ID.; ID.; ID.; ID.; FAILURE TO PRESENT A "SUFFICIENT SHOWING OF NEED" TO OVERCOME THE CLAIM OF PRIVILEGE; CASE AT BAR.— Petitioners have failed to

present the strong and "*sufficient showing of need*" referred to in the immediately cited cases. The arguments they proffer to establish their entitlement to the subject documents fall short of this standard. x x x AT ALL EVENTS, since it is not disputed that the offers exchanged by the Philippine and Japanese representatives have not been disclosed to the public, the Court shall pass upon the issue of whether access to the documents bearing on them is, as petitioners claim, essential to their right to participate in decision-making. The case for petitioners has, of course, been immensely weakened by the disclosure of the full text of the JPEPA to the public since September 11, 2006, even as it is still being deliberated upon by the Senate and, therefore, not yet binding on the Philippines. Were the Senate to concur with the validity of the JPEPA at this moment, there has already been, in the words of *PMPF v. Manglapus*, "ample opportunity for discussion before [the treaty] is approved." The text of the JPEPA having been published, petitioners have failed to convince this Court that they will not be able to meaningfully exercise their right to participate in decision-making unless the initial offers are also published. It is of public knowledge that various non-government sectors and private citizens have already publicly expressed their views on the JPEPA, their comments not being limited to general observations thereon but on its specific provisions. Numerous articles and statements critical of the JPEPA have been posted on the Internet. Given these developments, there is no basis for petitioners' claim that access to the Philippine and Japanese offers is essential to the exercise of their right to participate in decision-making. Petitioner-members of the House of Representatives additionally anchor their claim to have a right to the subject documents on the basis of Congress' inherent power to regulate commerce, be it domestic or international. They allege that Congress cannot meaningfully exercise the power to regulate international trade agreements such as the JPEPA without being given copies of the initial offers exchanged during the negotiations thereof. In the same vein, they argue that the President cannot exclude Congress from the JPEPA negotiations since whatever power and authority the President has to negotiate international trade agreements is derived only by delegation of Congress, pursuant to Article VI, Section 28(2) of the Constitution and Sections 401 and 402 of Presidential Decree No. 1464. x x x While the power then to fix tariff

rates and other taxes clearly belongs to Congress, and is exercised by the President only by delegation of that body, it has long been recognized that the power to enter into treaties is vested directly and exclusively in the President, subject only to the concurrence of at least two-thirds of all the Members of the Senate for the validity of the treaty. In this light, the authority of the President to enter into trade agreements with foreign nations provided under P.D. 1464 may be interpreted as an acknowledgment of a **power already inherent in its office**. It may not be used as basis to hold the President or its representatives accountable to Congress for the conduct of treaty negotiations. This is not to say, of course, that the President's power to enter into treaties is unlimited but for the requirement of Senate concurrence, since the President must still ensure that all treaties will substantively conform to all the relevant provisions of the Constitution. It follows from the above discussion that Congress, while possessing vast legislative powers, may not interfere in the field of treaty negotiations. While Article VII, Section 21 provides for Senate concurrence, such pertains only to the validity of the treaty under consideration, not to the conduct of negotiations attendant to its conclusion. Moreover, it is not even Congress as a whole that has been given the authority to concur as a means of checking the treaty-making power of the President, but only the Senate. Thus, as in the case of petitioners suing in their capacity as private citizens, petitioners-members of the House of Representatives fail to present a *"sufficient showing of need"* that the information sought is critical to the performance of the functions of Congress, functions that do not include treaty-negotiation. x x x The House Committee that initiated the investigations on the JPEPA did not pursue its earlier intention to subpoena the documents. This strongly undermines the assertion that access to the same documents by the House Committee is critical to the performance of its legislative functions. If the documents were indeed critical, the House Committee should have, at the very least, issued a *subpoena duces tecum* or, like what the Senate did in *Senate v. Ermita*, filed the present petition as a legislative body, rather than leaving it to the discretion of individual Congressmen whether to pursue an action or not. Such acts would have served as strong indicia that Congress itself finds the subject information to be critical to its legislative functions. Further, given that respondents have

claimed executive privilege, petitioner-members of the House of Representatives should have, at least, shown how its lack of access to the Philippine and Japanese offers would hinder the intelligent crafting of legislation. **Mere assertion that the JPEPA covers a subject matter over which Congress has the power to legislate would not suffice.** As *Senate Select Committee v. Nixon* held, the showing required to overcome the presumption favoring confidentiality turns, not only on the nature and appropriateness of the function in the performance of which the material was sought, but also the degree to which the material was necessary to its fulfillment. This petitioners failed to do.

10. ID.; ID.; EXECUTIVE DEPARTMENT; PRESIDENT; POWERS AND PREROGATIVES; FAILURE TO INVOKE THE PRIVILEGED CHARACTER OF THE JPEPA DOCUMENTS DURING HOUSE COMMITTEE HEARINGS MAY NOT BE CONSTRUED AS A WAIVER THEREOF BY THE EXECUTIVE BRANCH. — That respondents invoked the privilege for the first time only in their Comment to the present petition does not mean that the claim of privilege should not be credited. Petitioners' position presupposes that an assertion of the privilege should have been made during the House Committee investigations, failing which respondents are deemed to have waived it. When the House Committee and petitioner-Congressman Aguja requested respondents for copies of the documents subject of this case, respondents replied that the negotiations were still on-going and that the draft of the JPEPA would be released once the text thereof is settled and complete. There was no intimation that the requested copies are confidential in nature by reason of public policy. The response may not thus be deemed a claim of privilege by the standards of *Senate v. Ermita*, which recognizes as claims of privilege only those which are accompanied by **precise and certain reasons** for preserving the **confidentiality** of the information being sought. Respondents' failure to claim the privilege during the House Committee hearings may not, however, be construed as a waiver thereof by the Executive branch. As the immediately preceding paragraph indicates, what respondents received from the House Committee and petitioner-Congressman Aguja were mere requests for information. And as priorly stated, the House Committee itself refrained from

pursuing its earlier resolution to issue a subpoena *duces tecum* on account of then Speaker Jose de Venecia's alleged request to Committee Chairperson Congressman Teves to hold the same in abeyance. While it is a salutary and noble practice for Congress to refrain from issuing subpoenas to executive officials – out of respect for their office – until resort to it becomes necessary, the fact remains that such requests are not a compulsory process. Being mere requests, they do not strictly call for an assertion of executive privilege.

11. ID.; ID.; ID.; ID.; ID.; AS THE POWER TO NEGOTIATE TREATY IS VESTED BY THE CONSTITUTION WITH THE PRESIDENT, MEMBERS OF THE HOUSE OF REPRESENTATIVES MAY NOT PARTICIPATE THEREIN INDIRECTLY.— The dissent opines that petitioner-members of the House of Representatives, by asking for the subject JPEPA documents, are not seeking to directly participate in the negotiations of the JPEPA, hence, they cannot be prevented from gaining access to these documents. On the other hand, We hold that this is one occasion where the following ruling in *Agan v. PIATCO* – and in other cases both before and since – should be applied: "**This Court has long and consistently adhered to the legal maxim that those that cannot be done directly cannot be done indirectly.** *To declare the PIATCO contracts valid despite the clear statutory prohibition against a direct government guarantee* ***would not only make a mockery of what the BOT Law seeks to prevent*** *— which is to expose the government to the risk of incurring a monetary obligation resulting from a contract of loan between the project proponent and its lenders and to which the Government is not a party to —* ***but would also render the BOT Law useless for what it seeks to achieve*** *–- to make use of the resources of the private sector in the "financing, operation and maintenance of infrastructure and development projects" which are necessary for national growth and development but which the government, unfortunately, could ill-afford to finance at this point in time."* Similarly, while herein petitioners-members of the House of Representatives may not have been aiming to participate in the negotiations directly, opening the JPEPA negotiations to their scrutiny – even to the point of giving them access to the offers exchanged between the Japanese and Philippine delegations – would have made a

mockery of what the Constitution sought to prevent and rendered it useless for what it sought to achieve when it vested the power of direct negotiation solely with the President. What the U.S. Constitution sought to prevent and aimed to achieve in defining the treaty-making power of the President, which our Constitution similarly defines, may be gathered from Hamilton's explanation of why the U.S. Constitution excludes the House of Representatives from the treaty-making process. "x x x The fluctuating, and taking its future increase into account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, ***secrecy*** and **dispatch**; are incompatible with a body so variable and so numerous. The very complication of the business by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be source of so great inconvenience and expense, as alone ought to condemn the project." These considerations *a fortiori* apply in this jurisdiction, since the Philippine Constitution, unlike that of the U.S., does not even grant **the Senate** the power to advise the Executive in the making of treaties, but only vests in that body the power to concur in the validity of the treaty after negotiations have been concluded. Much less, therefore, should it be inferred that the House of Representatives has this power.

12. ID.; ID.; ID.; ID.; ID.; ONCE THE EXECUTIVE IS ABLE TO SHOW THAT THE DOCUMENTS SOUGHT ARE PRIVILEGED, THE BURDEN SHIFTS TO THE PARTY SEEKING INFORMATION TO OVERCOME THE PRIVILEGE BY A STRONG SHOWING OF NEED. — In asserting that the balance in this instance tilts in favor of disclosing the JPEPA documents, the dissent contends that the Executive has failed to show how disclosing them after the conclusion of negotiations would impair the performance of its functions. The contention, with due respect, misplaces the *onus probandi*. While, in keeping with the general

presumption of transparency, the burden is initially on the Executive to provide precise and certain reasons for upholding its claim of privilege, once the Executive is able to show that the documents being sought are covered by a recognized privilege, the burden shifts to the party seeking information to overcome the privilege by a strong showing of need. When it was thus established that the JPEPA documents are covered by the privilege for diplomatic negotiations pursuant to *PMPF v. Manglapus*, the presumption arose that their disclosure would impair the performance of executive functions. It was then incumbent on petitioner- requesting parties to show that they have a strong need for the information sufficient to overcome the privilege. They have not, however.

13. ID.; ID.; ID.; ID.; ID.; RULE THAT THE PRIVILEGE MUST BE CLAIMED "BY THE ORDER OF THE PRESIDENT," RELAXED. — Respecting the failure of the Executive Secretary to explicitly state that he is claiming the privilege "by order of the President," the same may not be strictly applied to the privilege claim subject of this case. When the Court in *Senate v. Ermita* limited the power of invoking the privilege to the President alone, it was laying down a new rule for which there is no counterpart even in the United States from which the concept of executive privilege was adopted. As held in the 2004 case of *Judicial Watch, Inc. v. Department of Justice*, citing *In re Sealed Case*, "the issue of whether a President must personally invoke the [presidential communications] privilege remains an open question." *U.S. v. Reynolds*, on the other hand, held that "[t]here 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 that officer." The rule was thus laid down by this Court, not in adherence to any established precedent, but with the aim of preventing the abuse of the privilege in light of its highly exceptional nature. The Court's recognition that the Executive Secretary also bears the power to invoke the privilege, provided he does so "by order of the President," is meant to avoid laying down too rigid a rule, the Court being aware that it was laying down a new restriction on executive privilege. It is with the same spirit that the Court should not be overly strict with applying the same rule in this peculiar instance, where the claim of executive

privilege occurred before the judgment in *Senate v. Ermita* became final.

14. ID.; ID.; BILL OF RIGHTS; RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN; THE PRINCIPLE LAID DOWN IN *PMPF V. MANGLAPUS* IS APPLICABLE BOTH IN THE CONTEXT OF EXECUTIVE-LEGISLATIVE CONFLICT AND A CITIZEN'S DEMAND FOR INFORMATION; REASONS. — *PMPF v. Manglapus* indeed involved a demand for information from private citizens and not an executive-legislative conflict, but so did *Chavez v. PEA* which held that "the [public's] right to information . . . does not extend to matters recognized as privileged information under the separation of powers." What counts as privileged information in an executive-legislative conflict is thus also recognized as such in cases involving the public's right to information. *Chavez v. PCGG* also involved the public's right to information, yet the Court recognized as a valid limitation to that right the same privileged information based on separation of powers – closed-door Cabinet meetings, executive sessions of either house of Congress, and the internal deliberations of the Supreme Court. These cases show that the Court has always regarded claims of privilege, whether in the context of an executive-legislative conflict or a citizen's demand for information, as closely intertwined, such that the principles applicable to one are also applicable to the other. The reason is obvious. If the validity of claims of privilege were to be assessed by entirely different criteria in each context, this may give rise to the *absurd result* where **Congress** would be denied access to a particular information because of a claim of executive privilege, but **the general public** would have access to the same information, the claim of privilege notwithstanding. *Absurdity* would be the ultimate result if, for instance, the Court adopts the "clear and present danger" test for the assessment of claims of privilege against citizens' demands for information. If executive information, when demanded by a citizen, is privileged only when there is a clear and present danger of a substantive evil that the State has a right to prevent, it would be very difficult for the Executive to establish the validity of its claim in each instance. In contrast, if the demand comes from Congress, the Executive merely has to show that the information is covered by a recognized privilege in order

to shift the burden on Congress to present a strong showing of need. **This would lead to a situation where it would be more difficult for Congress to access executive information than it would be for private citizens.** We maintain then that when the Executive has already shown that an information is covered by executive privilege, the party demanding the information must present a "strong showing of need," whether that party is Congress or a private citizen. The rule that the same "showing of need" test applies in both these contexts, however, should not be construed as a denial of the importance of analyzing the context in which an executive privilege controversy may happen to be placed. Rather, it affirms it, for it means that the specific need being shown by the party seeking information in every particular instance is highly significant in determining whether to uphold a claim of privilege. **This "need" is, precisely, part of the context in light of which every claim of privilege should be assessed.**

15. ID.; ID.; ID.; TO OVERCOME THE PRIVILEGE, THE PARTY DEMANDING MUST SHOW THAT THE INFORMATION IS VITAL FOR HIS ABILITY TO PARTICIPATE IN SOCIAL, POLITICAL, AND ECONOMIC DECISION-MAKING.— [T]he Court holds that, in determining whether an information is covered by the right to information, a specific "showing of need" for such information is not a relevant consideration, but only whether the same is a matter of public concern. When, however, the government has claimed executive privilege, and it has established that the information is indeed covered by the same, then the party demanding it, if it is to overcome the privilege, must show that the information is vital, not simply for the satisfaction of its curiosity, but for its ability to effectively and reasonably participate in social, political, and economic decision-making.

CARPIO, *J., concurring opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN; CAN NOT BE INVOKED IN CASE OF TREATY NEGOTIATIONS; REASONS.— If the Philippines does not respect the confidentiality of the offers and counter-offers of its negotiating partner State, then other countries will be reluctant to negotiate in a candid and frank manner with the Philippines. Negotiators of other countries

will know that Philippine negotiators can be forced to disclose publicly offers and counter-offers that their countries want to remain confidential even after the treaty signing. Thus, negotiators of such countries will simply repeat to Philippine negotiators offers and counter-offers that they can disclose publicly to their own citizens, which offers and counter-offers are usually more favorable to their countries. This denies to Philippine negotiators the opportunity to hear, and explore, other more balanced offers or counter-offers from negotiators of such countries. A writer on diplomatic secrets puts it this way: x x x Disclosure of negotiating strategy and goals impairs a party's ability to negotiate the most favorable terms, because a negotiating party that discloses its minimum demands insures that it will get nothing more than the minimum. Moreover, those involved in the practice of negotiations appear to be in agreement that publicity leads to 'grandstanding,' tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation. As Sissela Bok points out, if 'negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to 'play to the gallery . . . .' In fact, the public reaction may leave them little option. It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace. In the present case, at least one negotiating State – the Philippines – does not want to disclose publicly the offers and counter-offers, including its own. The Philippines is expected to enter into similar treaties with other countries. The Court cannot force the Executive branch to telegraph to other countries its possible offers and counter-offers that comprise our negotiating strategy. That will put Philippine negotiators at a great disadvantage to the prejudice of national interest. Offers and counter-offers in treaty negotiations are part of diplomatic secrets protected under the doctrine of executive privilege.

2. ID.; ID.; ID.; ID.; TREATY NEGOTIATIONS DISTINGUISHED FROM AWARDING OF CONTRACTS BY THE GOVERNMENT.— The negotiation of treaties is different from the awarding of contracts by government agencies. In diplomatic negotiations, there is a traditional expectation that

the offers and counter-offers of the negotiating States will remain confidential even after the treaty signing. States have honored this tradition and those that do not will suffer the consequences. There is no such expectation of keeping confidential the internal deliberations of government agencies after the awarding of contracts.

TINGA, *J., separate opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; BILL OF RIGHTS; RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN; THE NATURE OF BOTH "DELIBERATIVE PROCESS PRIVILEGE" AND "DIPLOMATIC SECRETS PRIVILEGE" MUST BE JOINTLY CONSIDERED IN RESOLVING THE PRIVILEGED CHARACTER OF JPEPA NEGOTIATIONS.— The *ponente* engages in a thorough and enlightening discussion on the importance and vitality of the diplomatic secrets privilege, and points out that such privilege, which is a specie of executive privilege, serves to balance the constitutional right to information invoked in this case. If I may add, in response to the Dissenting Opinion which treats the deliberative process privilege as "a distinct kind of executive privilege" from the "diplomatic secrets privilege," notwithstanding the distinction, both deliberative process privilege and diplomatic secrets privilege should be jointly considered if the question at hand, as in this case, involves such diplomatic correspondences related to treaty negotiations. The diplomatic character of such correspondences places them squarely within the diplomatic secrets privilege, while the fact that the ratification of such treaty will bestow on it the force and effect of law in the Philippines also places them within the ambit of the deliberate process privilege. Thus, it would not be enough to consider the question of privilege from only one of those two perspectives, as both species of executive privilege should be ultimately weighed and applied in conjunction with each other.

2. ID.; ID.; ID.; ID.; DOCUMENTS RELATING TO TREATY NEGOTIATIONS MUST NOT BE CONSIDERED AS PART OF PUBLIC RECORD SINCE IT WOULD IMPAIR THE ABILITY OF THE PHILIPPINES TO NEGOTIATE TREATIES OR AGREEMENTS WITH FOREIGN COUNTRIES.— In ascertaining the balance between executive

privilege and the constitutional right to information in this case, I likewise consider it material to consider the implications had the Court established a precedent that would classify such documents relating to treaty negotiations as part of the public record since it is encompassed within the constitutional right to information. The Dissenting Opinion is unfortunately unable to ultimately convince that establishing such a general rule would not set the Philippines so far apart from the general practice of the community of nations. For if indeed the Philippines would become unique among the governments of the world in establishing that these correspondences related to treaty negotiations are part of the public record, I fear that such a doctrine would impair the ability of the Philippines to negotiate treaties or agreements with foreign countries. The Philippines would become isolated from the community of nations, and I need not expound on the negative and destabilizing implications of such a consequence. It should be expected that national governments, including our own, would insist on maintaining the presumptive secrecy of all documents and correspondences relating to treaty negotiations. Such approach would be maintained upon no matter how innocuous, honest or above-board the privileged information actually is, since an acknowledgment that such information belongs to the public record would diminish a nation's bargaining power in the negotiation of treaties. This truth may be borne more so out of *realpolitik*, rather than the prevalence of a pristine legal principle, yet it is a political reality which this Court has to contend with since it redounds to the ultimate wellbeing of the Philippines as a sovereign nation. On the premise that at least a significant majority of the most relevant players in the international scene adhere to the basic confidentiality of treaty negotiations no matter the domestic implications of such confidentiality, then it can only be expected that such nations will hesitate, if not refuse outright, to negotiate treaties with countries which do not respect that same rule. x x x Where the contracting nations to a treaty share a common concern for the basic confidentiality of treaty negotiations it is understandable that such concern may evolve unto a firm norm of conduct between them for as long as no conflict between them in regard to the treaty emerges. Thus, with respect to the subject treaty the Government of the Philippines should expectedly heed Japan's normal interest in preserving the

confidentiality of the treaty negotiations and conduct itself accordingly in the same manner that our Government expects the Japanese Government to observe the protocol of confidentiality.

PUNO, *C.J., dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; EXECUTIVE DEPARTMENT; PRESIDENT; POWERS AND PREROGATIVES; THE REMARK IN THE U.S. CASE CURTISS-WRIGHT CANNOT BE RELIED ON TO JUSTIFY THAT THE PRESIDENT IS THE SOLE ORGAN FOR EXTERNAL RELATIONS.— Given this slice of U.S. history showing the allocation of power over international trade agreement negotiations between the executive and Congress in U.S. jurisdiction, **it will be turning somersaults with history to contend that the President is the sole organ for external relations.** The "sole organ" remark in **Curtiss-Wright** simply does not apply to the negotiation of international trade agreements in the U.S. where **Congress is allowed**, at the very least, to **indirectly participate in trade negotiations** through the setting of statutory limits to negotiating objectives and procedures, and to **almost directly negotiate** through the Congressional Oversight Group.

2. ID.; ID.; LEGISLATIVE DEPARTMENT; HOUSE OF REPRESENTATIVES; POWER OVER FOREIGN TRADE, RECOGNIZED. — In sum, while provision was made for granting authority to the President with respect to the fixing of tariffs, import and export quotas, and tonnage and wharfage dues, **the power of Congress over foreign trade,** and its authority to delegate the same to the President **by law, has consistently been constitutionally recognized.**

3. ID.; ID.; ID.; ID.; CONGRESS HAS POWER OVER THE SUBJECT MATTER OF THE JPEPA.— Turning to the case at bar, **Congress undoubtedly has power over the subject matter of the JPEPA**, as this agreement touches on the fixing of "tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts." **Congress can, in fact, revoke or amend the power of the President to fix these as authorized by law or the Tariff and Customs Code of 1978**. Congress can legislate and conduct an inquiry in aid of

legislation on this subject matter, as it did pursuant to House Resolution No. 551. The **purpose of the legislative inquiry in which the subject JPEPA documents are needed is to aid legislation**, which is **different from the purpose of the negotiations conducted by the Executive, which is to conclude a treaty**. Exercised within their proper limits, the power of the House of Representatives to conduct a legislative inquiry in aid of legislation and the power of the executive to negotiate a treaty should not collide with each other. It is worth noting that petitioner members of the House of Representatives are **not seeking to directly participate** in the negotiation of the JPEPA, **nor are they indirectly interfering** with the Executive's negotiation of the JPEPA. They seek access to the subject JPEPA documents for purposes of their inquiry, in aid of legislation, on the forging of bilateral trade and investment agreements with minimal public scrutiny and debate, as evinced in the title of **House Resolution No. 551, "Directing the Special Committee on Globalization to Conduct an Urgent Inquiry in Aid of Legislation on Bilateral Trade and Investment Agreements that Government Has Been Forging, with Far Reaching Impact on People's Lives and the Constitution But with Very Little Public Scrutiny and Debate."** In relation to this, the *ponencia* states, *viz*: Whether it can accurately be said that the Filipino people were not involved in the JPEPA negotiations is a question of fact which this Court need not resolve. Suffice it to state that respondents had presented documents purporting to show that public consultations were conducted on the JPEPA. Parenthetically, petitioners consider these "alleged consultations" as "woefully selective and inadequate." Precisely, the inquiry in aid of legislation under House Resolution No. 551 seeks to investigate the sufficiency of public scrutiny and debate on the JPEPA, considering its expansiveness, which is well within the foreign trade power of Congress. At this point, it is in fact impossible for petitioners to interfere with the JPEPA negotiations, whether directly or indirectly, as the negotiations have already been concluded. Be that as it may, the earlier discussion on the allocation of international trade powers between the Executive and Congress in U.S. jurisdiction has shown that it is not anathema to the preservation of the treaty-making powers of the President for Congress to indirectly participate in trade agreement negotiations.

4. ID.; ID.; EXECUTIVE DEPARTMENT; PRESIDENT; POWERS AND PREROGATIVES; EXECUTIVE PRIVILEGE, DEFINED AND CLASSIFIED.— In **Senate v. Ermita**, the Court defined "executive privilege" as the right of the President and high-level executive branch officials to withhold information from Congress, the courts, and the public. In the U.S., it is recognized that there are at least four kinds of executive privilege: (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges. In the case at bar, respondents invoke the state secrets privilege covering diplomatic or foreign relations and the deliberative process privilege.

5. ID.; ID.; ID.; ID.; ID.; ID.; CRITERIA IN DETERMINING THE APPLICABILITY OF DIPLOMATIC SECRETS PRIVILEGE.— In determining the applicability of the diplomatic secrets privilege to the case at bar, I **reiterate the primordial principle 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**. Thus, even while **Almonte** and **Senate v. Ermita** both recognized the state secrets privilege over diplomatic matters, and **Chavez** and *PMPF v. Manglapus* both acknowledged the confidentiality of inter-government exchanges **during** treaty negotiations, the validity of the claim of the diplomatic secrets privilege over the subject JPEPA documents shall be examined under the **particular circumstances of the case at bar**. I especially take note of the fact that unlike **PMPF v. Manglapus,** which involved a request for access to information **during negotiations** of a *military treaty*, the case at bar involves a request for information **after the conclusion of negotiations** of an **international trade agreement**.

6. ID.; ID.; ID.; ID.; ID.; ID.; HOW TO INVOKE THE DIPLOMATIC SECRETS PRIVILEGE.— *Almonte, Chavez, Senate v. Ermita,* **and** *PMPF v. Manglapus* did not discuss the manner of invoking the diplomatic secrets privilege. For the proper invocation of this privilege, *U.S. v. Reynolds* is instructive. This case involved the military secrets privilege, which can be analogized to the diplomatic secrets privilege, insofar as they are both based on the nature and the content of the information withheld. I submit that we should follow the procedure laid down in **Reynolds** to determine whether the

diplomatic secrets privilege is properly invoked, *viz*: 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 that 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. xxx xxx xxx 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.

7. ID.; ID.; ID.; ID.; ID.; ID.; REQUIREMENT FOR A CLAIM OF DIPLOMATIC SECRETS PRIVILEGE TO SUCCEED; APPLICATION.— For a claim of diplomatic secrets privilege to succeed, it is **incumbent upon respondents** to satisfy the Court that the disclosure of the subject JPEPA documents **after the negotiations have been concluded would prejudice our national interest, and that they should therefore be cloaked by the diplomatic secrets privilege.** It is the task of the Executive to show the Court the reason for the privilege **in the context in which it is invoked**, as required by *Senate v. Ermita*, just as the U.S. government did in **Reynolds**. Otherwise, the Court, which has the duty to determine with finality whether the circumstances are appropriate for a claim of privilege, will not have any basis for upholding or rejecting respondents' invocation of the privilege. The requirement to show the reason for the privilege is especially important in the case at bar, considering that the subject JPEPA documents are part of **trade agreement negotiations,** which involve the **interdependent powers of the Executive over treaty negotiations and the legislature over foreign trade, as recognized in both Philippine and U.S. jurisdictions.** Upon the Executive's showing of the reason and circumstances for invoking the diplomatic secrets privilege, the Court can then consider whether the application of the privilege to the information or

document in dispute is warranted. As the Executive is given the opportunity to show the applicability of the privilege, there is a **safeguard** for protecting what should rightfully be considered privileged information to uphold national interest. With respondents' failure to provide **reasons** for claiming the diplomatic secrets privilege **after** the conclusion of negotiations, the **inevitable conclusion is that respondents cannot withhold the subject JPEPA documents.**

8. ID.; ID.; ID.; ID.; ID.; ID.; DELIBERATIVE PROCESS PRIVILEGE, JUSTIFICATIONS OF.— In the U.S., it is settled jurisprudence that the **deliberative process privilege justifies** the government's withholding of 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." In 1958, the privilege was **first recognized** in a U.S. federal case, *Kaiser Aluminum Chemical Corp. v. United States*, in which the term "executive privilege" was also originally used. The Court sustained the following justification of the government for withholding a document: The document . . . contains opinions that were rendered to the Liquidator of War Assets by a member of his staff concerning a proposed sale of aluminum plants. **Those opinions do not necessarily reflect the views of, or represent the position ultimately taken by, the Liquidator of War Assets. A disclosure of the contents of documents of this nature would tend to discourage the staffs of Government agencies preparing such papers from giving complete and candid advice and would thereby impede effective administration of the functions of such agencies.** Thereupon, the Court etched out the **classic justification** of the **deliberative process privilege,** *viz:* **Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected** if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. The Court also threw in **public policy** and **public interest** as bases for the deliberative process privilege, *viz*: …Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen… There is a **public policy involved in this claim of privilege for this advisory opinion -the policy**

of open, frank discussion between subordinate and chief concerning administrative action. xxx xxx xxx … Viewing this claim of privilege for the intra-agency advisory opinion in its entirety, we determine that the Government's claim of privilege for the document is well-founded. It would be **definitely contrary to the public interest in our view for such an advisory opinion on governmental course of action to be produced by the United States** under the coercion of a bar against production of any evidence in defense of this suit for contract damages.

9. ID.; ID.; ID.; ID.; ID.; ID.; THE JUDICIAL BRANCH IS THE FINAL ARBITER OF WHETHER THE DELIBERATIVE PROCESS PRIVILEGE SHOULD APPLY.— The Court also held that the **judicial branch**, and not the executive branch, is the **final arbiter of whether the privilege should apply**, contrary to the government's assertion that the head of the relevant agency should be allowed to assert the privilege unilaterally.

10. ID.; ID.; ID.; ID.; ID.; ID.; THREE PURPOSES OF THE DELIBERATIVE PROCESS PRIVILEGE.— Courts and scholars have identified **three purposes** of the privilege: (1) to protect **candid discussions within an agency**; (2) to **prevent public confusion from premature disclosure of agency opinions** before the agency has established a final policy; and (3) to **protect against confusing the issues and misleading the public** by dissemination of documents suggesting **reasons and rationales for a course of action, when these were not in fact the ultimate reasons** for the agency's action.

11. ID.; ID.; ID.; ID.; ID.; ID.; TWO ESSENTIAL REQUISITES FOR A VALID ASSERTION OF DELIBERATIVE PROCESS PRIVILEGE.— Two requisites are essential for a valid assertion of the privilege: the material must be **pre-decisional** and **deliberative**. To be "**pre-decisional**," a document must be **generated before the adoption of an agency policy**. To be "**deliberative**," it must reflect the give-and-take of the consultative process. Both requirements stem from the privilege's "ultimate purpose (which) ... is to **prevent injury to the quality of agency decisions**" by allowing government officials freedom to debate alternative approaches in private. The deliberative process privilege **does not shield documents**

that simply state or explain a decision the government has already made; nor does the privilege cover material that is **purely factual**, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations. There must also be a **formal assertion** of the privilege by the head of the department in control of the information based on his actual personal consideration of the matter and an **explanation as to why the information sought falls within the scope of the privilege**.

12. ID.; ID.; ID.; ID.; ID.; ID.; DELIBERATIVE PROCESS PRIVILEGE AND PRESIDENTIAL COMMUNICATIONS PRIVILEGE, DISTINGUISHED; THE TWO PRIVILEGES HAVE THE SAME PURPOSE.— In our jurisdiction, the Court has had no occasion to recognize and rule on the applicability of the deliberative process privilege. In the recent case *Neri v. Senate Committees*, the Court recognized the claim of the **presidential communications privilege**, which is closely associated with the deliberative process privilege. In **In re Sealed Case** *(***Espy***)*, the distinction between the two privileges was explained, *viz*: Both are executive privileges designed to **protect executive branch decision-making**, but one (deliberative process privilege) applies to **decision-making of executive officials generally**, the other specifically to **decision-making of the President**. The presidential privilege is rooted in **constitutional separation of powers principles and the President's unique constitutional role**; the deliberative process privilege is primarily a **common law privilege**… Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege… Unlike the deliberative process privilege (which covers only **material that is pre-decisional and deliberative)**, the presidential communications privilege applies to **documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative** ones." The distinction notwithstanding, there is no reason not to recognize in our jurisdiction the deliberative process privilege, which has essentially the same purpose as the presidential communications privilege, except that it applies to executive officials in general.

13. ID.; ID.; ID.; ID.; ID.; ID.; ID.; JPEPA DOCUMENTS DO NOT COME WITHIN THE PURVIEW OF THE KIND OF INFORMATION WHICH THE DELIBERATIVE PROCESS PRIVILEGE MAY SHIELD.— It is my considered view that the subject JPEPA documents do not come within the purview of the kind of information which the deliberative process privilege shields in order to promote frank and candid discussions and protect **executive branch decision-making of the Philippine government**. The **initial offers** are not in the nature of "**advisory opinions**, **recommendations** and **deliberations**" similar to those submitted by the subordinate to the chief in a government agency, as in the seminal case of **Kaiser**. The **initial offer of the Philippines** is not a document that offers alternative courses of action to an executive official to aid in the decision-making of the latter, but is instead a proposal to **another government**, the Japanese government, to institute negotiations. The end in view of these negotiations is not a decision or policy of the Philippine government, but a joint decision or agreement between the Philippine and the Japanese governments. Likewise, the **final text of the JPEPA prior to signing** by the President is not in the nature of an advice or recommendation or deliberation by executive officials of the Philippine government, as it is the handiwork of **the Philippine and the Japanese negotiating panels working together**. The documents sought to be disclosed are **not of the same nature as internal deliberations** of the Department of Trade and Industry or the Philippine negotiating panel in crafting and deciding the initial offer of the Philippines or internal memoranda of Philippine government agencies to advise President Macapagal-Arroyo in her decision to sign the JPEPA. **Extending the mantle of protection of the deliberative process privilege to the initial offers of the Philippines and of Japan and the final JPEPA text prior to signing by President Macapagal-Arroyo will be tantamount to extending the protection of executive branch decision-making to the executive branch not only of the Philippine government, but also of the Japanese government, which, in trade agreement negotiations, represents an interest adverse to that of the Philippine government.** As seen from the rationale and history of the deliberative process privilege, this is **not the intent** of the deliberative process privilege. Given the nature of the subject JPEPA documents, it is the

diplomatic secrets privilege that can properly shield them upon sufficient showing of reasons for their confidentiality. Hence, the invocation of deliberative process privilege to protect the subject JPEPA documents must fail.

14. ID.; ID.; ID.; ID.; ID.; ID.; THE EXECUTIVE PRIVILEGE MUST BE INVOKED BY THE PRESIDENT OR THE EXECUTIVE SECRETARY BY THE ORDER OF THE PRESIDENT.— In *Senate v. Ermita***,** the Court also required that executive privilege **must be invoked by the President, or the Executive Secretary "by order of the President**,**"** unlike in U.S. jurisdiction where, as afore-discussed, the formal assertion of the head of the department claiming the privilege suffices. **In the case at bar**, the Executive Secretary invoked both the deliberative process privilege and the diplomatic secrets privilege **not "by order of the President,"** as his 23 June 2005 letter quoted above shows. Accordingly, the invocation of executive privilege was not properly made and was therefore without legal effect. *Senate v. Ermita* was decided on **20 April 2006** and became final and executory on **21 July 2006**. Hence, it may be argued that it cannot be used as a yardstick to measure whether respondent Secretary Ermita properly invoked executive privilege in his **23 June 2005** letter. It must be noted, however, that the case at bar has been pending decision even after the finality of *Senate v. Ermita*. During the time of its pendency, respondents failed to inform the Court whether Executive Secretary Ermita's position bore the imprimatur of the Chief Executive. The period of nearly two years from the time *Senate v. Ermita* became final up to the present is more than enough leeway for the respondents to comply with the requirement that executive privilege be invoked by the President, or the Executive Secretary "by order of the President." Contrary to the assertion of the *ponencia*, the Court would not be overly strict in exacting compliance with the *Senate v. Ermita* requirement, considering the two-year margin the Court has afforded respondents.

15. ID.; ID.; BILL OF RIGHTS; RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN; RATIONALE. — The intent of the constitutional right to information, as pointed out by Constitutional Commissioner Wilfrido V. Villacorta, is "to adequately inform the public so that nothing vital in state affairs is kept from them." In *Valmonte v. Belmonte*, we

explained the rationale of the right of access to information, *viz*: **An informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon is vital to the democratic government envisioned under our Constitution**. The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated… xxx xxx xxx …The right of access to information ensures that these freedoms are not rendered nugatory by the government's monopolizing pertinent information. For an essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this **open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in a discussion are aware of the issues and have access to information relating thereto can such bear fruit. The right to information is an essential premise of a meaningful right to speech and expression.** But this is not to say that the right to information is merely an adjunct of and therefore restricted in application by the exercise of the freedoms of speech and of the press. Far from it. **The right to information goes hand-in-hand with the constitutional policies of *full public disclosure*** (**footnote omitted**) ***and honesty in the public service*** (**footnote omitted**). **It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government.**

16. ID.; ID.; ID.; ID.; MEANING OF "MATTERS OF PUBLIC CONCERN."— The right to information was written in broad strokes, as it merely required that information sought to be disclosed must be a **matter of public concern**. In *Legaspi v. Civil Service Commission*, the Court elucidated on the meaning of "matters of public concern," *viz*: In determining whether

or not a particular information is of public concern, there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these **directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen.** In the final analysis, it is for the courts to determine on a case by case basis whether the **matter at issue is of interest or importance, as it relates to or affects the public.**

17. ID.; ID.; ID.; ID.; THE CONSTITUTIONAL PROVISION ON THE RIGHT TO INFORMATION IS SELF-EXECUTORY.— Under both the 1973 and the 1987 Constitutions, the right to information is **self-executory**. It is a public right that belongs to and can be invoked by the people. Consequently, **every citizen** has the "standing" to challenge any violation of the right and may seek its enforcement. The **self-executory status** and the significance in a democracy of the right of access to information were emphasized by the Court in *Gonzales v. Narvasa, viz*: Under both the 1973 (footnote omitted) and 1987 Constitutions, this (the right to information) is a **self-executory provision which can be invoked by any citizen before the courts…** Elaborating on the significance of the right to information, the Court said *in Baldoza v. Dimaano* that "[t]he incorporation of this right in the Constitution is a **recognition of the fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decision-making if they are denied access to information of general interest. Information is needed to enable the members of society to cope with the exigencies of the times**."

18. ID.; ID.; ID.; ID.; THE GENERAL RULE AND THE EXCEPTION ON THE CONSTITUTIONAL RIGHT TO INFORMATION.— With the elevation of the right to information to constitutional stature, the starting point of the inquiry is the **general rule** that the public has a right to information on matters of public concern and the State has a corresponding duty to allow public access to such information. It is recognized, however, that the constitutional guarantee admits of **exceptions** such as "limitations as may be provided

by law." Thus, as held in **Legaspi**, "in every case, the availability of access to a particular public record" is circumscribed by two elements: (1) the information is "of **public concern** or one that involves public interest," and, (2) it is "**not exempt** by law from the operation of the constitutional guarantee."

19. ID.; ID.; ID.; ID.; E.O.464, WHICH IS ALLEGED AS BASIS FOR EXEMPTION OF THE JPEPA DOCUMENTS FROM THE OPERATION OF THE RIGHT TO INFORMATION, APPLIES ONLY TO EXECUTIVE PRIVILEGE INVOKED AGAINST THE LEGISLATURE IN THE CONTEXT OF INQUIRIES IN AID OF LEGISLATION, AND NOT TO EXECUTIVE PRIVILEGE INVOKED AGAINST CITIZENS ASSERTING THEIR CONSTITUTIONAL RIGHT TO INFORMATION.— Respondents contend that Executive Order 464 (E.O. 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," provides basis for exemption of the subject JPEPA documents from the operation of the constitutional guarantee of access to information. They argue that while *Senate v. Ermita* struck down Sections 2(b) and 3 of E.O. 464 as unconstitutional, Section 2(a), which enumerates the scope of executive privilege including information prior to the conclusion of treaties, was spared from a declaration of constitutional infirmity. However, it is easily discernible from the title and provisions of E.O. 464 that **this presidential issuance applies to executive privilege invoked against the legislature in the context of inquiries in aid of legislation, and not to executive privilege invoked against private citizens asserting their constitutional right to information.** It thus cannot be used by respondents to discharge their burden of showing basis for exempting the subject JPEPA documents from disclosure to petitioners suing as private citizens.

20. ID.; ID.; ID.; ID.; DIPLOMATIC SECRETS PRIVILEGE IS A QUALIFIED PRIVILEGE OR QUALIFIED EXEMPTION FROM THE COVERAGE OF THE RIGHT TO INFORMATION.— It is my considered view that the diplomatic secrets privilege is a qualified privilege or qualified exemption from the coverage of the right to information. x x x The above

deliberations show that negotiation of treaties and executive agreements may or may not come within the purview of "transactions" covered by the right to information, **subject to reasonable safeguards to protect national interest**. In other words, the diplomatic secrets privilege over treaty negotiations may provide a ground for exemption, but **may be overcome if there are reasonable safeguards to protect the national interest**. It is thus **not an absolute exemption or privilege, but a qualified one**. The Freedom of Information Act 2000 of the **United Kingdom** provides that when an exemption is **qualified, the right to information will not be upheld only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.** The Act treats as **qualified exemptions** information that "would be **likely to prejudice**…relations between the United Kingdom and any other State" and "confidential information obtained from a State other than the United Kingdom…." As such, these exemptions may be overcome by a higher public interest in disclosure.

21. ID.; ID.; ID.; ID.; THE TEST TO USE IN ADJUDICATING THE CONSTITUTIONAL RIGHT TO INFORMATION *VIS-À-VIS* EXECUTIVE PRIVILEGE IS THE "BALANCING OF INTEREST" AND NOT THE "SHOWING OF NEED".— While I agree with the *ponencia's* treatment of the diplomatic secrets privilege as a qualified privilege and its recognition of the need to formulate a weighing test, it is my humble view that, contrary to its position, we cannot use the test laid down in *U.S. v. Nixon, Senate Select Committee v. Nixon,* and *In re Sealed Case (Espy)* that the Court should determine whether there is a "sufficient showing of need" for the disclosure of disputed documents. **None of these three cases can provide the proper test**. The requirement of "showing of need" applies when executive privilege is invoked against an **evidentiary need for information, such as in the case of another government entity seeking information in order to perform its function;** that is, the court in *U.S. v. Nixon*, the Senate in **Senate Select Committee**, and the grand jury in **In re Sealed Case (Espy). In the adjudication of rights guaranteed in the Constitution, however, the Court has never used "showing of need" as a test to uphold rights or allow inroads into them.** I respectfully submit that we ought not to weigh the need to exercise the right to free speech or free assembly

or free practice of religion. These are freedoms that have been won by all for the benefit of all, without the requisite showing of need for entitlement. When we valuate these constitutional rights, we do not consider their necessity for the performance of a function, as in the case of government branches and entities. The **question** in the adjudication of constitutional rights is whether the incursion into a right is **peripheral or essential**, as when there is only a "**soft restraint**" on the potential extraditee's right to procedural due process; or whether there is a **heavier public interest** that must prevail over a constitutional right in order to preserve an ordered society, such as when there is a "**clear and present danger**" of a substantive evil that the State has a right to prevent as demonstrated in free speech cases, or when there is a "**compelling state interest**" that must override the free exercise of religion. **The right to information lies at the heart of a government that is not only republican but also democratic**. For this reason, Article III, Section 7 of the 1987 Constitution, calls for "an informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon is vital to the democratic government envisioned under our Constitution." Thus, employing the **"balancing of interests" test**, the public interest in upholding this constitutional right of the public to information must be carefully **balanced** with the public interest in nondisclosure of information in relation to treaty negotiations. This test is in line with the approach adopted in the right to access statute of the United Kingdom and New Zealand. There is a **world of difference** between employing the "balancing of interests" test and the "showing of need" test adopted by the *ponencia* from *U.S. v. Nixon, Senate Select Committee v. Nixon,* and *In re Sealed Case (Espy).* In *U.S. v. Nixon,* the "showing of need" was necessary, as the information was being sought by a court as **evidence in a criminal proceeding.** In **Senate Select Committee**, the information was being sought by the Senate to **resolve conflicting testimonies in an investigation conducted in the exercise of its oversight functions over the executive branch and in aid of legislation pertaining to executive wrongdoing.** Finally, in *In re Sealed Case (Espy),* the information was being sought by the grand jury to **investigate whether a government official had**

committed a crime. x x x The right to information is a constitutional right **in and of itself** and does not derive its significance only in relation to the exercise of another right, such as the right to free speech or a free press if that is the kind of "function" of an individual that can be equated with the functions of government agencies in the above cases cited by the *ponencia*. To reiterate, ***Valmonte*** teaches that the right to information is not merely an adjunct of the right to free speech and a free press. Stated another way, **the right to information is an end in itself**, even as it may be exercised in furtherance of other rights or purposes of an individual. To say that one exercises the right to information simply to be informed, and not because of a particular need, is not a meaningless tautology. Thus, instead of using "showing of need" as a passport to access purportedly privileged information, as in the case of government entities needing information to perform a **constitutionally mandated duty**, the yardstick with respect to individuals exercising a **constitutionally granted right** to information should be the importance of the right and the public interest in upholding it. Prescinding from these premises, I respectfully submit that the test laid down by the *ponencia* — which predicates access to information on a "showing of need" understood in the context of *U.S. v. Nixon, Senate Select Committee v. Nixon,* and *In re Sealed Case (Espy)* — will have the **pernicious effect** of subverting the nature, purpose and wisdom of including the "right to information on matters of public concern" in the Bill of Rights as shown in the above-quoted deliberations of the 1986 Constitutional Commission. It sets an **emasculating precedent** on the interpretation of this all-important constitutional right and **throws into perdition** the philosophy of an open government, painstakingly enshrined by the framers of the 1987 Constitution in the many scattered provisions from beginning to end of our fundamental law.

22. ID.; ID.; ID.; ID.; BALANCING OF INTERESTS TEST, APPLIED.— Applying the **balancing of interests test** to the case at bar leads to the ineluctable conclusion that the scale must be tilted in favor of the people's right to information for, as shown earlier, the **records are bereft of basis for finding a public interest to justify the withholding of the subject JPEPA documents after the negotiations** have been concluded. Respondents have **not shown a sufficient and**

specific public interest to defeat the recognized public interest in exercising the constitutional right to information to **widen the role of the citizenry in governmental decision-making by giving them a better perspective of the vital issues confronting the nation, and to check abuse in government.** As aforestated, the **negotiations are already concluded** and the JPEPA has been submitted to the Senate for its concurrence. The **treaty has thus entered the ultimate stage** in which the people can exercise their right to participate in the discussion on whether the Senate should concur in its ratification or not. **This right will be diluted, unless the people can have access to the subject JPEPA documents.** The *ponencia* cites *PMPF v. Manglapus, Chavez v. PCGG and Chavez v. Public Estates Authority and Senate v. Ermita* as authorities for holding that the subject JPEPA documents are traditionally privileged; and emphasizes that "(t)he privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances." This approach espoused by the *ponencia*, however, deviates from the fundamental teaching of *Senate v. Ermita* that a claim of executive privilege may be held "valid or not **depending on the ground invoked to justify it and the context in which it is made**." In *U.S. v. Nixon*, the leading U.S. case on executive privilege, the U.S. Supreme Court was careful to delineate the applicability of the principles of the case in stating that "(w)e are not here 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. 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." I respectfully submit that the **Court likewise ought to take half a pause in making comparisons and distinctions between the above Philippine cases cited by the *ponencia* and the case at bar; and examine the underlying reasons for these comparisons and distinctions, lest we mistake apples for oranges**. That the application of the "showing of need" test to executive privilege cases involving branches of government and of the "balancing of interests" test to cases involving the constitutional

right to information could yield different results is not an absurdity. The difference in results would not be any more absurd than it would be for an accused to be adjudged innocent in a criminal action but liable in a civil action arising from one and the same act he committed. There is no absurdity when a distinction is made where there are real differences.

AZCUNA, *J., separate dissenting opinion*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; LEGISLATIVE DEPARTMENT; HOUSE OF REPRESENTATIVES; POWERS; EQUALLY IMPORTANT AND FUNDAMENTAL IS THE POWER AND DUTY OF CONGRESS TO INFORM AND ENLIGHTEN THE ELECTORATE BY WAY OF INVESTIGATION.— The *ponencia* regrettably assumes that the power of Congress, when it investigates, is either in aid of legislation or by way of oversight. What appears to have been forgotten is an equally important and fundamental power and duty of Congress and that is its informing function by way of investigating for the purpose of enlightening the electorate. Arthur M. Schlesinger, in THE IMPERIAL PRESIDENCY, aptly quotes Wilson on CONGRESSIONAL GOVERNMENT on this power: Congress's "only whip," Wilson said, "is investigation," and that "the chief purpose of investigation, even more than the direction of affairs, was the enlightenment of the electorate. The inquisitiveness of such bodies as Congress is the best conceivable source of information…. The informing function of Congress should be preferred even to its legislative function." For "the only really self-governing people is that people which discusses and interrogates its administration." This is all the more compelling in our polity because our Constitution is replete and suffused with provisions on transparency, accountability and the right of the people to know the facts of governance, as pointed out by the Chief Justice.

2. ID.; ID.; BILL OF RIGHTS; RIGHT TO INFORMATION ON MATTERS OF PUBLIC CONCERN; AS TRANSPARENCY OF THE GOVERNMENT IS THE PREVALENT TREND AND NON-DISCLOSURE IS THE EXCEPTION, IT IS THE BURDEN OF THE PRESIDENT TO SHOW THAT A PARTICULAR EXCEPTION OBTAINS IN A CASE WHERE THE PRIVILEGE IS CLAIMED.— Transparency is in fact the prevalent trend and non-disclosure is the diminishing exception. The reason lies in the recognition under international

law of the fundamental human right of a citizen to take part in governance, as set forth in the 1948 United Nations Universal Declaration of Human Rights, a right that cannot be realized without access to information. And even in the United States from where the privilege originated no President has claimed a general prerogative to withhold but rather the Executive has claimed particular exceptions to the general rule of unlimited executive disclosure: Conceding the idea of Congress as the grand inquest of the nation, Presidents only claimed particular exceptions to the general rule of unlimited executive disclosures – Washington, the protector of the exclusive constitutional jurisdiction of one house of Congress against invasion by the other house; Jefferson, the protector of presidential relationship within the executive branch and the defense of that branch against congressional harassment; Taylor, the protection of ongoing investigation and litigation; Polk, the protection of state secrets in intelligence and negotiation. While exceptions might accumulate, no President had claimed a general and absolute prerogative to withhold. The President, therefore, has the burden to show that a particular exception obtains in every case where the privilege is claimed. This has not been done in the present case. All that the Senate is asking for are copies of the starting offers of the Philippines and of Japan. What is the deep secret in those papers? If the final product is and has been disclosed, why cannot the starting offers be revealed? How can anyone, the Senate or the electorate included, fathom – to use the favorite word of a counsel – the end product if one is not told the starting positions?

APPEARANCES OF COUNSEL

Ma. Tanya Karina A. Lat and Ibarra M. Gutierrez and *Antonio L. Salvador* for petitioners.

The Solicitor General for respondents.

D E C I S I O N

CARPIO MORALES, *J.*:

Petitioners – non-government organizations, Congresspersons, citizens and taxpayers – seek via the present petition for *mandamus*

and prohibition to obtain from respondents the full text of the Japan-Philippines Economic Partnership Agreement (JPEPA) including the Philippine and Japanese offers submitted during the negotiation process and all pertinent attachments and annexes thereto.

Petitioners Congressmen Lorenzo R. Tañada III and Mario Joyo Aguja filed on January 25, 2005 House Resolution No. 551 calling for an inquiry into the bilateral trade agreements then being negotiated by the Philippine government, particularly the JPEPA. The Resolution became the basis of an inquiry subsequently conducted by the House Special Committee on Globalization (the House Committee) into the negotiations of the JPEPA.

In the course of its inquiry, the House Committee requested herein respondent Undersecretary Tomas Aquino (Usec. Aquino), Chairman of the Philippine Coordinating Committee created under Executive Order No. 213 ("CREATION OF A PHILIPPINE COORDINATING COMMITTEE TO STUDY THE FEASIBILITY OF THE JAPAN-PHILIPPINES ECONOMIC PARTNERSHIP AGREEMENT")[1] to study and negotiate the proposed JPEPA, and to furnish the Committee with a copy of the latest draft of the JPEPA. Usec. Aquino did not heed the request, however.

Congressman Aguja later requested for the same document, but Usec. Aquino, by letter of November 2, 2005, replied that the Congressman shall be provided with a copy thereof "once the negotiations are completed and as soon as a thorough legal review of the proposed agreement has been conducted."

In a separate move, the House Committee, through Congressman Herminio G. Teves, requested Executive Secretary Eduardo Ermita to furnish it with "all documents on the subject including the latest draft of the proposed agreement, the requests and offers *etc*."[2] Acting on the request, Secretary Ermita, by letter of June 23, 2005, wrote Congressman Teves as follows:

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[1] Effective May 28, 2003.

[2] Annex "F" of Petition, *rollo*, p. 95.

In its letter dated 15 June 2005 (copy enclosed), [the] D[epartment of] F[oreign] A[ffairs] explains that **the Committee's request to be furnished all documents on the JPEPA may be difficult to accomplish at this time, since the proposed Agreement has been a work in progress for about three years**. A copy of the draft JPEPA will however be forwarded to the Committee as soon as the text thereof is settled and complete. (Emphasis supplied)

Congressman Aguja also requested NEDA Director-General Romulo Neri and Tariff Commission Chairman Edgardo Abon, by letter of July 1, 2005, for copies of the latest text of the JPEPA.

Chairman Abon replied, however, by letter of July 12, 2005 that the Tariff Commission does not have a copy of the documents being requested, albeit he was certain that Usec. Aquino would provide the Congressman with a copy "once the negotiation is completed." And by letter of July 18, 2005, NEDA Assistant Director-General Margarita R. Songco informed the Congressman that his request addressed to Director-General Neri had been forwarded to Usec. Aquino who would be "in the best position to respond" to the request.

In its third hearing conducted on August 31, 2005, the House Committee resolved to issue a subpoena for the most recent draft of the JPEPA, but the same was not pursued because by Committee Chairman Congressman Teves' information, then House Speaker Jose de Venecia had requested him to hold in abeyance the issuance of the subpoena until the President gives her consent to the disclosure of the documents.[3]

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[3] The Petition quoted the following statement of Congressman Teves appearing in the transcript of the Committee hearing held on October 12, 2005:

THE CHAIRPERSON. Now I call on Usec. Aquino to furnish us a copy of the draft JPEPA and enunciate to this body the positive as well as the negative impact of said agreement. Is this the draft that the government will sign in December or this will still be subjected to revisions in the run-up to its signing? x x x **We requested also to subpoena this but then the Speaker requested me to hold in abeyance because he wanted to get a (sic) consent of the President before we can x x x the department can furnish us a copy of this agreement.** (*Rollo*, p. 32)

Amid speculations that the JPEPA might be signed by the Philippine government within December 2005, the present petition was filed on December 9, 2005.[4] The agreement was to be later signed on September 9, 2006 by President Gloria Macapagal-Arroyo and Japanese Prime Minister Junichiro Koizumi in Helsinki, Finland, following which the President endorsed it to the Senate for its concurrence pursuant to Article VII, Section 21 of the Constitution. To date, the JPEPA is still being deliberated upon by the Senate.

The JPEPA, which will be the first **bilateral** free trade agreement to be entered into by the Philippines with another country in the event the Senate grants its consent to it, covers a broad range of topics which respondents enumerate as follows: trade in goods, rules of origin, customs procedures, paperless trading, trade in services, investment, intellectual property rights, government procurement, movement of natural persons, cooperation, competition policy, mutual recognition, dispute avoidance and settlement, improvement of the business environment, and general and final provisions.[5]

While the final text of the JPEPA has now been made accessible to the public since September 11, 2006,[6] respondents do not dispute that, at the time the petition was filed up to the filing of petitioners' Reply – when the JPEPA was still being negotiated – the initial drafts thereof were kept from public view.

Before delving on the substantive grounds relied upon by petitioners in support of the petition, the Court finds it necessary to first resolve some material procedural issues.

Standing

For a petition for *mandamus* such as the one at bar to be given due course, it must be instituted by a party aggrieved by

[4] *Id*. at 16.

[5] Annex "A", Comment, *rollo*, p. 207.

[6] Respondents' Manifestation dated September 12, 2007; *vide* "Business Philippines: A Department of Trade and Industry Website" at www.business.gov.ph, particularly www.business.gov.ph/DTI_News.php?contentID=136 (visited August 9, 2007).

the alleged inaction of any tribunal, corporation, board or person which unlawfully excludes said party from the enjoyment of a legal right.[7] Respondents deny that petitioners have such standing to sue. "[I]n the interest of a speedy and definitive resolution of the substantive issues raised," however, respondents consider it sufficient to cite a portion of the ruling in *Pimentel v. Office of Executive Secretary*[8] which emphasizes the need for a "personal stake in the outcome of the controversy" on questions of standing.

In a petition anchored upon the right of the people to information on matters of public concern, which is a public right by its very nature, petitioners need not show that they have any legal or special interest in the result, it being sufficient to show that they are citizens and, therefore, part of the general public which possesses the right.[9] As the present petition is anchored on the right to information and petitioners are all suing in their capacity as citizens and groups of citizens including petitioners-members of the House of Representatives who additionally are suing in their capacity as such, the standing of petitioners to file the present suit is grounded in jurisprudence.

Mootness

Considering, however, that "[t]he principal relief petitioners are praying for is the disclosure of the contents of the JPEPA prior to its finalization between the two States parties,"[10] public disclosure of the text of the JPEPA after its signing by the President, during the pendency of the present petition, has been largely rendered moot and academic.

With the Senate deliberations on the JPEPA still pending, the agreement as it now stands cannot yet be considered as

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[7] *Legaspi v. Civil Service Commission*, G.R. No. 72119, May 29, 1987; 150 SCRA 530, 535.

[8] G.R. No. 158088, July 6, 2005; 462 SCRA 622, 630-631.

[9] *Supra* note 7 at 536.

[10] Reply to the Comment of the Solicitor General, *rollo*, p. 319 (underscoring supplied).

final and binding between the two States. Article 164 of the JPEPA itself provides that the agreement does not take effect immediately upon the signing thereof. For it must still go through the procedures required by the laws of each country for its entry into force, *viz*:

> Article 164
> Entry into Force
>
> This Agreement shall enter into force on the thirtieth day after the date on which the Governments of the Parties exchange diplomatic notes informing each other **that their respective legal procedures necessary for entry into force of this Agreement have been completed.** It shall remain in force unless terminated as provided for in Article 165.[11] (Emphasis supplied)

President Arroyo's endorsement of the JPEPA to the Senate for concurrence is part of the legal procedures which must be met prior to the agreement's entry into force.

The text of the JPEPA having then been made accessible to the public, the petition has become moot and academic to the extent that it seeks the disclosure of the "full text" thereof.

The petition is not entirely moot, however, because petitioners seek to obtain, not merely the text of the JPEPA, but also the Philippine and Japanese offers in the course of the negotiations.[12]

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[11] Business Philippines: A Department of Trade and Industry Website, http://www.business.gov.ph/filedirectory/JPEPA.pdf, accessed on June 12, 2007.

[12] By Resolution dated August 28, 2007, this Court directed the parties to manifest whether the Philippine and Japanese offers have been made accessible to the public just like the full text of the JPEPA and, if not, whether petitioners still intend to pursue their prayer to be provided with copies thereof. In compliance, petitioners manifested that the offers have not yet been made public and reiterated their prayer that respondents be compelled to provide them with copies thereof, including all pertinent attachments and annexes thereto (Manifestation and Motion dated September 17, 2007). Respondents, on the other hand, asserted that the offers have **effectively** been made accessible to the public since September 11, 2006 (Manifestation dated September 12, 2007). Respondents' claim does not persuade, however. By their own manifestation, the documents posted on the DTI website on that date were

A discussion of the substantive issues, insofar as they impinge on petitioners' demand for access to the Philippine and Japanese offers, is thus in order.

Grounds relied upon by petitioners

Petitioners assert, *first*, that the refusal of the government to disclose the documents bearing on the JPEPA negotiations violates their right to information on matters of public concern[13] and contravenes other constitutional provisions on transparency, such as that on the policy of full public disclosure of all transactions involving public interest.[14] *Second*, they contend that non-disclosure of the same documents undermines their right to effective and reasonable participation in all levels of social, political, and economic decision-making.[15] *Lastly*, they proffer that divulging the contents of the JPEPA only after the agreement has been concluded will effectively make the Senate into a mere rubber stamp of the Executive, in violation of the principle of separation of powers.

Significantly, the grounds relied upon by petitioners for the disclosure of the **latest text** of the JPEPA are, except for the last, the same as those cited for the disclosure of the Philippine and Japanese **offers**.

The first two grounds relied upon by petitioners which bear on the merits of respondents' claim of privilege shall be discussed.

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only the following: (1) Joint Statement on the Occasion of the Signing of the Agreement between Japan and the Republic of the Philippines, (2) the full text of the JPEPA itself and its annexes, (3) the JPEPA implementing Agreement, and (4) "resource materials on the JPEPA including presentations of the [DTI] during the hearings of the Senate's Committee on Trade and Commerce and Committee on Economic Affairs." While these documents no doubt provide very substantial information on the JPEPA, the publication thereof still falls short of addressing the prayer of petitioners to be provided with copies of the Philippine and Japanese offers. Thus, the petition, insofar as it prays for access to these offers, has not become moot.

[13] CONSTITUTION, Art. III, Sec. 7.

[14] *Id*. at Art. II, Sec. 28.

[15] *Id*. at Art. XIII, Sec. 16.

The last, being purely speculatory given that the Senate is still deliberating on the JPEPA, shall not.

The JPEPA is a matter of public concern

To be covered by the right to information, the information sought must meet the threshold requirement that it be a matter of public concern. *Apropos* is the teaching of *Legaspi v. Civil Service Commission*:

> In determining whether or not a particular information is of public concern there is no rigid test which can be applied. 'Public concern' like 'public interest' is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen. In the final analysis, it is for the courts to determine on a case by case basis whether the matter at issue is of interest or importance, as it relates to or affects the public.[16] (Underscoring supplied)

From the nature of the JPEPA as an international trade agreement, it is evident that the Philippine and Japanese offers submitted during the negotiations towards its execution are matters of public concern. This, respondents do not dispute. They only claim that diplomatic negotiations are covered by the doctrine of **executive privilege**, thus constituting an exception to the right to information and the policy of full public disclosure.

Respondents' claim of privilege

It is well-established in jurisprudence that neither the right to information nor the policy of full public disclosure is absolute, there being matters which, albeit of public concern or public interest, are recognized as privileged in nature. The types of information which may be considered privileged have been elucidated in *Almonte v. Vasquez*,[17] *Chavez v. PCGG*,[18] *Chavez*

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[16] *Supra* note 7 at 541.

[17] 314 Phil. 150 (1995).

[18] 360 Phil. 133 (1998).

v. Public Estate's Authority,[19] and most recently in *Senate v. Ermita*[20] where the Court reaffirmed the validity of the doctrine of executive privilege in this jurisdiction and dwelt on its scope.

Whether a claim of executive privilege is valid depends on the ground invoked to justify it and the context in which it is made.[21] In the present case, the ground for respondents' claim of privilege is set forth in their **Comment**, *viz:*

> x x x The categories of information that may be considered privileged includes matters of diplomatic character and under negotiation and review. In this case, the privileged character of the **diplomatic negotiations** has been categorically invoked and clearly explained by respondents particularly respondent DTI Senior Undersecretary.
>
> The documents on the proposed JPEPA as well as the text which is subject to negotiations and legal review by the parties fall under the exceptions to the right of access to information on matters of public concern and policy of public disclosure. They come within the coverage of executive privilege. At the time when the Committee was requesting for copies of such documents, the negotiations were ongoing as they are still now and the text of the proposed JPEPA is still uncertain and subject to change. Considering the status and nature of such documents then and now, these are evidently covered by executive privilege consistent with existing legal provisions and settled jurisprudence.
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> Practical and strategic considerations likewise counsel against the disclosure of the "rolling texts" which may undergo radical change or portions of which may be totally abandoned. Furthermore, the **negotiations of the representatives of the Philippines as well as of Japan must be allowed to explore alternatives in the course of the negotiations in the same manner as judicial deliberations and working drafts of opinions are accorded strict confidentiality.**[22] (Emphasis and underscoring supplied)

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[19] 433 Phil. 506 (2002).

[20] G.R. No. 169777, April 20, 2006, 488 SCRA 1.

[21] *Id.* at 51.

[22] *Rollo*, pp. 191-192.

The ground relied upon by respondents is thus not simply that the information sought involves a diplomatic matter, but that it pertains to diplomatic negotiations then in progress.

Privileged character of diplomatic negotiations

The privileged character of diplomatic negotiations has been recognized in this jurisdiction. In discussing valid limitations on the right to information, the Court in *Chavez v. PCGG* held that "information on inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest."[23] Even earlier, the same privilege was upheld in *People's Movement for Press Freedom (PMPF) v. Manglapus*[24] wherein the Court discussed the reasons for the privilege in more precise terms.

In *PMPF v. Manglapus*, the therein petitioners were seeking information from the President's representatives on the state of the then on-going negotiations of the RP-US Military Bases Agreement.[25] The Court denied the petition, stressing that "**secrecy of negotiations with foreign countries is not violative** of the constitutional provisions of freedom of speech or of the press nor **of the freedom of access to information**." The Resolution went on to state, thus:

> **The nature of diplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature.** Although much has been said about "open"

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[23] 360 Phil. 133, 764 (1998), citing V RECORD OF THE CONSTITUTIONAL COMMISSION 25 (1986).

[24] G.R. No. 84642, Resolution of the Court *En Banc* dated September 13, 1988.

[25] Specifically, petitioners therein asked that the Court order respondents to (1) open to petitioners their negotiations/sessions with the U.S. counterparts on the agreement; (2) reveal and/or give petitioners access to the items which they have already agreed upon; and (3) reveal and/or make accessible the respective positions on items they have not agreed upon, particularly the compensation package for the continued use by the U.S. of their military bases and facilities in the Philippines.

and "secret" diplomacy, with disparagement of the latter, Secretaries of State Hughes and Stimson have clearly analyzed and justified the practice. In the words of Mr. Stimson:

> "**A complicated negotiation . . . cannot be carried through without many, many private talks and discussion, man to man; many tentative suggestions and proposals. Delegates from other countries come and tell you in confidence of their troubles at home and of their differences with other countries and with other delegates; they tell you of what they would do under certain circumstances and would not do under other circumstances. . . If these reports . . . should become public . . . who would ever trust American Delegations in another conference?** (United States Department of State, Press Releases, June 7, 1930, pp. 282-284.)."

x x x x x x x x x

There is frequent criticism of the secrecy in which negotiation with foreign powers on nearly all subjects is concerned. This, it is claimed, is incompatible with the substance of democracy. As expressed by one writer, "It can be said that there is no more rigid system of silence anywhere in the world." (E.J. Young, *Looking Behind the Censorship*, J. B. Lippincott Co., 1938) President Wilson in starting his efforts for the conclusion of the World War declared that we must have "open covenants, openly arrived at." He quickly abandoned his thought.

No one who has studied the question believes that such a method of publicity is possible. **In the moment that negotiations are started, pressure groups attempt to "muscle in." An ill-timed speech by one of the parties or a frank declaration of the concession which are exacted or offered on both sides would quickly lead to widespread propaganda to block the negotiations. After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved.** (*The New American Government and Its Works*, James T. Young, 4th Edition, p. 194) (Emphasis and underscoring supplied)

Still in *PMPF v. Manglapus*, the Court adopted the doctrine in *U.S. v. Curtiss-Wright Export Corp*.[26] that the President is

[26] 299 U.S. 304 (1936).

the sole organ of the nation in its negotiations with foreign countries, *viz*:

"x x x In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, **"The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."** Annals, 6th Cong., col. 613. . . (Emphasis supplied; underscoring in the original)

Applying the principles adopted in *PMPF v. Manglapus,* it is clear that while the final text of the JPEPA may not be kept perpetually confidential – since there should be "ample opportunity for discussion before [a treaty] is approved" – the offers exchanged by the parties during the negotiations continue to be privileged even after the JPEPA is published. It is reasonable to conclude that the Japanese representatives submitted their offers with the understanding that "**historic confidentiality**"[27] would govern the same. Disclosing these offers could impair the ability of the Philippines to deal not only with Japan but with other foreign governments **in future negotiations**.

A ruling that Philippine offers in treaty negotiations should now be open to public scrutiny would discourage future Philippine

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[27] *Vide Xerox Corp. v. U.S.* (12 Cl.Ct. 93). Against the claim of a taxpayer for the production of a letter from the Inland Revenue of the United Kingdom to the associate commissioner of the Internal Revenue Service (IRS), defendant asserted a claim of privilege, relying on the affidavit of Lawrence B. Gibbs, Commissioner of IRS, which stated that the production of the letter "would impair the United States government's ability to deal with the tax authorities of foreign governments * * * by breaching the **historic confidentiality** of negotiations between the United States and foreign sovereigns * * *." (Emphasis supplied) The U.S. court therein ruled thus: "Given the context in which the letter in question was written, it is reasonable to conclude that frank and honest expression of views on the treaty language in issue were expressed, views that ostensibly were expressed in the belief that "historic confidentiality" would govern such expressions." (Underscoring supplied)

representatives from frankly expressing their views during negotiations. While, on first impression, it appears wise to deter Philippine representatives from entering into compromises, it bears noting that treaty negotiations, or any negotiation for that matter, normally involve a process of *quid pro quo*, and **oftentimes negotiators have to be willing to grant concessions in an area of lesser importance in order to obtain more favorable terms in an area of greater national interest**. *Apropos* are the following observations of Benjamin S. Duval, Jr.:

> x x x **[T]hose involved in the practice of negotiations appear to be in agreement that publicity leads to "grandstanding," tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation.** As Sissela Bok points out, if "negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to 'play to the gallery . . .'' In fact, **the public reaction may leave them little option**. It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace.[28] (Emphasis supplied)

Indeed, by hampering the ability of our representatives to compromise, we may be jeopardizing higher national goals for the sake of securing less critical ones.

Diplomatic negotiations, therefore, are recognized as privileged in this jurisdiction, the JPEPA negotiations constituting no exception. It bears emphasis, however, that such privilege is only **presumptive**. For as *Senate v. Ermita* holds, recognizing a type of information as privileged does not mean that it will be considered privileged in all instances. Only after a consideration of the context in which the claim is made may it be determined if there is a public interest that calls for the disclosure of the desired information, strong enough to overcome its traditionally privileged status.

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[28] B. DuVal, Jr., Project Director, American Bar Foundation. B.A., 1958, University of Virginia; J.D., 1961, Yale University, THE OCCASIONS OF SECRECY (47 U. Pitt. L. Rev. 579).

Whether petitioners have established the presence of such a public interest shall be discussed later. For now, the Court shall first pass upon the arguments raised by petitioners against the application of *PMPF v. Manglapus* to the present case.

Arguments proffered by petitioners *against* the application of *PMPF v. Manglapus*

Petitioners argue that *PMPF v. Manglapus* cannot be applied *in toto* to the present case, there being substantial factual distinctions between the two.

To petitioners, the *first* and most fundamental distinction lies in the nature of the treaty involved. They stress that *PMPF v. Manglapus* involved the Military Bases Agreement which necessarily pertained to matters affecting national security; whereas the present case involves an economic treaty that seeks to regulate trade and commerce between the Philippines and Japan, matters which, unlike those covered by the Military Bases Agreement, are not so vital to national security to disallow their disclosure.

Petitioners' argument betrays a faulty assumption that information, to be considered privileged, must involve national security. The recognition in *Senate v. Ermita*[29] that executive privilege has encompassed claims of varying kinds, such that it may even be more accurate to speak of "executive privileges," cautions against such generalization.

While there certainly are privileges grounded on the necessity of safeguarding national security such as those involving military secrets, not all are founded thereon. One example is **the "informer's privilege,"** or the privilege of the Government not to disclose the identity of a person or persons who furnish information of violations of law to officers charged with the enforcement of that law.[30] The suspect involved need not be so notorious as to be a threat to national security for this privilege to apply in any given instance. Otherwise, the privilege would

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[29] *Supra* note 20 at 46.

[30] *Ibid.*

be inapplicable in all but the most high-profile cases, in which case not only would this be contrary to long-standing practice. It would also be highly prejudicial to law enforcement efforts in general.

Also illustrative is the **privilege accorded to presidential communications**, which are presumed privileged without distinguishing between those which involve matters of national security and those which do not, the rationale for the privilege being that

> x x x [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. x x x[31] (Emphasis supplied)

In the same way that the privilege for judicial deliberations does not depend on the nature of the case deliberated upon, so presidential communications are privileged whether they involve matters of national security.

It bears emphasis, however, that the privilege accorded to presidential communications is **not absolute**, one significant qualification being 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**."[32] This qualification applies whether the privilege is being invoked in the context of a judicial trial or a congressional investigation conducted in aid of legislation.[33]

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[31] *Supra* note 19 at 189.

[32] *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 162 U.S.App.D.C. 183.

[33] *Vide Arnault v. Nazareno*, 87 PHILS. 29, 46 (1950): "In the present case the jurisdiction of the Senate, thru the Special Committee created by it, to investigate the Buenavista and Tambobong estates deal is not challenged by the petitioner; and we entertain no doubt as to the Senate's authority to do so and as to the validity of Resolution No. 8 hereinabove quoted. 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. x x x"

Closely related to the "presidential communications" privilege is the **deliberative process privilege** recognized in the United States. As discussed by the U.S. Supreme Court in *NLRB v. Sears, Roebuck & Co*,[34] deliberative process covers documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated. Notably, the privileged status of such documents rests, **not on the need to protect national security** but, on the "obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," the objective of the privilege being to enhance the quality of agency decisions.[35]

The diplomatic negotiations privilege bears a close resemblance to the deliberative process and presidential communications privilege. It may be readily perceived that the rationale for the confidential character of diplomatic negotiations, deliberative process, and presidential communications is similar, if not identical.

The earlier discussion on *PMPF v. Manglapus*[36] shows that the privilege for diplomatic negotiations is meant to encourage a frank exchange of exploratory ideas between the negotiating parties by shielding such negotiations from public view. Similar to the privilege for presidential communications, the diplomatic negotiations privilege seeks, through the same means, to protect the independence in decision-making of the President, particularly in its capacity as "the sole organ of the nation in its external relations, and its sole representative with foreign nations." And, as with the deliberative process privilege, the privilege accorded to diplomatic negotiations arises, not on account of the content of the information *per se*, but because the information is part of a process of deliberation which, in pursuit of the public interest, must be presumed confidential.

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[34] 421 U.S., at 150, 95 S.Ct. 1504, reiterated in *Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, 532 U.S. 1, 121 S.Ct. 1060.

[35] *Id*. at 151, 95 S.Ct. 1504 (emphasis supplied).

[36] *Supra* note 24.

The decision of the U.S. District Court, District of Columbia in *Fulbright & Jaworski v. Department of the Treasury*[37] enlightens on the close relation between diplomatic negotiations and deliberative process privileges. The plaintiffs in that case sought access to notes taken by a member of the U.S. negotiating team during the U.S.-French **tax treaty** negotiations. Among the points noted therein were the issues to be discussed, positions which the French and U.S. teams took on some points, the draft language agreed on, and articles which needed to be amended. Upholding the confidentiality of those notes, Judge Green ruled, thus:

Negotiations between two countries to draft a treaty represent a true example of a deliberative process. Much give-and-take must occur for the countries to reach an accord. A description of the negotiations at any one point would not provide an onlooker a summary of the discussions which could later be relied on as law. It would not be "working law" as the points discussed and positions agreed on would be subject to change at any date until the treaty was signed by the President and ratified by the Senate.

The policies behind the deliberative process privilege support non-disclosure. Much harm could accrue to the negotiations process if these notes were revealed. Exposure of the pre-agreement positions of the French negotiators might well offend foreign governments and would lead to less candor by the U. S. in recording the events of the negotiations process. As several months pass in between negotiations, this lack of record could hinder readily the U. S. negotiating team. Further disclosure would reveal prematurely adopted policies. If these policies should be changed, public confusion would result easily.

Finally, releasing these snapshot views of the negotiations would be comparable to releasing drafts of the treaty, particularly when the notes state the tentative provisions and language agreed on. As drafts of regulations typically are protected by the deliberative process privilege, *Arthur Andersen & Co. v. Internal Revenue Service*, C.A. No. 80-705 (D.C.Cir., May 21, 1982)**, drafts of treaties** should **be accorded the same protection.** (Emphasis and underscoring supplied)

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[37] 545 F.Supp. 615, May 28, 1982.

Clearly, the privilege accorded to diplomatic negotiations follows as a logical consequence from the privileged character of the deliberative process.

The Court is not unaware that in *Center for International Environmental Law (CIEL), et al. v. Office of U.S. Trade Representative*[38] – where the plaintiffs sought information relating to the just-completed negotiation of a United States-Chile Free Trade Agreement – the same district court, this time under Judge Friedman, consciously refrained from applying the doctrine in *Fulbright* and ordered the disclosure of the information being sought.

Since the factual milieu in *CIEL* seemed to call for the straight application of the doctrine in *Fulbright*, a discussion of why the district court did not apply the same would help illumine this Court's own reasons for deciding the present case along the lines of *Fulbright*.

In both *Fulbright* and *CIEL*, the U.S. government cited a statutory basis for withholding information, namely, Exemption 5 of the Freedom of Information Act (FOIA).[39] In order to qualify for protection under Exemption 5, a document must satisfy two conditions: (1) it must be either **inter-agency or intra-agency** in nature, and (2) it must be both **pre-decisional and part of the agency's deliberative or decision-making process**.[40]

Judge Friedman, in *CIEL*, himself cognizant of a "superficial similarity of context" between the two cases, based his decision

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[38] 237 F.Supp.2d 17.

[39] 5 U.S.C. 552(b)(5).

[40] *CIEL v. Office of U.S. Trade Representative*, 237 F.Supp.2d 17. *Vide Department of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Association*, 532 U.S. 1, 121 S.Ct. 1060: "Exemption 5 protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). To qualify, a document must thus satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."

on what he perceived to be a significant distinction: he found the negotiator's notes that were sought in *Fulbright* to be "clearly internal," whereas the documents being sought in *CIEL* were those produced by or exchanged with an outside party, *i.e*. Chile. The documents subject of *Fulbright* being clearly internal in character, the question of disclosure therein turned not on the threshold requirement of Exemption 5 that the document be inter-agency, but on whether the documents were part of the agency's pre-decisional deliberative process. On this basis, Judge Friedman found that "Judge Green's discussion [in *Fulbright*] of the harm that could result from disclosure therefore is irrelevant, **since the documents at issue [in *CIEL*] are not inter-agency, and the Court does not reach the question of deliberative process.**" (Emphasis supplied)

In fine, *Fulbright* was not overturned. The court in *CIEL* merely found the same to be irrelevant in light of its distinct factual setting. Whether this conclusion was valid – a question on which this Court would not pass – the ruling in *Fulbright* that "[n]egotiations between two countries to draft a treaty represent a true example of a deliberative process" was left standing, since the *CIEL* court explicitly stated that it did not reach the question of deliberative process.

Going back to the present case, the Court recognizes that the information sought by petitioners includes documents produced and communicated by a party external to the Philippine government, namely, the Japanese representatives in the JPEPA negotiations, and to that extent this case is closer to the factual circumstances of *CIEL* than those of *Fulbright*.

Nonetheless, for reasons which shall be discussed shortly, this Court echoes the principle articulated in *Fulbright* that the public policy underlying the deliberative process privilege requires that diplomatic negotiations should also be accorded privileged status, even if the documents subject of the present case cannot be described as purely internal in character.

It need not be stressed that in *CIEL*, the court ordered the disclosure of information based on its finding that the first

requirement of FOIA Exemption 5 – that the documents be inter-agency – was not met. In determining whether the government may validly refuse disclosure of the exchanges between the U.S. and Chile, it necessarily had to deal with this requirement, it being laid down by a statute binding on them.

In this jurisdiction, however, there is no counterpart of the FOIA, nor is there any statutory requirement similar to FOIA Exemption 5 in particular. Hence, Philippine courts, when assessing a claim of privilege for diplomatic negotiations, are more free to focus directly on the issue of **whether the privilege being claimed is indeed supported by public policy**, without having to consider – as the *CIEL* court did – if these negotiations fulfill a formal requirement of being "inter-agency." Important though that requirement may be in the context of domestic negotiations, it need not be accorded the same significance when dealing with international negotiations.

There being a public policy supporting a privilege for diplomatic negotiations for the reasons explained above, the Court sees no reason to modify, much less abandon, the doctrine in *PMPF v. Manglapus*.

A *second* point petitioners proffer in their attempt to differentiate *PMPF v. Manglapus* from the present case is the fact that the petitioners therein consisted entirely of members of the mass media, while petitioners in the present case include members of the House of Representatives who invoke their right to information not just as citizens but as members of Congress.

Petitioners thus conclude that the present case involves the right of members of Congress to demand information on negotiations of international trade agreements from the Executive branch, a matter which was not raised in *PMPF v. Manglapus*.

While indeed the petitioners in *PMPF v. Manglapus* consisted only of members of the mass media, it would be incorrect to claim that the doctrine laid down therein has no bearing on a controversy such as the present, where the demand for information

has come from members of Congress, not only from private citizens.

The privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances. The probability of the claim succeeding in the new context might differ, but to say that the privilege, as such, has no validity at all in that context is another matter altogether.

The Court's statement in *Senate v. Ermita* that "presidential refusals to furnish information may be actuated by any of at least three distinct kinds of considerations [state secrets privilege, informer's privilege, and a generic privilege for internal deliberations], and may be asserted, **with differing degrees of success**, in the context of either judicial or legislative investigations,"[41] implies that a privilege, once recognized, may be invoked under different procedural settings. That this principle holds true particularly with respect to diplomatic negotiations may be inferred from *PMPF v. Manglapus* itself, where the Court held that it is the President alone who negotiates treaties, and not even the Senate or the House of Representatives, unless asked, may intrude upon that process.

Clearly, the privilege for diplomatic negotiations may be invoked not only against citizens' demands for information, but also in the context of legislative investigations.

Hence, the recognition granted in *PMPF v. Manglapus* to the privileged character of diplomatic negotiations cannot be considered irrelevant in resolving the present case, the contextual differences between the two cases notwithstanding.

As *third* and last point raised against the application of *PMPF v. Manglapus* in this case, petitioners proffer that "the socio-political and historical contexts of the two cases are worlds apart." They claim that the constitutional traditions and concepts prevailing at the time *PMPF v. Manglapus* came about, particularly the school of thought that the requirements of foreign policy

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[41] *Supra* note 20 at 46 (emphasis supplied).

and the ideals of transparency were incompatible with each other or the "incompatibility hypothesis," while valid when international relations were still governed by power, politics and wars, are no longer so in this age of international cooperation.[42]

Without delving into petitioners' assertions respecting the "incompatibility hypothesis," the Court notes that the ruling in *PMPF v. Manglapus* is grounded more on the nature of treaty negotiations as such than on a particular socio-political school of thought. If petitioners are suggesting that the nature of treaty negotiations have so changed that "[a]n ill-timed speech by one of the parties or a frank declaration of the concession which are exacted or offered on both sides" no longer "lead[s] to widespread propaganda to block the negotiations," or that parties in treaty negotiations no longer expect their communications to be governed by historic confidentiality, the burden is on them to substantiate the same. This petitioners failed to discharge.

Whether the privilege applies only at certain stages of the negotiation process

Petitioners admit that "diplomatic negotiations on the JPEPA are entitled to a reasonable amount of confidentiality so as not to jeopardize the diplomatic process." They argue, however, that the same is privileged "only at certain stages of the negotiating process, after which such information must necessarily be revealed to the public."[43] They add that the duty to disclose this information

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[42] Petitioners expound as follows:

"It has been 18 years since the *PMPF v. Manglapus* case, and the world has changed considerably in that span of time. The Berlin Wall fell in 1989, bringing down with it the Cold War and its attendant hostilities, and ushering in a new era of globalization and international economic cooperation as we know it. The Philippines now finds itself part of an international economic community as a member of both the ASEAN Free Trade Area (AFTA) and the World Trade Organization (WTO). Domestically, this Honorable Court has repeatedly upheld the people's right to information on matters of public concern, allowing ordinary Filipino citizens to inquire into various government actions such as GSIS loans to public officials, settlement of Marcos ill-gotten wealth, and sale of reclaimed land to foreign corporations." (*Rollo*, p. 326)

[43] *Rollo*, pp. 50-51.

was vested in the government when the negotiations moved from the formulation and exploratory stage to the firming up of definite propositions or official recommendations, citing *Chavez v. PCGG*[44] and *Chavez v. PEA*.[45]

The following statement in *Chavez v. PEA*, however, suffices to show that the doctrine in both that case and *Chavez v. PCGG* with regard to the duty to disclose "definite propositions of the government" does not apply to diplomatic negotiations:

> We rule, therefore, that the constitutional right to information includes official information on on-going negotiations before a final contract. **The information, however, must constitute definite propositions by the government and should not cover recognized exceptions like privileged information, military and diplomatic secrets and similar matters affecting national security and public order**. x x x[46] (Emphasis and underscoring supplied)

It follows from this ruling that even definite propositions of the government may not be disclosed if they fall under "recognized exceptions." The privilege for diplomatic negotiations is clearly among the recognized exceptions, for the footnote to the immediately quoted ruling cites *PMPF v. Manglapus* itself as an authority.

Whether there is sufficient *public interest* to overcome the claim of privilege

It being established that diplomatic negotiations enjoy a presumptive privilege against disclosure, even against the demands of members of Congress for information, the Court shall now determine whether petitioners have shown the existence of a public interest sufficient to overcome the privilege in this instance.

To clarify, there are at least two kinds of public interest that must be taken into account. One is the presumed public interest

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[44] *Supra* note 18.

[45] *Supra* note 19.

[46] 433 Phil. 506, 534 (2002), citing *PMPF v. Manglapus, supra* note 24 and *Chavez v. PCGG, supra* note 18.

in favor of keeping the subject information confidential, which is the reason for the privilege in the first place, and the other is the public interest **in favor of disclosure**, the existence of which must be shown by the party asking for information.[47]

The criteria to be employed in determining whether there is a sufficient public interest in favor of disclosure may be gathered from cases such as *U.S. v. Nixon*,[48] *Senate Select Committee on Presidential Campaign Activities v. Nixon*,[49] and *In re Sealed Case*.[50]

U.S. v. Nixon, which involved a claim of the presidential communications privilege against the subpoena *duces tecum* of a district court in a *criminal* case, emphasized the need to balance such claim of privilege against the constitutional duty of courts to ensure a fair administration of *criminal* justice.

x x x **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. (Emphasis, italics and underscoring supplied)

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[47] *In re Sealed Case* (121 F.3d 729, 326 U.S.App.D.C. 276 [1997]) states thus: "*Nixon, GSA, Sirica*, and the other *Nixon* cases all employed a balancing methodology in analyzing whether, and in what circumstances, the presidential communications privilege can be overcome. **Under this methodology, these opinions balanced the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure."** (Emphasis supplied)

[48] 418 U.S. 683 (1974).

[49] *Supra* note 31.

[50] *Supra* note 47.

Similarly, *Senate Select Committee v. Nixon*,[51] which involved a claim of the presidential communications privilege against the subpoena *duces tecum* of a Senate committee, spoke of the need to balance such claim with the duty of Congress to perform its *legislative* functions.

> 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. x x x
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> x x x x x x x x x
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> **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.** x x x (Emphasis and underscoring supplied)

In re Sealed Case[52] involved a claim of the deliberative process and presidential communications privileges against a subpoena *duces tecum* of a grand jury. On the claim of deliberative process privilege, the court stated:

> The deliberative process privilege is a *qualified* privilege and **can be overcome by a *sufficient showing of need*. This need determination is to be made flexibly on a case-by-case, *ad hoc* basis**. "[E]ach time [the deliberative process privilege] is asserted the district court must undertake a fresh balancing of the competing interests," **taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government,"**

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[51] *Supra* note 32

[52] *Supra* note 47.

and the "possibility of future timidity by government employees. x x x (Emphasis, italics and underscoring supplied)

Petitioners have failed to present the strong and "*sufficient showing of need*" referred to in the immediately cited cases. The arguments they proffer to establish their entitlement to the subject documents fall short of this standard.

Petitioners go on to assert that the non-involvement of the Filipino people in the JPEPA negotiation process effectively results in the bargaining away of their economic and property rights without their knowledge and participation, in violation of the due process clause of the Constitution. They claim, moreover, that it is essential for the people to have access to the initial offers exchanged during the negotiations since only through such disclosure can their constitutional right to effectively participate in decision-making be brought to life in the context of international trade agreements.

Whether it can accurately be said that the Filipino people were not involved in the JPEPA negotiations is a question of fact which this Court need not resolve. Suffice it to state that respondents had presented documents purporting to show that public consultations were conducted on the JPEPA. Parenthetically, petitioners consider these "alleged consultations" as "woefully selective and inadequate."[53]

AT ALL EVENTS, since it is not disputed that the offers exchanged by the Philippine and Japanese representatives have not been disclosed to the public, the Court shall pass upon the issue of whether access to the documents bearing on them is, as petitioners claim, essential to their right to participate in decision-making.

The case for petitioners has, of course, been immensely weakened by the disclosure of the full text of the JPEPA to the public since September 11, 2006, even as it is still being deliberated upon by the Senate and, therefore, not yet binding on the Philippines. Were the Senate to concur with the validity

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[53] *Rollo*, p. 349.

of the JPEPA at this moment, there has already been, in the words of *PMPF v. Manglapus*, "ample opportunity for discussion before [the treaty] is approved."

The text of the JPEPA having been published, petitioners have failed to convince this Court that they will not be able to meaningfully exercise their right to participate in decision-making unless the initial offers are also published.

It is of public knowledge that various non-government sectors and private citizens have already publicly expressed their views on the JPEPA, their comments not being limited to general observations thereon but on its specific provisions. Numerous articles and statements critical of the JPEPA have been posted on the Internet.[54] Given these developments, there is no basis for petitioners' claim that access to the Philippine and Japanese offers is essential to the exercise of their right to participate in decision-making.

Petitioner-members of the House of Representatives additionally anchor their claim to have a right to the subject documents on the basis of Congress' inherent power to regulate commerce, be it domestic or international. They allege that Congress cannot meaningfully exercise the power to regulate international trade agreements such as the JPEPA without being given copies of the initial offers exchanged during the negotiations thereof. In the same vein, they argue that the President cannot exclude Congress from the JPEPA negotiations since whatever power and authority the President has to negotiate international trade agreements is derived only by delegation of Congress, pursuant

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[54] For a small sampling, *vide* "Primer sa Japan-Philippine Economic Partnership Agreement" (JPEPA) at www.bayan.ph/downloads/Primer%20on%20jpepa.pdf; "A RESOLUTION EXPRESSING SUPPORT TO THE CALLS FOR THE SENATE TO REJECT THE JAPAN-PHILIPPINES PARTNERSHIP AGREEMENT (JPEPA)" at www.nccphilippines.org/indexfiles/Page1562.htm; "JPEPA Ratification: Threat Economics" at http://www.aer.ph/index.php?option/=com_content&task=view&id=632&Itemid=63 (all sites visited on February 2, 2008).

to Article VI, Section 28(2) of the Constitution and Sections 401 and 402 of Presidential Decree No. 1464.[55]

The subject of Article VI Section 28(2) of the Constitution is not the power to negotiate treaties and international agreements, but the power to fix tariff rates, import and export quotas, and other taxes. Thus it provides:

(2) The Congress may, by law, authorize the President to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts within the framework of the national development program of the Government.

As to the power to negotiate treaties, the constitutional basis thereof is Section 21 of Article VII – the article on the Executive Department – which states:

No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

The doctrine in *PMPF v. Manglapus* that the treaty-making power is exclusive to the President, being the sole organ of the nation in its external relations, was echoed in *BAYAN v. Executive Secretary*[56] where the Court held:

By constitutional fiat and by the intrinsic nature of his office, the President, as head of State, is the sole organ and authority in the external affairs of the country. In many ways, the President is the chief architect of the nation's foreign policy; his "dominance in the field of foreign relations is (then) conceded."

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[55] Entitled "A DECREE TO CONSOLIDATE AND CODIFY ALL THE TARIFF AND CUSTOMS LAWS OF THE PHILIPPINES," promulgated June 11, 1978. In light of the arguments of petitioners, the most salient portion of the provisions cited by them is Section 402(1) which states, in part: "For the purpose of expanding foreign markets x x x in establishing and maintaining better relations between the Philippines and other countries, the President is authorized from time to time:

(1.1) To enter into trade agreements with foreign governments or instrumentalities thereof; x x x"

[56] 396 Phil. 623, 663 (2000).

Wielding vast powers and influence, his conduct in the external affairs of the nation, as Jefferson describes, is "*executive altogether*."

As regards the power to enter into treaties or international agreements, the Constitution vests the same in the President, subject only to the concurrence of at least two thirds vote of all the members of the Senate. In this light, the negotiation of the VFA and the subsequent ratification of the agreement are exclusive acts which pertain solely to the President, in the lawful exercise of **his *vast executive and diplomatic powers granted him no less than by the fundamental law itself. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it*.** x x x (Italics in the original; emphasis and underscoring supplied)

The same doctrine was reiterated even more recently in *Pimentel v. Executive Secretary*[57] where the Court ruled:

In our system of government, the President, being the head of state, is regarded as **the sole organ and authority in external relations and is the country's sole representative with foreign nations.** As the chief architect of foreign policy, the President acts as the country's mouthpiece with respect to international affairs. Hence, **the President is vested with the authority to** deal with foreign states and governments, extend or withhold recognition, maintain diplomatic relations, **enter into treaties**, and otherwise transact the business of foreign relations. **In the realm of treaty-making, the President has the sole authority to negotiate with other states.**

Nonetheless, while the President has the sole authority to negotiate and enter into treaties, the Constitution provides a limitation to his power by requiring the concurrence of 2/3 of all the members of the Senate for the validity of the treaty entered into by him. x x x (Emphasis and underscoring supplied)

While the power then to fix tariff rates and other taxes clearly belongs to Congress, and is exercised by the President only by delegation of that body, it has long been recognized that the power to enter into treaties is vested directly and exclusively in

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[57] G.R. No. 158088, July 6, 2005, 462 SCRA 622, 632-633.

the President, subject only to the concurrence of at least two-thirds of all the Members of the Senate for the validity of the treaty. In this light, the authority of the President to enter into trade agreements with foreign nations provided under P.D. 1464[58] may be interpreted as an acknowledgment of a **power already inherent in its office**. It may not be used as basis to hold the President or its representatives accountable to Congress for the conduct of treaty negotiations.

This is not to say, of course, that the President's power to enter into treaties is unlimited but for the requirement of Senate concurrence, since the President must still ensure that all treaties will substantively conform to all the relevant provisions of the Constitution.

It follows from the above discussion that Congress, while possessing vast legislative powers, may not interfere in the field of treaty negotiations. While Article VII, Section 21 provides for Senate concurrence, such pertains only to the validity of the treaty under consideration, not to the conduct of negotiations attendant to its conclusion. Moreover, it is not even Congress as a whole that has been given the authority to concur as a means of checking the treaty-making power of the President, but only the Senate.

Thus, as in the case of petitioners suing in their capacity as private citizens, petitioners-members of the House of Representatives fail to present a *"sufficient showing of need"* that the information sought is critical to the performance of the functions of Congress, functions that do not include treaty-negotiation.

Respondents' alleged failure to timely claim executive privilege

On respondents' invocation of executive privilege, petitioners find the same defective, not having been done seasonably as it was raised only in their Comment to the present petition and not during the House Committee hearings.

That respondents invoked the privilege for the first time only in their Comment to the present petition does not mean that the

[58] *Supra* note 55.

claim of privilege should not be credited. Petitioners' position presupposes that an assertion of the privilege should have been made during the House Committee investigations, failing which respondents are deemed to have waived it.

When the House Committee and petitioner-Congressman Aguja requested respondents for copies of the documents subject of this case, respondents replied that the negotiations were still on-going and that the draft of the JPEPA would be released once the text thereof is settled and complete. There was no intimation that the requested copies are confidential in nature by reason of public policy. The response may not thus be deemed a claim of privilege by the standards of *Senate v. Ermita*, which recognizes as claims of privilege only those which are accompanied by **precise and certain reasons** for preserving the **confidentiality** of the information being sought.

Respondents' failure to claim the privilege during the House Committee hearings may not, however, be construed as a waiver thereof by the Executive branch. As the immediately preceding paragraph indicates, what respondents received from the House Committee and petitioner-Congressman Aguja were mere requests for information. And as priorly stated, the House Committee itself refrained from pursuing its earlier resolution to issue a subpoena *duces tecum* on account of then Speaker Jose de Venecia's alleged request to Committee Chairperson Congressman Teves to hold the same in abeyance.

While it is a salutary and noble practice for Congress to refrain from issuing subpoenas to executive officials – out of respect for their office – until resort to it becomes necessary, the fact remains that such requests are not a compulsory process. Being mere requests, they do not strictly call for an assertion of executive privilege.

The privilege is an exemption to Congress' power of inquiry.[59] So long as Congress itself finds no cause to enforce such power, there is no strict necessity to assert the privilege. In this light,

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[59] G.R. No. 169777, April 20, 2006, 488 SCRA 1, 44.

respondents' failure to invoke the privilege during the House Committee investigations did not amount to a waiver thereof.

The Court observes, however, that the claim of privilege appearing in respondents' Comment to this petition fails to satisfy in full the requirement laid down in *Senate v. Ermita* that the claim should be invoked by the President or through the Executive Secretary "by order of the President."[60] Respondents' claim of privilege is being sustained, however, its flaw notwithstanding, because of circumstances peculiar to the case.

The assertion of executive privilege by the Executive Secretary, who is one of the respondents herein, without him adding the phrase "by order of the President," shall be considered as partially complying with the requirement laid down in *Senate v. Ermita*. The requirement that the phrase "by order of the President" should accompany the Executive Secretary's claim of privilege is a new rule laid down for the first time in *Senate v. Ermita*, which was not yet final and executory at the time respondents filed their Comment to the petition.[61] A strict application of this requirement would thus be unwarranted in this case.

Response to the Dissenting Opinion of the Chief Justice

We are aware that behind the dissent of the Chief Justice lies a genuine zeal to protect our people's right to information against any abuse of executive privilege. It is a zeal that We fully share.

The Court, however, in its endeavor to guard against the abuse of executive privilege, should be careful not to veer towards the opposite extreme, to the point that it would strike down as invalid even a legitimate exercise thereof.

We respond only to the salient arguments of the Dissenting Opinion which have not yet been sufficiently addressed above.

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[60] *Id.* at 68.

[61] According to the records of this Court, the judgment in *Senate v. Ermita* was entered on July 21, 2006. Respondents filed their Comment on May 15, 2006.

1. After its historical discussion on the allocation of power over international trade agreements in the United States, the dissent concludes that "it will be turning somersaults with history to contend that the President is the sole organ for external relations" in that jurisdiction. With regard to this opinion, We make only the following observations:

There is, at least, a core meaning of the phrase "sole organ of the nation in its external relations" which is not being disputed, namely, that the power to directly negotiate treaties and international agreements is vested by our Constitution only in the Executive. Thus, the dissent states that "Congress has the power to regulate commerce with foreign nations **but does not have the power to negotiate international agreements directly**."[62]

What is disputed is how this principle applies to the case at bar.

The dissent opines that petitioner-members of the House of Representatives, by asking for the subject JPEPA documents, are not seeking to directly participate in the negotiations of the JPEPA, hence, they cannot be prevented from gaining access to these documents.

On the other hand, We hold that this is one occasion where the following ruling in *Agan v. PIATCO*[63] – and in other cases both before and since – should be applied:

This Court has long and consistently adhered to the legal maxim that those that cannot be done directly cannot be done indirectly. *To declare the PIATCO contracts valid despite the clear statutory prohibition against a direct government guarantee* ***would not only make a mockery of what the BOT Law seeks to prevent*** *— which is to expose the government to the risk of incurring a monetary obligation resulting from a contract of loan between the project proponent and its lenders and to which the Government is not a party to —* ***but would also render the BOT Law useless***

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[62] Revised Dissenting Opinion, p. 15 (Emphasis and underscoring supplied).

[63] 450 Phil. 744 (2003), penned by then Associate Justice Puno.

for what it seeks to achieve *–- to make use of the resources of the private sector in the "financing, operation and maintenance of infrastructure and development projects" which are necessary for national growth and development but which the government, unfortunately, could ill-afford to finance at this point in time.*[64]

Similarly, while herein petitioners-members of the House of Representatives may not have been aiming to participate in the negotiations directly, opening the JPEPA negotiations to their scrutiny – even to the point of giving them access to the offers exchanged between the Japanese and Philippine delegations – would have made a mockery of what the Constitution sought to prevent and rendered it useless for what it sought to achieve when it vested the power of direct negotiation solely with the President.

What the U.S. Constitution sought to prevent and aimed to achieve in defining the treaty-making power of the President, which our Constitution similarly defines, may be gathered from Hamilton's explanation of why the U.S. Constitution excludes the House of Representatives from the treaty-making process:

> x x x The fluctuating, and taking its future increase into account, the multitudinous composition of that body, forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character, decision, ***secrecy*** and **dispatch**; are incompatible with a body so variable and so numerous. The very complication of the business by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the house of representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be source of so great inconvenience and expense, as alone ought to condemn the project.[65]

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[64] *Id.*, at 833 (Italics in the original, emphasis and underscoring supplied).

[65] The Federalist, No. 75 (Italics in the original, emphasis and underscoring supplied).

These considerations *a fortiori* apply in this jurisdiction, since the Philippine Constitution, unlike that of the U.S., does not even grant **the Senate** the power to advise the Executive in the making of treaties, but only vests in that body the power to concur in the validity of the treaty after negotiations have been concluded.[66] Much less, therefore, should it be inferred that the House of Representatives has this power.

Since allowing petitioner-members of the House of Representatives access to the subject JPEPA documents would set a precedent for future negotiations, leading to the contravention of the public interests articulated above which the Constitution sought to protect, the subject documents should not be disclosed.

2. The dissent also asserts that respondents can no longer claim the diplomatic secrets privilege over the subject JPEPA documents now that negotiations have been concluded, since their reasons for nondisclosure cited in the June 23, 2005 letter of Sec. Ermita, and later in their Comment, necessarily apply only for as long as the negotiations were still pending;

In their Comment, respondents contend that "the negotiations of the representatives of the Philippines as well as of Japan must be allowed to explore alternatives in the course of the negotiations in the same manner as judicial deliberations and working drafts of opinions are accorded strict confidentiality." **That respondents liken the documents involved in the JPEPA negotiations to judicial deliberations and working drafts of opinions evinces, by itself, that they were claiming confidentiality not only until, but even after, the conclusion of the negotiations.**

Judicial deliberations do not lose their confidential character once a decision has been promulgated by the courts. The same

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[66] Article II Section 2 of the U.S. Constitution states: "He [the President] shall have Power, by **and with the Advice** and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur x x x." (Emphasis and underscoring supplied) On the other hand, Article VII Section 21 of the Philippine Constitution states: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate."

holds true with respect to working drafts of opinions, which are comparable to intra-agency recommendations. Such intra-agency recommendations are privileged even after the position under consideration by the agency has developed into a definite proposition, hence, the rule in this jurisdiction that agencies have the duty to disclose only definite propositions, and not the inter-agency and intra-agency communications during the stage when common assertions are still being formulated.[67]

3. The dissent claims that petitioner-members of the House of Representatives have sufficiently shown their need for the same documents to overcome the privilege. Again, We disagree.

The House Committee that initiated the investigations on the JPEPA did not pursue its earlier intention to subpoena the documents. This strongly undermines the assertion that access to the same documents by the House Committee is critical to the performance of its legislative functions. If the documents were indeed critical, the House Committee should have, at the very least, issued a subpoena *duces tecum* or, like what the Senate did in *Senate v. Ermita*, filed the present petition as a legislative body, rather than leaving it to the discretion of individual Congressmen whether to pursue an action or not. Such acts would have served as strong indicia that Congress itself finds the subject information to be critical to its legislative functions.

Further, given that respondents have claimed executive privilege, petitioner-members of the House of Representatives should have, at least, shown how its lack of access to the Philippine and Japanese offers would hinder the intelligent crafting of legislation. **Mere assertion that the JPEPA covers a subject matter over which Congress has the power to legislate would not suffice**. As *Senate Select Committee v. Nixon*[68] held, the showing required to overcome the presumption favoring confidentiality turns, not only on the nature and appropriateness of the function in the performance of which the material was

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[67] *Supra* note 18.

[68] 162 U.S. App.D.C. 183, 189.

sought, but also the degree to which the material was necessary to its fulfillment. This petitioners failed to do.

Furthermore, from the time the final text of the JPEPA including its annexes and attachments was published, petitioner-members of the House of Representatives have been free to use it for any legislative purpose they may see fit. Since such publication, petitioners' need, if any, specifically for the Philippine and Japanese offers leading to the final version of the JPEPA, has become even less apparent.

In asserting that the balance in this instance tilts in favor of disclosing the JPEPA documents, the dissent contends that the Executive has failed to show how disclosing them after the conclusion of negotiations would impair the performance of its functions. The contention, with due respect, misplaces the *onus probandi*. While, in keeping with the general presumption of transparency, the burden is initially on the Executive to provide precise and certain reasons for upholding its claim of privilege, once the Executive is able to show that the documents being sought are covered by a recognized privilege, the burden shifts to the party seeking information to overcome the privilege by a strong showing of need.

When it was thus established that the JPEPA documents are covered by the privilege for diplomatic negotiations pursuant to *PMPF v. Manglapus*, the presumption arose that their disclosure would impair the performance of executive functions. It was then incumbent on petitioner- requesting parties to show that they have a strong need for the information sufficient to overcome the privilege. They have not, however.

4. Respecting the failure of the Executive Secretary to explicitly state that he is claiming the privilege "by order of the President," the same may not be strictly applied to the privilege claim subject of this case.

When the Court in *Senate v. Ermita* limited the power of invoking the privilege to the President alone, it was laying down a new rule for which there is no counterpart even in the United States from which the concept of executive privilege was adopted.

As held in the 2004 case of *Judicial Watch, Inc. v. Department of Justice*,[69] citing *In re Sealed Case*,[70] "the issue of whether a President must personally invoke the [presidential communications] privilege remains an open question." *U.S. v. Reynolds*,[71] on the other hand, held that "[t]here 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 that officer."

The rule was thus laid down by this Court, not in adherence to any established precedent, but with the aim of preventing the abuse of the privilege in light of its highly exceptional nature. The Court's recognition that the Executive Secretary also bears the power to invoke the privilege, provided he does so "by order of the President," is meant to avoid laying down too rigid a rule, the Court being aware that it was laying down a new restriction on executive privilege. It is with the same spirit that the Court should not be overly strict with applying the same rule in this peculiar instance, where the claim of executive privilege occurred before the judgment in *Senate v. Ermita* became final.

5. To show that *PMPF v. Manglapus* may not be applied in the present case, the dissent implies that the Court therein erred in citing *US v. Curtiss Wright*[72] and the book entitled *The New American Government and Its Work*[73] since these authorities, so the dissent claims, may not be used to calibrate the importance of the right to information in the Philippine setting.

The dissent argues that since *Curtiss-Wright* referred to a conflict between the executive and legislative branches of government, the factual setting thereof was different from that of *PMPF v. Manglapus* which involved a collision between

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[69] 365 F.3d 1108, 361 U.S.App.D.C. 183 (2004).

[70] *Supra* note 47.

[71] 345 U.S. 1, 73 S.Ct. 528 (1953).

[72] *Supra* at note 63.

[73] *Supra* at note 64.

governmental power over the conduct of foreign affairs and the citizen's right to information.

That the Court could freely cite *Curtiss-Wright* – a case that upholds the secrecy of diplomatic negotiations against congressional demands for information – in the course of laying down a ruling on the public right to information only serves to underscore the principle mentioned earlier that the privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances.

PMPF v. Manglapus indeed involved a demand for information from private citizens and not an executive-legislative conflict, but so did *Chavez v. PEA*[74] which held that "the [public's] right to information . . . does not extend to matters recognized as privileged information under the separation of powers." What counts as privileged information in an executive-legislative conflict is thus also recognized as such in cases involving the public's right to information.

Chavez v. PCGG[75] also involved the public's right to information, yet the Court recognized as a valid limitation to that right the same privileged information based on separation of powers – closed-door Cabinet meetings, executive sessions of either house of Congress, and the internal deliberations of the Supreme Court.

These cases show that the Court has always regarded claims of privilege, whether in the context of an executive-legislative conflict or a citizen's demand for information, as closely intertwined, such that the principles applicable to one are also applicable to the other.

The reason is obvious. If the validity of claims of privilege were to be assessed by entirely different criteria in each context, this may give rise to the *absurd result* where **Congress** would be denied access to a particular information because of a claim

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[74] *Supra* note 19.

[75] *Supra* at note 18.

of executive privilege, but **the general public** would have access to the same information, the claim of privilege notwithstanding.

Absurdity would be the ultimate result if, for instance, the Court adopts the "clear and present danger" test for the assessment of claims of privilege against citizens' demands for information. If executive information, when demanded by a citizen, is privileged only when there is a clear and present danger of a substantive evil that the State has a right to prevent, it would be very difficult for the Executive to establish the validity of its claim in each instance. In contrast, if the demand comes from Congress, the Executive merely has to show that the information is covered by a recognized privilege in order to shift the burden on Congress to present a strong showing of need. **This would lead to a situation where it would be more difficult for Congress to access executive information than it would be for private citizens.**

We maintain then that when the Executive has already shown that an information is covered by executive privilege, the party demanding the information must present a "strong showing of need," whether that party is Congress or a private citizen.

The rule that the same "showing of need" test applies in both these contexts, however, should not be construed as a denial of the importance of analyzing the context in which an executive privilege controversy may happen to be placed. Rather, it affirms it, for it means that the specific need being shown by the party seeking information in every particular instance is highly significant in determining whether to uphold a claim of privilege. **This "need" is, precisely, part of the context in light of which every claim of privilege should be assessed.**

Since, as demonstrated above, there are common principles that should be applied to executive privilege controversies across different contexts, the Court in *PMPF v. Manglapus* did not err when it cited the *Curtiss-Wright* case.

The claim that the book cited in *PMPF v. Manglapus* entitled *The New American Government and Its Work* could not have taken into account the expanded statutory right to information

in the FOIA assumes that the observations in that book in support of the confidentiality of treaty negotiations would be different had it been written after the FOIA. Such assumption is, with due respect, at best, speculative.

As to the claim in the dissent that "[i]t is more doubtful if the same book be used to calibrate the importance of the right of access to information in the Philippine setting considering its elevation as a constitutional right," we submit that the elevation of such right as a constitutional right did not set it free from the legitimate restrictions of executive privilege which is itself **constitutionally-based**.[76] Hence, the comments in that book which were cited in *PMPF v. Manglapus* remain valid doctrine.

6. The dissent further asserts that the Court has never used "need" as a test to uphold or allow inroads into rights guaranteed under the Constitution. With due respect, we assert otherwise. The Court has done so before, albeit without using the term "need."

In executive privilege controversies, the requirement that parties present a "sufficient showing of need" only means, in substance, that they should show a public interest in favor of disclosure sufficient in degree to overcome the claim of privilege.[77] Verily, the Court in such cases engages in a **balancing of interests**. Such a balancing of interests is certainly not new in constitutional adjudication involving fundamental rights. *Secretary of Justice v. Lantion*,[78] which was cited in the dissent, applied just such a test.

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[76] *U.S. v. Nixon* (418 U.S. 683) states: "Nowhere in the Constitution x x x 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**." (Emphasis, italics and underscoring supplied)

[77] *In re Sealed Case* (121 F.3d 729) states thus: "*Nixon, GSA, Sirica*, and the other *Nixon* cases all employed a balancing methodology in analyzing whether, and in what circumstances, the presidential communications privilege can be overcome. **Under this methodology, these opinions balanced the public interests served by protecting the President's confidentiality in a particular context with those furthered by requiring disclosure**." (Emphasis and underscoring supplied)

[78] G.R. No. 139465, October 17, 2000, penned by then Associate Justice Reynato S. Puno.

Given that the dissent has clarified that it does not seek to apply the "clear and present danger" test to the present controversy, but the balancing test, there seems to be no substantial dispute between the position laid down in this *ponencia* and that reflected in the dissent as to what test to apply. It would appear that the only disagreement is on the results of applying that test in this instance.

The dissent, nonetheless, maintains that "it suffices that information is of public concern for it to be covered by the right, regardless of the public's need for the information," and that the same would hold true even "if they simply want to know it because it interests them." As has been stated earlier, however, there is no dispute that the information subject of this case is a matter of public concern. The Court has earlier concluded that it is a matter of public concern, not on the basis of any specific need shown by petitioners, but from the very nature of the JPEPA as an international trade agreement.

In that case, respondent Mark Jimenez claimed under **the due process clause the right to notice and hearing** in the extradition proceedings against him. Consider the following enlightening disquisition of the Court:

"In the case at bar, on one end of the balancing pole is the private respondent's **claim to due process** predicated on Section 1, Article III of the Constitution, which provides that "No person shall be deprived of life, liberty, or property without due process of law…" Without a bubble of a doubt, procedural due process of law lies at the foundation of a civilized society which accords paramount importance to justice and fairness. It has to be accorded the weight it deserves.

"This brings us to the other end of the balancing pole. Petitioner avers that the Court should give more weight to our national commitment under the RP-US Extradition Treaty to expedite the extradition to the United States of persons charged with violation of some of its laws. Petitioner also emphasizes the need to defer to the judgment of the Executive on matters relating to foreign affairs in order not to weaken if not violate the principle of separation of powers.

"Considering that in the case at bar, the extradition proceeding is only at its evaluation stage, the nature of the right being claimed by the private respondent is nebulous and *the degree of prejudice he will allegedly suffer is weak*, we accord *greater weight to the interests espoused by the government* thru the petitioner Secretary of Justice. x x x (Emphasis, italics, and underscoring supplied)

However, when the Executive has – as in this case – invoked the privilege, and it has been established that the subject information is indeed covered by the privilege being claimed, can a party overcome the same by merely asserting that the information being demanded is a matter of public concern, without any further showing required? Certainly not, for that would render the doctrine of executive privilege of no force and effect whatsoever as a limitation on the right to information, because then the sole test in such controversies would be whether an information is a matter of public concern.

Moreover, in view of the earlier discussions, we must bear in mind that, by disclosing the documents of the JPEPA negotiations, the Philippine government runs the grave risk of betraying the trust reposed in it by the Japanese representatives, indeed, by the Japanese government itself. How would the Philippine government then explain itself when that happens? Surely, it cannot bear to say that it just **had to** release the information because certain persons simply wanted to know it "because it interests them."

Thus, the Court holds that, in determining whether an information is covered by the right to information, a specific "showing of need" for such information is not a relevant consideration, but only whether the same is a matter of public concern. When, however, the government has claimed executive privilege, and it has established that the information is indeed covered by the same, then the party demanding it, if it is to overcome the privilege, must show that the information is vital, not simply for the satisfaction of its curiosity, but for its ability to effectively and reasonably participate in social, political, and economic decision-making.[79]

7. The dissent maintains that "[t]he treaty has thus entered the ultimate stage where the people can exercise their **right to participate** in the discussion whether the Senate should concur in its ratification or not." (Emphasis supplied) It adds that this right "will be diluted unless the people can have access to the

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[79] Constitution, Art. XIII, Sec. 16.

subject JPEPA documents." What, to the dissent, is a dilution of the right to participate in decision-making is, to Us, simply a recognition of the qualified nature of the public's right to information. It is beyond dispute that the right to information is not absolute and that the doctrine of executive privilege is a recognized limitation on that right.

Moreover, contrary to the submission that the right to participate in decision-making would be diluted, We reiterate that our people have been exercising their right to participate in the discussion on the issue of the JPEPA, and they have been able to articulate their different opinions without need of access to the JPEPA negotiation documents.

Thus, we hold that the balance in this case tilts in favor of executive privilege.

8. Against our ruling that the principles applied in *U.S. v. Nixon*, the *Senate Select Committee* case, and *In re Sealed Case*, are similarly applicable to the present controversy, the dissent cites the caveat in the *Nixon* case that the U.S. Court was there addressing only the President's assertion of privilege in the context of a criminal trial, not a civil litigation nor a congressional demand for information. What this caveat means, however, is only that courts must be careful not to hastily apply the ruling therein to other contexts. It does not, however, absolutely mean that the principles applied in that case may never be applied in such contexts.

Hence, U.S. courts have cited *U.S. v. Nixon* in support of their rulings on claims of executive privilege in contexts other than a criminal trial, as in the case of *Nixon v. Administrator of General Services*[80] – which involved former President Nixon's invocation of executive privilege to challenge the constitutionality of the "Presidential Recordings and Materials Preservation Act"[81] – and the above-mentioned *In re Sealed Case* which involved a claim of privilege against a *subpoena duces tecum* issued in a grand jury investigation.

[80] 433 U.S. 425.

[81] 88 Stat. 1695.

Indeed, in applying to the present case the principles found in *U.S. v. Nixon* and in the other cases already mentioned, We are merely affirming what the Chief Justice stated in his Dissenting Opinion in *Neri v. Senate Committee on Accountability*[82] – a case involving an executive-legislative conflict over executive privilege. That dissenting opinion stated that, while *Nixon* was not concerned with the balance between the President's generalized interest in confidentiality and congressional demands for information, "**[n]onetheless the [U.S.] 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.**"[83] While the Court was divided in *Neri*, this opinion of the Chief Justice was not among the points of disagreement, and We similarly hold now that the *Nixon* case is a useful guide in the proper resolution of the present controversy, notwithstanding the difference in context.

Verily, while the Court should guard against the abuse of executive privilege, it should also give full recognition to the validity of the privilege whenever it is claimed within the proper bounds of executive power, as in this case. Otherwise, the Court would undermine its own credibility, for it would be perceived as no longer aiming to strike a balance, but seeking merely to water down executive privilege to the point of irrelevance.

Conclusion

To recapitulate, petitioners' demand to be furnished with a copy of the **full text** of the JPEPA has become moot and academic, it having been made accessible to the public since September 11, 2006. As for their demand for copies of the Philippine and Japanese **offers** submitted during the JPEPA negotiations, the same must be denied, respondents' claim of executive privilege being valid.

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[82] G.R. No. 180643, March 25, 2008.

[83] Emphasis supplied.

Diplomatic negotiations have, since the Court promulgated its Resolution in *PMPF v. Manglapus* on September 13, 1988, been recognized as privileged in this jurisdiction and the reasons proffered by petitioners against the application of the ruling therein to the present case have not persuaded the Court. Moreover, petitioners – both private citizens and members of the House of Representatives – have failed to present a *"sufficient showing of need"* to overcome the claim of privilege in this case.

That the privilege was asserted for the first time in respondents' Comment to the present petition, and not during the hearings of the House Special Committee on Globalization, is of no moment, since it cannot be interpreted as a waiver of the privilege on the part of the Executive branch.

For reasons already explained, this Decision shall not be interpreted as departing from the ruling in *Senate v. Ermita* that executive privilege should be invoked by the President or through the Executive Secretary "by order of the President."

WHEREFORE, the petition is *DISMISSED*.

SO ORDERED.

Quisumbing, Corona, Chico-Nazario, Velasco, Jr., Nachura, Reyes, and *Leonardo-de Castro, JJ.,* concur.

Carpio, J., see concurring opinion.

Tinga, J., in the result, see separate opinion.

Puno, C.J., see dissenting opinion.

Ynares-Santiago and *Austria-Martinez, JJ.,* join in the dissenting opinion of Chief Justice Puno.

Azcuna, J., dissents in a separate opinion.

Brion, J., no part.

CONCURRING OPINION

CARPIO, *J.*:

I concur with the *ponencia* of Justice Conchita Carpio Morales on the following grounds:

1. Offers and counter-offers between States negotiating a treaty are expected by the negotiating States to remain confidential during the negotiations prior to the signing of the treaty. There is no dispute on this.

2. After the signing of the treaty, the public disclosure of such offers and counter-offers depends on the consent of **both** negotiating States. A State may wish to keep its offers and counter-offers confidential even after the signing of the treaty because it plans to negotiate similar treaties with other countries and it does not want its negotiating positions known beforehand by such other countries. The offers and counter-offers of a negotiating State usually include references to or discussions of the offers and counter-offers of the other negotiating State. Hence, a negotiating State cannot decide alone to disclose publicly its own offers and counter-offers if they refer to or discuss the offers and counter-offers of the other negotiating State.

3. If the Philippines does not respect the confidentiality of the offers and counter-offers of its negotiating partner State, then other countries will be reluctant to negotiate in a candid and frank manner with the Philippines. Negotiators of other countries will know that Philippine negotiators can be forced to disclose publicly offers and counter-offers that their countries want to remain confidential even after the treaty signing. Thus, negotiators of such countries will simply repeat to Philippine negotiators offers and counter-offers that they can disclose publicly to their own citizens, which offers and counter-offers are usually more favorable to their countries. This denies to Philippine negotiators the opportunity to hear, and explore, other more balanced offers or counter-offers from negotiators of such countries. A writer on diplomatic secrets puts it this way:

x x x Disclosure of negotiating strategy and goals impairs a party's ability to negotiate the most favorable terms, because a negotiating party that discloses its minimum demands insures that it will get nothing more than the minimum. Moreover, those involved in the practice of negotiations appear to be in agreement that publicity

leads to 'grandstanding,' tends to freeze negotiating positions, and inhibits the give-and-take essential to successful negotiation. As Sissela Bok points out, if 'negotiators have more to gain from being approved by their own sides than by making a reasoned agreement with competitors or adversaries, then they are inclined to 'play to the gallery . . . .' In fact, the public reaction may leave them little option. It would be a brave, or foolish, Arab leader who expressed publicly a willingness for peace with Israel that did not involve the return of the entire West Bank, or Israeli leader who stated publicly a willingness to remove Israel's existing settlements from Judea and Samaria in return for peace.[1]

4. In the present case, at least one negotiating State – the Philippines – does not want to disclose publicly the offers and counter-offers, including its own. The Philippines is expected to enter into similar treaties with other countries. The Court cannot force the Executive branch to telegraph to other countries its possible offers and counter-offers that comprise our negotiating strategy. That will put Philippine negotiators at a great disadvantage to the prejudice of national interest. Offers and counter-offers in treaty negotiations are part of diplomatic secrets protected under the doctrine of executive privilege. Thus, in *United States v. Curtiss-Wright*,[2] the leading case in American jurisprudence on this issue, the U.S. Supreme Court, quoting with approval a letter of President George Washington, held:

x x x Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - **a refusal the wisdom of which was recognized by the House itself and has never since been doubted**. In his reply to the request, President Washington said:

> The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought

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[1] Benjamin S. DuVal, *The Occasions of Secrecy*, UNIVERSITY OF PITTSBURGH LAW REVIEW, Spring 1986.

[2] 299 U.S. 304 (1936).

> 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 that 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. (Emphasis supplied)

5. The negotiation of treaties is different from the awarding of contracts by government agencies. In diplomatic negotiations, there is a traditional expectation that the offers and counter-offers of the negotiating States will remain confidential even after the treaty signing. States have honored this tradition and those that do not will suffer the consequences. There is no such expectation of keeping confidential the internal deliberations of government agencies after the awarding of contracts.

6. However, in the ratification of a treaty, the Senate has the right to see in **executive session,** the offers and counter-offers made in the treaty negotiations even in the absence of consent from our treaty partner State. Otherwise, the Senate cannot examine fully the wisdom of the treaty. In the present case, however, the Senate is not a party.

Accordingly, I vote to **DISMISS** the petition.

SEPARATE OPINION

TINGA, *J.*:

The dissent of our eminent Chief Justice raises several worthy points. Had the present question involved the legislative consideration of a domestic enactment, rather than a bilateral treaty submitted for ratification by the Senate, I would have no

qualms in voting to grant the petition. However, my vote to dismiss the petition, joining in the result of the *ponencia* of the esteemed Justice Morales, is due to my inability to blithely disregard the diplomatic and international ramifications should this Court establish a rule that materials relevant to treaty negotiations are demandable as a matter of right. The long-standing tradition of respecting the confidentiality of diplomatic negotiations is embodied in the rule according executive privilege to diplomatic secrets.

The *ponente* engages in a thorough and enlightening discussion on the importance and vitality of the diplomatic secrets privilege, and points out that such privilege, which is a specie of executive privilege, serves to balance the constitutional right to information invoked in this case. If I may add, in response to the Dissenting Opinion which treats the deliberative process privilege as "a distinct kind of executive privilege" from the "diplomatic secrets privilege", notwithstanding the distinction, both deliberative process privilege and diplomatic secrets privilege should be jointly considered if the question at hand, as in this case, involves such diplomatic correspondences related to treaty negotiations. The diplomatic character of such correspondences places them squarely within the diplomatic secrets privilege, while the fact that the ratification of such treaty will bestow on it the force and effect of law in the Philippines also places them within the ambit of the deliberate process privilege. Thus, it would not be enough to consider the question of privilege from only one of those two perspectives, as both species of executive privilege should be ultimately weighed and applied in conjunction with each other.

In ascertaining the balance between executive privilege and the constitutional right to information in this case, I likewise consider it material to consider the implications had the Court established a precedent that would classify such documents relating to treaty negotiations as part of the public record since it is encompassed within the constitutional right to information. The Dissenting Opinion is unfortunately unable to ultimately convince that establishing such a general rule would not set the Philippines so far apart from the general practice of the community of

nations. For if indeed the Philippines would become unique among the governments of the world in establishing that these correspondences related to treaty negotiations are part of the public record, I fear that such a doctrine would impair the ability of the Philippines to negotiate treaties or agreements with foreign countries. The Philippines would become isolated from the community of nations, and I need not expound on the negative and destabilizing implications of such a consequence.

It should be expected that national governments, including our own, would insist on maintaining the presumptive secrecy of all documents and correspondences relating to treaty negotiations. Such approach would be maintained upon no matter how innocuous, honest or above-board the privileged information actually is, since an acknowledgment that such information belongs to the public record would diminish a nation's bargaining power in the negotiation of treaties. This truth may be borne more so out of *realpolitik*, rather than the prevalence of a pristine legal principle, yet it is a political reality which this Court has to contend with since it redounds to the ultimate wellbeing of the Philippines as a sovereign nation. On the premise that at least a significant majority of the most relevant players in the international scene adhere to the basic confidentiality of treaty negotiations no matter the domestic implications of such confidentiality, then it can only be expected that such nations will hesitate, if not refuse outright, to negotiate treaties with countries which do not respect that same rule.

The Dissenting Opinion does strive to establish that in certain countries such as the United States, the United Kingdom, Australia and New Zealand, there is established a statutory right to information that allows those states' citizens to demand the release of documents pertinent to public affairs. However, even the dissent acknowledges that in the United Kingdom for example, "confidential information obtained from a State other than the United Kingdom" or information that would be likely to prejudice relations between the United Kingdom and other countries are exempt from its own Freedom of Information Act of 2000. It is impossible to conclude, using the examples of those countries,

that there is a general presumptive right to access documents relevant to diplomatic negotiations.

It would be a different matter if the petitioners or the dissent were able to demonstrate that a significant number of nations have adopted a paradigm that incorporates their treaty negotiations into the public record out of recognition of the vital right to information, transparency, good governance, or whatever national interest revelation would promote; or that there is an emerging trend in international law that recognizes that treaty negotiations are not privileged in character, or even if so, that the privilege is of such weak character that it may easily be overcome. If either circumstance was established, it would be easier to adopt the position of the dissent, which admirably attempts to infuse full vitality into the constitutional rights of the people, as it would assure that such constitutional affirmation would not come at the expense of the country's isolation from the community of nations.

Unfortunately, neither the Dissenting Opinion nor the petitioners herein, have attempted to engage such perspective. A cursory inquiry into foreign jurisprudence and international law does not reveal that either of the two trends exist at the moment. In the United Kingdom, the concept of State interest immunity (formerly known as "Crown Privilege") guarantees that information, the disclosure of which would be prejudicial to the interests of the State, may not be disclosed. In the *Corfu Channel Case*,[1] the International Court of Justice affirmed the United Kingdom's refusal to turn over certain documents relevant to its dispute with Albania on the ground of national security. In Australia, the Attorney General's certification that information may not be disclosed for the reason that it would prejudice the security, defense or international relations of Australia is authoritative and must be adhered to by the court.[2]

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[1] *United Kingdom v. Albania*, 1949 I.C.J. 4 (Apr. 9).

[2] See paragraphs 144 & 145, DECISION ON THE OBJECTION OF THE REPUBLIC OF CROATIA TO THE ISSUANCE OF *SUBPOENAE DUCES TECUM*, International Criminal Tribunal for the former Yugoslavia (18 July 1997).

According to commentaries on the law on evidence in Pakistan, "if the privilege is claimed on the ground that the document relates to the affairs of the State which means matters of public nature in which a State is concerned and disclosure of which will be prejudicial to public interest or endangers national defense or is detrimental to good diplomatic relations then the general rule [of judicial review] ceases to apply and the Court shall not inspect the document or show it to the opposite party unless the validity of the privilege claimed is determined."[3]

The International Criminal Tribunal for the former Yugoslavia, in a decision dated 18 July 1997, did recognize an international trend that in cases where national security or state secrets privilege is invoked, the courts may nonetheless assess the validity of the claim, thus requiring the disclosure of such documents to the courts or its designates.[4] Nonetheless, assuming that such a ruling is indicative of an emerging norm in international law, it only establishes that the invocation of state secrets cannot be taken at face value but must be assessed by the courts. The Dissenting Opinion implicitly goes further and establishes that documents involved in diplomatic negotiations relating to treaty agreements should form part of the public record as a consequence of the constitutional right to information. I would have been more conformable to acknowledge such a doctrine if it is supported by a similar trend in foreign jurisprudence or international law.

Where the contracting nations to a treaty share a common concern for the basic confidentiality of treaty negotiations it is understandable that such concern may evolve unto a firm norm of conduct between them for as long as no conflict between them in regard to the treaty emerges. Thus, with respect to the subject treaty the Government of the Philippines should expectedly heed Japan's normal interest in preserving the confidentiality of the treaty negotiations and conduct itself accordingly in the same manner that our Government expects the Japanese Government to observe the protocol of confidentiality.

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[3] See *id*.

[4] See note 2.

Even if a case arises between the contracting nations concerning the treaty it does not necessarily follow that the confidentiality of the treaty negotiations may be dispensed with and looked into by the tribunal hearing the case, except for the purposes mentioned in Article 32 of the Vienna Convention of the Law of Treaties. The Article provides:

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leaves to a result which is manifestly absurd or unreasonable.

The aforequoted "preparatory work" or *travaux preparatiores* may be used either to confirm the meaning of the treaty or as an aid to interpretation where, following the application of Article 32, the meaning is ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.[5] The article may be limited in design as a rule in the interpretation of treaties.

Moreover, it is less clear what exactly classifies documents or correspondences as "preparatory work." Should such preparatory work have been cleared for disclosure by the negotiating countries? In 1995, the International Court of Justice, in *Qatar v. Bahrain*,[6] dealt with Bahrain's claim that following Article 32, the ICJ should adopt its theory concerning a territorial dispute based on the text of a documents headed "Minutes" signed at Doha on 25 December 1990 by the Ministers for Foreign Affairs of Bahrain, Qatar and Saudi Arabia. While the ICJ ultimately rejected Bahrain's contention on the ground that such minutes could not provide conclusive supplementary

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[5] *International Law*, ed. By Malcolm D. Evans, p. 188.

[6] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment,* ICJ Reports 995.

elements for the interpretation of the text adopted, it is useful to dwell on the fact that such a document classified as "preparatory work" was, at the very least, expressly approved by the negotiating parties through their Foreign Ministers.

In the case at bar, it appears that the documents which the petitioners are particularly interested in their disclosure are the various drafts of the JPEPA. It is not clear whether such drafts were ever signed by the Philippine and Japanese governments, or incorporated in minutes or similar documents signed by the two governments. Even assuming that they were signed but without any intention to release them for public documentation, would such signatures already classify the minutes as part of "preparatory work" which, following the Vienna Convention, provides supplementary means of interpretation and should logically be within the realm of public disclosure? These are manifestly difficult questions which unfortunately, the petitioners and the Dissenting Opinion did not adequately address.

Finally, I wish to add that if the petitioner in this case is the Senate of the Philippines, and that it seeks the requested documents in the process of deliberating on the ratification of the treaty, I will vote for the disclosure of such documents, subject to mechanisms such as *in camera* inspection or executive sessions that would have accorded due regard to executive privilege. However, the reason behind such a position will be based not on the right to information, but rather, on the right of the Senate to fully exercise its constituent function of ratifying treaties.

DISSENTING OPINION

PUNO, *C.J.*:

Some 22,000 years ago, the *homo sapiens* in the Tabon caves of Palawan gathered food, hunted, and used stone tools to survive. Advancing by thousands of years, the early inhabitants of our land began to trade with neighboring countries. They exchanged wax, rattan, and pearls for porcelain, silk, and gold of China, Indo-China, and Malaysia.[1] The 16th century then ushered in

[1] Philippine Yearbook 2005, National Statistics Office (2005), p. 44.

the galleon trade between Manila and Acapulco. The 1700s saw the genesis of the Filipino trading with the British, followed by the German and the French in the 1800s. The 1900s opened commerce between the Philippines and the United States of America.[2] Today, with the onset of globalization of the economy and the shrinking of the world through technology, a far more complicated international trade has become a matter of survival - much like gathering food and hunting 22,000 years ago - to both countries and individuals.

The growth and development envisioned by globalization are premised on the proposition that the whole world economy would expand and become more efficient if barriers and protectionist policies are eliminated. Expansion will happen as each country opens its doors to every other producer, and more efficient producers start to compete successfully with countries that produce at higher costs because of special protections that domestic laws and regulations provide. Smaller countries and small enterprises will then concentrate their resources where they can be most competitive. The logic is that ultimately, the individual consumer will benefit and lower cost will stimulate consumption, thus increasing trade and the production of goods and services where it is economically advantageous.[3]

Not a few world leaders, however, have cautioned against the downside of globalization. Pope John Paul II observed that "(g)lobalization has also worked to the detriment of the poor, tending to push poorer countries to the margin of international economic and political relations. Many Asian nations are unable to hold their own in a global market economy."[4] Mahatma Gandhi's words, although referring to infant industrialization, are prescient and of similar import: "The world we must strive to build needs to be based on the concept of genuine social

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[2] *Id.* at 50-51, 54-55.

[3] De Leon, A., "*Entering the Lists: SMEs in Globalized Competition," Bridging the Gap: Philippine Small and Medium Enterprises and Globalization,* Alfonso, O., *ed.* (2001), p. 49.

[4] Pope John Paul II, "*Ecclesia in Asia,*" Synod of Bishops in Asia, 1999.

equality…economic progress cannot mean that few people charge ahead and more and more are left behind."

The key to resolving the decisive issue in the case at bar turns on the proper framework of analysis. The instant case involves primarily not an assessment of globalization and international trade or of the extent of executive privilege in this global arena, but a valuation of the **right of the individual and his representatives in Congress to participate in economic governance**. Economic decisions such as forging comprehensive free trade agreements impact not only on the growth of our nation, but also on the lives of individuals, especially those who are powerless and vulnerable in the margins of society.

First, the facts.

In 2002, Japanese Prime Minister Junichiro Koizumi introduced the "Initiative for Japan-ASEAN Comprehensive Economic Partnership."[5] President Gloria Macapagal-Arroyo proposed the creation of a working group to study the feasibility of an economic partnership with Japan.[6] In October of that year, the Working Group on the Japan-Philippine Economic Partnership Agreement (JPEPA) was formed, consisting of representatives from concerned government agencies of the Philippines and Japan. It was tasked to study the possible coverage and content of a mutually beneficial economic partnership between the two countries.[7]

On 28 May 2003, the Philippine Coordinating Committee (PCC), composed of representatives from eighteen (18) government agencies, was created under Executive Order No. 213. It was tasked to negotiate with the Japanese representatives on the proposed JPEPA, conduct consultations with concerned government and private sector representatives, and draft a proposed framework for the JPEPA and its implementing agreements.[8]

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[5] Petition, p. 17; see also Comment, p. 4.

[6] *Id*.

[7] *Id.* at 18.

[8] §2, Executive Order No. 213, promulgated May 28, 2003.

In June 2003, the Working Group signified that both countries were ready to proceed to the next level of discussions and thus concluded its work. The Joint Coordinating Team (JCT) for JPEPA, composed of representatives from concerned government agencies and the private sector, was then created.[9]

On 11 December 2003, Prime Minister Koizumi and President Macapagal-Arroyo agreed that the Japanese and Philippine governments should start negotiations on JPEPA in 2004 based on the discussions and outputs of the Working Group and the Joint Coordinating Team. In February 2004, negotiations on JPEPA commenced.[10]

On 25 January 2005, petitioners Congressman Lorenzo R. Tañada III and Congressman Mario Joyo Aguja jointly filed **House Resolution No. 551, "Directing the Special Committee on Globalization to Conduct an Urgent Inquiry in Aid of Legislation on Bilateral Trade and Investment Agreements that Government Has Been Forging, with Far Reaching Impact on People's Lives and the Constitution But with Very Little Public Scrutiny and Debate**."[11] In the course of the inquiry conducted by the Special Committee on Globalization (Committee), respondent DTI Undersecretary Thomas G. Aquino was requested to furnish the Committee a copy of the latest draft of the JPEPA. Respondent Undersecretary Aquino was the Chairperson of the PCC. He did not accede to the request.[12]

On 10 May 2005, Congressman Herminio G. Teves, as Chairperson of the Special Committee on Globalization, wrote to respondent Executive Secretary Eduardo Ermita, requesting that the Committee be furnished all documents on the JPEPA, including the latest drafts of the agreement, the requests and the offers.[13] Executive Secretary Ermita wrote Congressman

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[9] Petition, p. 18; see also Comment, p. 4 and Annex C.

[10] *Id*. at 19.

[11] *Id*. at 19; see also Annex C.

[12] *Id*. at 21-22.

[13] *Id*. at 22.

Teves on 23 June 2005, informing him that the DFA would be **unable to furnish the Committee all documents on the JPEPA, since the proposed agreement "has been a work in progress for about three years." He also said that a copy of the draft agreement would be forwarded to the Committee "as soon as the text thereof is settled and complete."**[14]

On 1 July 2005, petitioner Congressman Aguja, as member of the Committee, wrote NEDA Director-General Romulo Neri and respondent Tariff Commission Chairperson Abon to request copies of the latest text of the JPEPA. Respondent Chairperson Abon wrote petitioner Congressman Aguja on 12 July 2005 that the former did not have a copy of the document being requested. He also stated that "the negotiation is still ongoing" and that he was certain respondent Undersecretary Aquino would provide petitioner Congressman Aguja a copy "once the negotiation was completed."[15] For its part, NEDA replied through respondent Assistant Director-General Songco that petitioner Congressman Aguja's request had been forwarded to the office of respondent Undersecretary Aquino, who would be in the best position to respond to the request.[16]

In view of the failure to furnish the Committee the requested document, the Committee resolved to subpoena the records of the DTI with respect to the JPEPA. However, House Speaker Jose de Venecia requested the Committee to hold the subpoena in abeyance, as he wanted to secure first the consent of President Macapagal-Arroyo to furnish the Committee a copy of the JPEPA.[17]

On 25 October 2005, petitioner Congressman Aguja, as member of the Committee, wrote to the individual members of the PCC, reiterating the Committee's request for an update on the status

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[14] *Id*. See also Annex I.

[15] *Id*. See also Annex J.

[16] *Id*. at 23-24, Annex K.

[17] *Id*. at 25, citing TSN, Committee Hearing on Resolution No. 551, 12 October 2005.

of the JPEPA negotiations, the timetable for the conclusion and signing of the agreement, and a copy of the latest working draft of the JPEPA.[18] None of the members provided the Committee the requested JPEPA draft. In his letter dated 2 November 2005, respondent Undersecretary Aquino replied that the **Committee would be provided the latest draft of the agreement "once the negotiations are completed and as soon as a thorough legal review of the proposed agreement has been conducted."**[19]

As the Committee has not secured a copy of the full text of the JPEPA and its attachments and annexes despite the Committee's many requests, petitioners filed the instant Urgent Petition for *Mandamus* and Prohibition on 9 December 2005. They pray that the Court (1) order respondents to provide them the full text of the JPEPA, including the Philippine and Japanese offers and all pertinent attachments and annexes thereto; and (2) restrain respondents from concluding the JPEPA negotiations, signing the JPEPA, and transmitting it to the President until said documents have been furnished the petitioners.

On 17 May 2006, respondents filed their Comment. Petitioners filed their Reply on 5 September 2006.

On 11 September 2006, a certified true copy of the full text of the JPEPA **signed by President Macapagal-Arroyo and Prime Minister Koizumi** with annexes and the implementing agreement was posted on the website of the Department of Trade and Industry and made accessible to the public.[20] **Despite the accessibility of the signed full text of the JPEPA**, petitioners reiterated in their Manifestation and Motion filed on 19 September 2007 their prayer that respondents furnish them copies of the initial offers (of the Philippines and of Japan) of the JPEPA, including all pertinent attachments and annexes thereto, and

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[18] *Id.* at 26, Annexes M-1 to M-15, N-1 to N-7.

[19] *Id.* at 28, Annex P.

[20] Respondents' Manifestation, pp. 2-3.

the **final text of the JPEPA prior to signing by the President** (the "subject JPEPA documents").[21]

I respectfully submit that the *ponencia* overlooks the fact that it is the **final text of the JPEPA prior to its signing by the President that petitioners seek to access** when the *ponencia* holds at the outset, *viz*:

> Considering, however, that "[t]he principal relief petitioners are praying for is the disclosure of the contents of the JPEPA prior to its finalization between the two States parties," (Reply to the Comment of the Solicitor General, *rollo*, p. 319 [underscoring supplied]) public disclosure of the **text of the JPEPA after its signing by the President**, during the pendency of the present petition, has been largely rendered moot and academic.
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> The text of the JPEPA having been made accessible to the public, the petition has become moot and academic to the extent that it seeks the disclosure of the "full text" thereof.[22] (*emphasis supplied*)

Thus, insofar as petitioners' access to the **final text of the JPEPA prior to signing by the President** is concerned, the *ponencia* failed to include the same among the issues for the Court to resolve.

The issues for resolution in the case at bar are substantive and procedural, *viz*:

I. Do petitioners have standing to bring this action for *mandamus* in their capacity as citizens of the Republic, taxpayers and members of Congress?

II. Does the Court have jurisdiction over the instant petition?

III. Do petitioners have a right of access to the documents and information being requested in relation to the JPEPA?

IV. Will petitioners' right to effective participation in economic decision-making be violated by the deferral of the public

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[21] Petitioners' Manifestation and Motion, p. 3.

[22] *Ponencia*.

disclosure of the requested documents until such time that the JPEPA has been concluded and signed by the President?

I shall focus on the jugular issue of whether or not petitioners have a right of access to the subject JPEPA documents. Let me first take up **petitioners' demand for these documents as members of the House of Representatives**.

I. The context: the question of access of the members of the House of Representatives to the subject JPEPA documents is raised in relation to international trade agreement negotiations

In demanding the subject JPEPA documents, **petitioners suing as members of the House of Representatives** invoke their **power over foreign trade** under Article VI, Section 28 (2) of the 1987 Constitution which provides, *viz*:

> Sec. 28 (2). The **Congress may, by law, authorize the President to fix within specified limits**, and subject to such **limitations and restrictions as it may impose**, **tariff rates, import and export quotas, tonnage and wharfage dues**, and other **duties or imposts** within the framework of the national development program of the Government. (*emphasis supplied*)

Respondents, on the other hand, deny petitioners' demand for information by contending that the President is the **sole organ of the nation in external relations** and has **sole authority** in the **negotiation of a treaty; hence, petitioners as members of the House of Representatives** cannot have access to the subject JPEPA documents.[23] On closer examination, respondents' contention can be reduced into two claims: (1) the executive has **sole** authority in treaty negotiations, hence, the House of Representatives has no power in relation to treaty negotiations;

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[23] Comment, p. 24; *ponencia*. 1987 PHIL. CONST. Art. VII on the Executive Department, §21 provides, *viz*:

> Section 21. No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate.

and (2) the information and documents used by the executive in treaty negotiations are confidential.

To buttress their contention, which the *ponencia* upholds, respondents rely on ***United States v. Curtiss-Wright Export Corporation***,[24] a case that has become a classic authority on recognizing executive primacy or even exclusivity in foreign affairs in the U.S.[25] and in the Philippines.[26] They also cite ***People's Movement for Press Freedom (PMPF) v. Manglapus,* the only Philippine case wherein the Court, in an unpublished Resolution, had occasion to rule on the issue of access to information on treaty negotiations. *PMPF v. Manglapus*** extensively quoted **Curtiss-Wright**, *viz*:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but **he alone negotiates**. **Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.** As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The **President is the sole organ of the nation in its external relations**, and its **sole representative with foreign nations**.' Annals, 6th Cong., col. 613. The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:
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> 'The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with

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[24] 299 U.S. 304 (1936).

[25] Ducat, C., *Constitutional Interpretation: Powers of Government* (2000), Vol. 1., p. 252; Powell, H., "*The President's Authority over Foreign Affairs: An Executive Branch Perspective*," 67 George Washington Law Review (March 1999), n.8. See also *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corporation, Civil Aeronautics Board,* 333 U.S. 103 (1948); *Webster v. Doe*, 486 U.S. 592, 605-06 (1988); *Harlow v. Fitzgerald*, 457 U.S. 800, 812 n.19 (1982).

[26] See *Santos v. Executive Secretary Catalino Macaraig and Secretary Raul Manglapus*, G.R. No. 94070, April 10, 1992, 208 SCRA 74, and *People's Movement for Press Freedom, et al. v. Manglapus, et al.*, G.R. No. 84642, September 13, 1988.

foreign nations and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee considers this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. **The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch.'** 8 U.S. Sen. Reports Comm. on Foreign Relations, p. 24.

It is important to bear in mind that **we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.** It is quite apparent that if, in the maintenance of our international relations, embarrassment -perhaps serious embarrassment- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. **Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.** Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - a refusal the wisdom of which was recognized by the House itself and has never since been doubted.[27] *(emphasis supplied)*

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[27] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319-320 (1936), citing 1 Messages and Papers of the Presidents, 194.

In examining the validity of respondents' contention and the *ponencia*'s affirmation thereof, that the executive has sole authority in treaty negotiations, and that information pertaining to treaty negotiations is confidential, let me begin by **tracing respondents' and the *ponencia*'s steps back to U.S. jurisdiction** as they heavily rely on **Curtiss-Wright,** which was quoted in ***PMPF v. Manglapus,*** for their position.

In the U.S., there is a long-standing debate on the locus of the primary or even exclusive power over foreign affairs.[28] Ironically, while **Curtiss-Wright** is considered a most influential decision on asserting presidential primacy in foreign affairs, the issue in that case was the validity of **Congress' delegation of its foreign affairs power** to the President; President Franklin D. Roosevelt ordered an embargo on ammunition sales to two South American countries **in execution of a Joint Resolution of Congress.** Towards the end of the *ponencia*, Justice Sutherland stated that "it was not within the power of the President to repeal the Joint Resolution."[29] The oft-quoted "sole organ" remark in **Curtiss-Wright** has not a few times been regarded in the U.S. as dictum in that case.[30] I make this observation to caution against over-reliance on **Curtiss-Wright**, but the case at bar is not the occasion to delve into and settle the debate on the locus of the primary power in the broad area of foreign affairs. In

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[28] Powell, H., "*The President's Authority over Foreign Affairs: An Executive Branch Perspective*," 67 George Washington Law Review 527 (1999). See also Henkin, L. Foreign Affairs and the United States Constitution 36 (2nd ed.)

[29] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 331 (1936).

[30] Justice Sutherland's use of the "sole organ" remark in *Curtiss-Wright* prompted Justice Robert Jackson to say in the 1952 landmark case *Youngstown Sheet and Tube Co. v. Sawyer* (343 U.S. 579) that at best, what can be drawn from Sutherland's decision is the intimation that the President "might act in external affairs without congressional authority, but not that he might act contrary to an act of Congress." Justice Jackson also noted that "much of the (Sutherland) opinion is dictum." In 1981, the District of Columbia Circuit cautioned against placing undue reliance on "certain dicta" in Sutherland's opinion: "To the extent that denominating the President as the 'sole organ'

this vast landscape, I shall limit my view only to the subject matter of the instant case — **the openness or secrecy of treaty negotiations and, more particularly, of trade agreement negotiations.**

Aside from the fact that **Curtiss-Wright** did not involve treaty negotiations, much less **trade agreement** negotiations, that case was decided in 1936 or more than 70 years ago. Since then, **the dynamics of the allocation of power over international trade agreements between the executive and the legislature has dramatically changed.** An appreciation of these developments would provide a useful backdrop in resolving the issue of access to the subject JPEPA documents.

A. Negotiation of trade agreements: the question of power allocation between the executive and Congress in U.S. jurisdiction

The U.S. constitution is a good place to start in understanding the allocation of power over international trade agreements between the executive and the legislative branches of government.

Article II of the U.S. Constitution grants the President the power to make treaties, but only with the approval of a super-

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of the United States in international affairs constitutes a blanket endorsement of plenary Presidential power over any matter extending beyond the borders of this country, we reject that characterization." (*American Intern. Group v. Islamic Republic of Iran*, 657 F.2d 430, 438 n.6 [D.C. Cir. 1981]) (Fisher, L., Invoking Executive Privilege: Navigating Ticklish Political Waters, 8 William and Mary Bill of Rights Journal [April 2000], p. 583, 608-609).

In *Dames & Moore v. Regan* (453 U.S. 654 [1981]), the U.S. Supreme Court observed that sixteen years after **Curtiss-Wright** was decided, Justice Jackson responded to the virtually unlimited powers of the executive in foreign affairs in the landmark case *Youngstown Sheet and Tube Co. v. Sawyer* (343 U.S. 579, p. 641), *viz*:

"The example of such unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image."

majority of the Senate.[31] Under Article I, Congress has the power to regulate foreign trade,[32] including the power to "lay and collect Taxes, Duties, Imposts and Excises."[33]

While the drafters of the U.S. Constitution discussed the commerce power and the power to make treaties,[34] there is scant information on how they intended to allocate the powers of foreign commerce between the political branches of government.[35] "The well-recognized utility of Congressional involvement in treaty and international agreement negotiation applies with even greater force when it comes to international trade. For here, the **making of international agreements intersects with the Constitution's express grant of authority to Congress to regulate commerce with foreign nations**." (*emphasis supplied*)[36]

The drafters of the Constitution gave the President power to negotiate because of the need to demonstrate clear leadership

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[31] U.S. CONST. Art. II, §2, cl. 2 provides, *viz*: "(The President) shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

[32] U.S. CONST. Art. I, §8, cl. 3 provides, *viz*: "The Congress shall have the power…to regulate Commerce with foreign Nations . . . ."

[33] U.S. CONST. Art. I, §8, cl. 1.

[34] Wright, L., "*Trade Promotion Authority: Fast Track for the Twenty-First Century*?," 12 William and Mary Bill of Rights Journal 979, 982 (2004). "See generally 1 *The Debates in the Several Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., Burt Franklin reprints, photo. reprint 1987) (2d ed. 1836); The Federalist No. 75 (Alexander Hamilton); James Madison, *Journal of the Federal Convention* (E.H. Scott ed., Books for Libraries Press 1970) (1840); 2 James Madison, *The Debates in the Federal Convention of 1787 which Framed the Constitution of the United States of America* (Gaillard Hunt & James Brown Scott eds., 1987)." *Id.* at Note 25.

[35] *Id.*, citing John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 Dick. J. Int'l L. 203, 224 (1995) ("Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce."). *Id.* at Note 26.

[36] *Id.* at 981-82, citing 148 Cong. Rec. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

and a unified front when dealing with other nations.[37] The Senate was given the power to ratify treaties because, as the more "contemplative" arm of the legislature, it was less subject to short-term interests than the House while still directly representing the interests of the people.[38] Congress was granted the power to set tariffs and to regulate commerce in order to check the powers of the Executive.[39]

Thus, under the U.S. Constitution, the President has the power to negotiate international treaties, but does not have the constitutional authority to regulate commerce or to determine tariffs and duties. On the other hand, Congress has the power to regulate commerce with foreign nations, but does not have the power to negotiate international agreements directly.[40] That **there is a question on the demarcation of powers between the President and Congress in international trade agreements cannot escape the eye.** Throughout U.S. history, answers to this question have come in various permutations.

In the late 1700s, after the U.S. established its independence, it had a weak military and relied on trade policies to maintain its independence and guard its national security through restriction of imports or exports with offending great powers.[41] Congress

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[37] *Id.* "See The Federalist No. 75 (Alexander Hamilton). Another concern was that the legislative branch would not represent the best interests of the nation as a whole, whereas the President would place the national interests ahead of those of individual states. See Robert Knowles, *Comment, Starbucks and the New Federalism*: *The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735, 771 (2001) (referring to the "concerns raised by Madison that the treaty-maker should represent the interests of the entire nation")." *Id.* at Note 21.

[38] *Id.* at 982, citing John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 760 (2002).

[39] See Michael A. Carrier, *All Aboard the Congressional Fast Track*: *From Trade to Beyond*, 29 Geo. Wash. J. Int'l L. & Econ. 687, 688-89 (1996).

[40] *Supra* note 34.

[41] Koh, H. & Yoo, J., "*Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*," 26 Int'l Law 715, 720 (1992).

implemented these trade policies through legislation[42] and ratification of commercial treaties negotiated by the President.[43] **This continued in the 1800s** – the **President** negotiated treaties, including trade treaties, and secured the requisite Senate concurrence.[44]

But **beginning in the 1920s, Congress began to reassert its power over the development of international trade policy**.[45] It began passing protectionist legislation to respond to pressure from domestic industries and agriculture.[46] In 1930, Congress passed the Smoot-Hawley Tariff Act of 1930,[47] which increased tariffs to an average of fifty-three percent and increased the number of products subject to duties.[48] In retaliation, other countries quickly subjected the U.S. to similar tariffs. In the mid-1930s, Congress realized that its setting of tariffs was at

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[42] Wilson, T., "*Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power,*" 47 Drake L. Rev. 141, 164 (1998).

[43] *Supra* note 34, citing John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 Dick. J. Int'l L. 203, 208-209 (1995) ("Hardly anything can be found in the documentation relating to the drafting of the Constitution so as to glean any intent on the separation of powers in the area of foreign commerce."). *Id.* at Note 26.

[44] *Id.*, citing John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 Dick. J. Int'l L. 203, 208 (1995).

[45] *Supra* note 42 at 166.

[46] *Id.* referring to the Tariff Act of 1922.

[47] *Supra* note 34 at 983. The Smoot-Hawley Tariff Act, Pub. L. No. 71-361, 46 Stat. 590 (1930). "The Smoot-Hawley Tariff Act was the ultimate display of U.S. protectionism, John Linarelli, International Trade Relations and the Separation of Powers Under the United States Constitution, 13 Dick. J. Int'l L. 203, 210 (1995), and resulted from Congress caving to special interests. Harold Hongju Koh, Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha, 18 N.Y.U. J. Int'l L. & Pol. 1191, 1194 (1986) ("Because congressional logrolling and horsetrading contributed to every individual duty rate, Smoot-Hawley set the most protectionist tariff levels in U.S. history.")." *Id.* at Note 36.

[48] *Supra* note 42 at 166 referring to the Tariff Act of 1922.

best inefficient[49] and thus **passed the Reciprocal Trade Agreement Act of 1934 (the 1934 Act)**.[50]

The 1934 Act **allowed the President to reduce tariffs within guidelines prescribed by Congress.**[51] It permitted the President to issue a Presidential Proclamation enacting international agreements that lowered tariffs without any further action by Congress.[52] Needless to state, the 1934 Act was a significant delegation of Congress' power to set tariffs. But the Act had a limited lifespan and, with each extension of the Act, Congress issued more guidelines and restrictions on the powers it had delegated to the President.[53]

The **modern period saw a drastic alteration in the U.S. approach to negotiating trade agreements**.[54] Instead of making additional changes to the 1934 Act, Congress passed the **Trade Act of 1974** (the 1974 Act), which created **modern procedures called the "fast track."**[55] Fast track legislation was enacted to address conflicts between the President and Congress.[56] These

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[49] Wright, L., "*Trade Promotion Authority: Fast Track for the Twenty-First Century*?", 12 William and Mary Bill of Rights Journal 979, 984 (2004), citing John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 Dick. J. Int'l L. 203, 211 (1995).

[50] *Id.* citing Reciprocal Trade Agreements Act of 1934, Pub. L. No. 73-316, 48 Stat. 943 (1934) (allowing the President to negotiate tariff agreements with foreign nations and implement them by Presidential Proclamation without congressional approval).

[51] *Id.* at Note 41, citing John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 Dick. J. Int'l L. 203, 211 (1995).

[52] *Id.*, citing John Linarelli, *International Trade Relations and the Separation of Powers Under the United States Constitution*, 13 Dick. J. Int'l L. 203, 211-212 (1995), citing Reciprocal Trade Agreements Act of 1934.

[53] Koh, H., "*Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*," 18 N.Y.U. J. Int'l L. & Pol. 1191, 1196 (1986).

[54] Koh, H., "*The Fast Track and United States Trade Policy*," 18 Brook. J. Int'l L. 143, 143-48 (1992).

[55] Trade Act of 1974, 19 U.S.C.A. §§2191-94.

[56] Carr, T., "*The Executive Trade Promotion Authority and International Environmental Review in the Twenty-First Century*," 25 Houston Journal of International Law 141, 144-145 (2002).

conflicts stemmed from the presidential exercise of the executive trade agreement authority and the ordinary congressional approval procedures, which resulted in ongoing amendments and a slower, less reliable trade negotiation process.[57] Fast track procedures were intended as a "consultative" solution to foreign trade disputes between Congress and the President.[58] It was designed to benefit both branches of government by allowing congressional input into trade agreement negotiations while enabling "the President to guarantee to international trading partners that Congress will decide on the final agreement promptly."[59]

The **1974 Act** broadened the scope of powers delegated to the President who was given the authority to make international trade agreements affecting both tariff and non-tariff barriers.[60] With the 1974 Act, Congress delegated to the President both the power to set tariffs and the power to regulate commerce with foreign nations.[61] But while the scope of the powers granted to the President was broader, the **extent of the grant was limited. Unlike in the 1934 Act, Congress did not give the President the authority to enact**

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[57] *Id.* at 145.

[58] *Id*.

[59] *Id.* citing Powell, F., "*Environmental Protection in International Trade Agreements: The Role of Public Participation in the Aftermath of the NAFTA*," 6 Colo J. Int'l Envtl. L. & Pol'y 109, 116 (1995).

[60] *Supra* note 49 at 984, citing Wilson, T., "*Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*," 47 Drake L. Rev. 141, 169-171 (1998). "Nontariff barriers (NTBs) are essentially anything other than a tariff or quota that is used to restrict trade. The General Agreement on Tariffs and Trade (GATT) broadly defines NTBs as '[l]aws, regulations, judicial decisions and administrative rulings of general application . . . pertaining to . . . requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefore, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use . . . .' General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, Art. X, para. 1. Examples include customs valuation, import licensing rules, subsidies, compatibility standards, quality standards, health and safety regulations, and labeling laws. John J. Jackson *et al.*, *Legal Problems of International Economic Relations* 411 (4th ed. 2002)." *Id.* at Note 47.

[61] *Id.* at 985.

international trade agreement by a simple proclamation.[62] Instead, the **President had to seek congressional approval**.[63] To facilitate approval, the fast track mechanism put in place procedures for congressional review of the agreement during the negotiation process.[64] The most significant feature of the fast track procedure was that Congress could only approve or disapprove, but not modify, the text of the agreement.[65] This mechanism gave the President greater credibility when negotiating international agreements, because other countries knew that the agreements would not be subject to prolonged debates and drastic changes by Congress.[66]

In the 1980s, legislation made the fast track procedure increasingly complicated.[67] The Trade and Tariff Act of 1984 added a requirement that the President consult with the House Ways and Means Committee and the Senate Finance Committee before giving notice of his intent to sign the agreement so that the committees could disapprove the negotiations before formal talks even began.[68] Congress effectively retained a bigger portion of its constitutional authority over regulation of international trade.[69] In 1988, Congress passed the **Omnibus Trade and**

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[62] Wright, L., "*Trade Promotion Authority: Fast Track for the Twenty-First Century*?," 12 William and Mary Bill of Rights Journal 979, 984-85 (2004), citing Wilson, T., "*Note, Who Controls International Trade? Congressional Delegation of the Foreign Commerce Power*," 47 Drake L. Rev. 141, 170 (1998), referring to the Trade Act of 1974.

[63] *Id*.

[64] *Id.* citing Wilson, *supra* note 62 at 170-172, referring to the Trade Act of 1974.

[65] *Id*.

[66] *Id.*, at 985 (2004), citing Koh, H., "*Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*," 18 N.Y.U. J. Int'l L. & Pol. 1191, 1200-03.

[67] Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948.

[68] Koh, H., "*The Fast Track and United States Trade Policy*," 18 Brook. J. Int'l L. 143, 149 (1992).

[69] Wright, L., "*Trade Promotion Authority: Fast Track for the Twenty-First Century*?," 12 William and Mary Bill of Rights Journal 979, 986 (2004), citing Koh, H., *supra* note 68 at 150.

Competitiveness Act of 1988.[70] The Act further "enhance(d) Congress' power in two respects: by reserving for either House the power to block extension of the Fast Track authority past the original expiration date and for both houses to derail already authorized agreements from the Fast Track."[71] Aside from the House Ways and Means and Senate Finance Committees, the House Rules Committee was given the power to "derail" an extension of the fast track.[72] The Act extended the fast-track for only three years.[73]

The fast track legislation saw its end in 1994.[74] For the **first time** after fifty years, the executive branch was without authority to enter into international trade agreements except

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[70] Pub. L. No. 100-418, 102 Stat. 1107.

[71] *Supra* note 68 at 151.

[72] *Supra* note 69, citing Koh, H., "*The Fast Track and United States Trade Policy*," 18 Brook. J. Int'l L. 143, 151 (1992), referring to the 1988 Act §1103(b)(5)(A)-(B)). "Section 1103(b)(5)(A) defines the term 'extension disapproval resolution' as:

a resolution of either House of the Congress . . . [that] disapproves the request of the President for the extension . . . of the [fast-track] provisions to any implementing bill submitted with respect to any trade agreement entered into under Section 1102(b) or (c) of such Act after May 31, 1991, because sufficient tangible progress has not been made in trade negotiations.

Section 1103(b)(5)(B) provides that extension disapproval resolutions 'may be introduced in either House of Congress by any member of such House [and] shall be jointly referred, in the House of Representatives, to the Committee on Ways and Means and the Committee on Rules.'" *Id.* at Note 60.

[73] *Id.*, citing C. O'Neal Taylor, *Fast Track, Trade Policy, and Free Trade Agreements*: *Why the NAFTA Turned into a Battle*, 28 Geo. Wash. J. Int'l L. & Econ. 1, 31 (1994): The President's agreements were only to receive fast track treatment if they were entered into before June 1, 1991. For agreements entered into after May 31, 1991, but before June 1, 1993, fast track was available only if the President requested an extension of negotiating authority and neither house adopted an extension disapproval resolution before June 1, 1991.

[74] *Id.* at 988, citing Housman, R., "*The Treatment of Labor and Environmental Issues in Future Western Hemisphere Trade Liberalization Efforts*," 10 Conn. J. Int'l L. 301, 311-13 (1995).

through treaties subject to Senate approval. Despite persistent attempts by President William J. Clinton and President George H.W. Bush to renew the fast track,[75] **Congress refused to grant the executive branch the power to enter directly into international trade agreements from 1994 until August 2002**.[76]

Finally, with the dawn of the **new millennium**, Congress enacted the **Bipartisan Trade Promotion Authority Act of 2002** (Trade Act of 2002),[77] which provided for a revised fast-track procedure under the new label, "trade promotion authority (TPA)."[78] The Trade Act of 2002 was billed as "establish(ing) a partnership of equals. It recognizes that **Congress' constitutional authority to regulate foreign trade and the President's constitutional authority to negotiate with foreign**

"Initially, the (Clinton) administration sought a virtually unfettered extension of fast-track authority for a seven year period. . . . This first proposal was met with immediate and unified opposition . . . . (T)his first surge of opposition amounted to a game of 'policy chicken.'

Facing continuing opposition, the administration floated a second fast-track proposal . . . . Republicans and the business community once again came out against this new proposal. . . . (T)he administration dropped its second fast-track proposal and floated in its place yet another proposal. . . . While the third proposal garnered quick support from opponents of the prior two proposals, it did not fare well (with other groups). The administration rushed to counter this opposition, relying heavily on the argument that the extension of fast-track was vital to give the administration credibility. . . . In the end, the Uruguay Round bill went forward without any fast-track extension." *Id.* at Note 70 (footnotes omitted).

[75] *Id.*, citing Lenore Sek, Congr. Res. Serv., Pub. No. IB10084, *Trade Promotion Auth*. (*Fast-Track Authority for Trade Agreements*): *Background & Devs. in the 107th Congress* (2003), detailing multiple proposals and speeches made by Clinton and Bush requesting renewal of fast-track authority); Clinton Makes Fast Track Plea To Congress, (Nov. 5, 1997), at http:// www.cnn.com/ ALLPOLITICS/1997/11/05/trade/ (last visited Mar. 4, 2003); David Schepp, Bush Wants More Trade Powers, BBC News Online (Mar. 23, 2001), available at http://news.bbc.co.uk/1/hi/business/1238717.stm.

[76] *Id.*, citing John R. Schmertz & Mike Meier, *U.S. Enacts New "Fast-Track" Trade Bill*, 8 Int'l L. Update 126 (2002).

[77] 19 U.S.C.A. §§3801-13.

[78] Trade Act of 2002 §3804 (detailing the new fast-track procedures).

nations are interdependent. It requires a working relationship that reflects that interdependence."[79] (*emphasis supplied*) The purpose of the Act was to attempt again to resolve the ambiguity in the constitutional separation of powers in the area of international trade.[80]

The Trade Act of 2002 was intended for **Congress to retain its constitutional authority over foreign trade while allowing performance by the President of the role of negotiatior**,[81] but with Congress keeping a **closer watch on the President**.[82] Aside from providing **strict negotiating objectives** to the President, Congress reserved the right to veto a negotiated agreement.[83] The **President's power is limited by specific guidelines and concerns identified by Congress** and his negotiations may address only the issues identified by Congress in the statute and must follow **specific guidelines**.[84] Authorization to negotiate is given if the President determines that foreign trade is "unduly burden(ed) and restrict(ed)" and "the purposes, policies, priorities, and objectives of (the Trade Act of 2002)

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[79] *Supra* note 69, citing 148 Cong. Rec. S10,661 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus).

[80] *Id.* at 989.

[81] *Id.*, citing 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) ("This will give Congress a chance to affect the outcome of the negotiations well before they occur.").

[82] *Id.*, citing 148 Cong. Rec. S10,660 (daily ed. Oct. 17, 2002) (statement of Sen. Baucus) ("Indeed, the Trade Act of 2002 contemplates an even closer working relationship between Congress and the Administration . . . .").

[83] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 989 (2004), citing Trade Act of 2002 §3805(b). "If the agreement negotiated by the administration does not meet the congressional requirements, 'there are ways that either House of Congress can derail a trade agreement.' 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (referring to Trade Act of 2002 §3805(b))." *Id.* at Note 80.

[84] Trade Act of 2002 §3803 provides the authorization for the President to negotiate a trade agreement with a foreign country regarding tariff and/or nontariff barriers and the guidelines he must follow.

will be promoted" by the negotiations.[85] The Act provides five additional limitations on the negotiation of agreements regarding tariff barriers.[86] Negotiation of agreements regarding non-tariff barriers is subject to the objectives, limitations and requirement of consultation and notice provided in the Act.[87] In addition, the President must notify Congress prior to initiating negotiations, in order for the final negotiated agreement to be eligible for TPA.[88] The President is also required to **consult Congress regarding the negotiations "before and after submission of the notice**."[89] The Act also requires the President to make specific determinations and special consultations with Congress in the areas of agriculture and textiles.[90]

As **oversight** to ensure that the President follows the guidelines laid out by Congress, the Trade Act of 2002 created a **Congressional Oversight Group (COG) composed of members of Congress, in order to provide direct participation and oversight to trade negotiations initiated under the Act**.[91] The COG membership includes four members of the House Committee on Ways and Means, four members of the Senate Committee on Finance, and members of the committees of the House and the Senate, "which would have . . . jurisdiction over provisions of law affected by a (sic) trade agreement negotiations . . . ."[92] Each member of the **COG is an official advisor to**

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[85] Trade Act of 2002 §3803.

[86] *Id.*, §3803(a). Limitations on modifications to tariff barriers primarily set minimums for rate of duty reductions.

[87] *Supra* note 83 at 990, citing Trade Act of 2002 §3803(b) (limiting agreements as provided in Sections 3802 and 3804). "The President's actions are considerably more restricted under the Trade Act of 2002 than under previous legislation. Compare Trade Act of 1974, 19 U.S.C.A. §§2101-2495 (1974) and Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 with Trade Act of 2002, §§3801-13." *Id.* at Note 84.

[88] Trade Act of 2002 §3804(a).

[89] *Id.*, §3804.

[90] *Id.*, § 3804(b)-(c).

[91] *Id.*, §3807.

[92] *Id.*, §3807(a)(2)-(3).

the U.S. delegation in negotiations for any trade agreement under the Act.[93] The COG was created "to provide an additional consultative mechanism for Members of Congress and to provide advice to the (United States Trade Representative) on trade negotiations."[94]

To enter into an international agreement using the TPA procedures, the President must first consult with the Senate Committee on Finance, the House Committee on Ways and Means, and the COG.[95] He must then provide written notice to Congress of his intention to enter into negotiations.[96] The notice must include the date that negotiations are scheduled to begin, the specific objectives of the negotiations, and whether the President seeks to create a new agreement or modify an existing agreement.[97] Six months prior to signing an agreement, the President must "send a report to Congress . . . that lays out what he plans to do with respect to (U.S.) trade laws."[98] At that time, Congress reviews the proposed agreement. The Trade Act of 2002 "provides for a resolution process where Congress

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[93] *Id.*, §3807(a)(4). "Without accreditation, congressional representatives would be bystanders and would not be permitted to participate directly in negotiations. As accredited representatives, the members of the COG have the authority to act on behalf of the United States in negotiations." *Supra* note 83 at 992, citing Note 98.

[94] Wright, L., "Trade Promotion Authority: Fast Track for the Twenty-First Century?," 12 William and Mary Bill of Rights Journal 979, 992 (2004), citing 148 Cong. Rec. S9108 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley); see also Trade Act of 2002 §3807(a)(4). The purpose of the COG is "to provide advice to the Trade Representative regarding the formulation of specific objectives, negotiating strategies and positions, the development of the applicable trade agreement, and compliance and enforcement of the negotiated commitments under the trade agreement."

[95] Trade Act of 2002 §3804(a)(2).

[96] *Id.*, §3804(a)(1) (requiring that written notice be provided at least ninety days prior to the commencement of negotiations).

[97] *Id.*, §3804(a)(1).

[98] *Supra* note 94, citing 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (referring to §3804(a)(3)).

can specifically find that the proposed changes are 'inconsistent' with the negotiating objectives."[99]

In defending the complexity of the Trade Act of 2002, Congress points out that "the negotiating objectives and procedures . . . represent a very careful substantive and political balance on some very complex and difficult issues such as investment, labor and the environment, and the relationship between Congress and the Executive branch during international trade negotiations."[100] Without doubt, the Act ultimately places much more stringent limitations on the President's ability to negotiate effectively with foreign nations than previous fast-track legislation did.[101]

Given this slice of U.S. history showing the allocation of power over international trade agreement negotiations between the executive and Congress in U.S. jurisdiction, **it will be turning somersaults with history to contend that the President is the sole organ for external relations**. The "sole organ" remark in **Curtiss-Wright** simply does not apply to the negotiation of international trade agreements in the U.S. where **Congress is allowed**, at the very least, to **indirectly participate in trade negotiations** through the setting of statutory limits to negotiating objectives and procedures, and to **almost directly negotiate** through the Congressional Oversight Group.

Let me now discuss the allocation of power over international trade agreements between the Executive and Congress in Philippine jurisdiction.

B. Negotiation of trade agreements: the question of power allocation between the Executive and Congress in Philippine jurisdiction

In their Reply, petitioners refute respondents' contention that the President is the sole organ of the nation in its external relations

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[99] *Id.*, citing 148 Cong. Rec. S7768 (daily ed. Aug. 1, 2002) (statement of Sen. Baucus) (setting limitations on trade authorities procedures Trade Act of 2002 §3805(b)).

[100] *Id.*, citing 148 Cong. Rec. S9107 (daily ed. Sept. 24, 2002) (statement of Sen. Grassley).

[101] *Supra* note 94 at 992.

and has exclusive authority in treaty negotiation by asserting that Congress has the power to legislate on matters dealing with **foreign trade;** hence, they should have access to the subject JPEPA documents.

Specifically, as aforementioned, petitioners as members of the House of Representatives point to Article VI, Section 28 (2) of the 1987 Constitution, as basis of their power over foreign trade. It provides, *viz*:

> Sec. 28 (2). The **Congress may, by law, authorize the President** to fix within specified limits, and subject to such limitations and restrictions as it may impose, **tariff rates, import and export quotas, tonnage and wharfage dues**, and other **duties or imposts** within the framework of the national development program of the Government. (*emphasis supplied*)

They contend that, pursuant to this provision, the Executive's authority to enter into international trade agreements is a **legislative power delegated to the President** through Sections 401 and 402 of Presidential Decree No. 1464 or the Tariff and Customs Code of the Philippines, *viz*:

> **Sec. 401. Flexible Clause. —**
>
> a. In the interest of national economy, general welfare and/or national security, and subject to the limitations herein prescribed, the **President**, upon recommendation of the National Economic and Development Authority (hereinafter referred to as NEDA), **is hereby empowered: (1) to increase, reduce or remove existing protective rates of import duty (including any necessary change in classification).** The existing rates may be increased or decreased to any level, in one or several stages but in no case shall the increased rate of import duty be higher than a maximum of one hundred (100) per cent *ad valorem*; **(2) to establish import quota or to ban imports of any commodity, as may be necessary**; and (**3) to impose an additional duty on all imports** not exceeding ten (10%) percent *ad valorem* whenever necessary;
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> x x x x x x x x x
>
> **c. The power of the President to increase or decrease rates of import duty** within the limits fixed in subsection "a" shall include

the authority to modify the form of duty. In modifying the form of duty, the corresponding *ad valorem* or specific equivalents of the duty with respect to imports from the principal competing foreign country for the most recent representative period shall be used as bases.

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Sec. 402. Promotion of Foreign Trade. —

a. For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries, **the President, is authorized from time to time:**

(1) To enter into trade agreements with foreign governments or instrumentalities thereof; and

(2) To modify import duties (including any necessary change in classification) **and other import restrictions, as are required or appropriate to carry out and promote foreign trade with other countries:...**

b. The duties and other import restrictions as modified in subsection "a" above, shall apply to articles which are the growth, produce or manufacture of the specific country, whether imported directly or indirectly, with which the Philippines has entered into a trade agreement: xxx

c. Nothing in this section shall be construed to give any authority to cancel or reduce in any manner any of the indebtedness of any foreign country to the Philippines or any claim of the Philippines against any foreign country.

d. Before any trade agreement is concluded with any foreign government or instrumentality thereof, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the Commission which shall seek information and advice from the Department of Agriculture, Department of Natural Resources, Department of Trade and Industry, Department of Tourism, the Central

Bank of the Philippines, the Department of Foreign Affairs, the Board of Investments and from such other sources as it may deem appropriate.[102] (*emphasis supplied*)

Indeed, it is indubitable that **Article VI, Section 28 (2) of the 1987 Constitution, vests Congress with power over foreign trade**, at least with respect to the **fixing of tariff rates, import and export quotas, tonnage and wharfage dues and other duties and imposts, similar to the power of Congress under the U.S. Constitution**. This grant of power to the Philippine Congress is not new in the 1987 Constitution. The 1935 Constitution, in almost similar terms, provides for the same power under Article VI, Section 22(2), *viz*:

Sec. 22(2). The Congress may **by law authorize the President, subject to such limitations and restrictions as it may impose** to fix, within specified limits, tariff rates, import and export quotas, and tonnage and wharfage dues.[103] (*emphasis supplied*)

Pursuant to this provision, Congress enacted Republic Act. No. 1937, entitled, "An Act to Revise and Codify the Tariff and Customs Laws of the Philippines," in 1957. Section 402 of the Act is the precursor of Section 402 of the Tariff and Customs Code of the Philippines of 1978,[104] which petitioners

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[102] §§401-402, Tariff and Customs Code of the Philippines, Presidential Decree No. 1464, promulgated June 11, 1978, amending Republic Act No. 1937, An Act to Revise and Codify the Tariff and Customs Laws of the Philippines, enacted on June 22, 1957.

[103] Congress authorized the President to enter into foreign trade agreements and to impose and regulate duties and other import restrictions, under Rep. Act No. 1189, entitled "An Act Authorizing the President of the Republic of the Philippines to Enter into Trade Agreements with Other Countries for a Limited Period and for Other Purposes," enacted on June 20, 1954; and Rep. Act. No. 1937, entitled "An Act to Revise and Codify the Tariff and Customs Laws of the Philippines," enacted on June 22, 1957.

[104] Tariff and Customs Code of 1978, Presidential Decree No. 1464, provides, *viz*:

WHEREAS, the **Tariff and Customs Code of the Philippines known as Republic Act No. 1937** has been amended by several Presidential Decrees dating back to the year 1972;

x x x x x x x x x

cite. In almost identical words, these sections provide for the authority of the President to "enter into trade agreements with foreign governments or instrumentalities thereof."[105] Section 401 of both the Tariff and Customs Code of 1978 and Republic Act No. 1937 also provide for the power of the President to, among others, increase or reduce rates of import duty.[106]

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Republic of the Philippines, by virtue of the powers in me vested by the Constitution, do hereby order and decree as follows:

Section 1. Codification of all Tariff and Customs Laws. — All tariff and customs laws embodied in the present Tariff and Customs Code and various laws, presidential decrees and executive orders including new amendments thereto made in this Decree, are hereby **consolidated into a single Code to be known as the Tariff and Customs Code of 1978** which shall form an integral part of this Decree. (*emphasis supplied*)

[105] §402, Tariff and Customs Code of 1978, Presidential Decree No. 1464, provides for the authority of the President to enter into trade agreements, *viz*:

Sec. 402. Promotion of Foreign Trade. —

a. For the purpose of expanding foreign markets for Philippine products as a means of assistance in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relations between the Philippines and other countries, **the President, is authorized from time to time:**

(1) To enter into trade agreements with foreign governments or instrumentalities thereof; (*emphasis supplied*)

§402, Rep. Act. No. 1937, provides for the authority of the President to enter into trade agreements, *viz*:

Sec. 402. Promotion of Foreign Trade

a. For the purpose of expanding foreign markets for Philippine products as a means of assisting in the economic development of the country, in overcoming domestic unemployment, in increasing the purchasing power of the Philippine peso, and in establishing and maintaining better relationship between the Philippines and other countries, the President, upon investigation by the Commission and **recommendation of the National Economic Council, is authorized from time to time:**

(1) To enter into trade agreements with foreign governments or instrumentalities thereof; (*emphasis supplied*)

[106] §401, Tariff and Customs Code of 1978, Presidential Decree No. 1464, provides, *viz*:

The provision in Article VI, Section 22(2) of the 1935 Constitution —to authorize the President, by law, to fix, within specified limits, tariff rates, import and export quotas, and tonnage and wharfage dues — was inspired by a desire to enable the nation, through the President, to carry out a unified national economic program and to administer the laws of the country to the end that its economic interests would be adequately protected.[107] This intention to implement a unified national economic program was made explicit in the 1987 Constitution with the addition of the phrase "within the framework of the national development program of the government," upon motion of Commissioner Christian Monsod. He explained the rationale for adding the phrase, *viz*:

The reason I am proposing this insertion is that an economic program has to be internally consistent. While it is directory to the President – and it says "within specified limits" on line 2 – there

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Sec. 401. Flexible Clause.

In the interest of national economy, general welfare and/or national security, and subject to the limitations herein prescribed, the **President**, upon recommendation of the National Economic and Development Authority (hereinafter referred to as NEDA), **is hereby empowered: (1) to increase, reduce or remove existing protective rates of import duty (including any necessary change in classification).** The existing rates may be increased or decreased to any level, in one or several stages but in no case shall the increased rate of import duty be higher than a maximum of one hundred (100) per cent *ad valorem*; **(2) to establish import quota or to ban imports of any commodity, as may be necessary**; and (**3) to impose an additional duty on all imports** not exceeding ten (10%) percent *ad valorem* whenever necessary; (*emphasis supplied*)

§401, Rep. Act. No. 1937, provides, *viz*:

Sec. 401. Flexible Clause.

The President, upon investigation by the Commission and recommendation of the National Economic Council, is hereby empowered to **reduce** by not more than fifty per cent or to **increase** by not more than five times the rates of import duty expressly fixed by statute (including any necessary change in classification) when in his judgment such modification in the rates of import duty is necessary in the interest of national economy, general welfare and/or national defense. (*emphasis supplied*)

[107] Aruego, J., *The Framing of the Philippine Constitution* (1936), Vol. 1, p. 388.

are situations where the limits prescribed to the President might, in fact be distortive of the economic program.

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We are not taking away any power from Congress. We are just saying that as a frame of reference, the authority and the limits prescribed should be consistent with the economic program of government **which the legislature itself approves.**[108] (*emphasis supplied*)

In sum, while provision was made for granting authority to the President with respect to the fixing of tariffs, import and export quotas, and tonnage and wharfage dues, **the power of Congress over foreign trade,** and its authority to delegate the same to the President **by law, has consistently been constitutionally recognized**.[109] Even **Curtiss-Wright,** which respondents and the *ponencia* rely on, make a qualification that the foreign relations power of the President, "**like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution."**[110] **Congress' power over foreign trade is one such provision that must be considered in interpreting the treaty-making power of the President.**

Moreover, while **Curtiss-Wright** admonished that "…if, in the maintenance of our international relations, embarrassment -perhaps serious embarrassment- is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would

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[108] 2 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 191.

[109] The 1973 Constitution similarly provides in Article VIII, Sec. 17(1), *viz*:

Sec. 17(1). The National Assembly may by law authorize the Prime Minister to fix within specified limits, and subject to such limitations and restrictions as it may impose, tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts.

[110] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936).

not be admissible were domestic affairs alone involved,"[111] the 1987 Constitution itself, reiterating the 1935 and the 1973 Constitutions, provides that **Congress may, by law, authorize the President** to fix tariff rates, import and export quotas, tonnage and wharfage dues **within specified** limits, and **subject to such limitations and restrictions** as Congress may impose. **One cannot simply turn a blind eye on Congress' foreign trade power granted by the Constitution in interpreting the power of the Executive to negotiate international trade agreements.**

Turning to the case at bar, **Congress undoubtedly has power over the subject matter of the JPEPA**,[112] as this agreement touches on the fixing of "tariff rates, import and export quotas, tonnage and wharfage dues, and other duties or imposts." **Congress can, in fact, revoke or amend the power of the President to fix these as authorized by law or the Tariff and Customs Code of 1978**. Congress can legislate and conduct an inquiry in aid of legislation on this subject matter, as it did pursuant to House Resolution No. 551. The **purpose of the legislative inquiry in which the subject JPEPA documents are needed is to aid legislation**, which is **different from the purpose of the negotiations conducted by the Executive, which is to conclude a treaty**. Exercised within their proper limits, the power of the House of Representatives to conduct a legislative inquiry in aid of legislation and the power of the executive to negotiate a treaty should not collide with each other.

It is worth noting that petitioner members of the House of Representatives are **not seeking to directly participate** in the negotiation of the JPEPA, **nor are they indirectly interfering** with the Executive's negotiation of the JPEPA. They seek access to the subject JPEPA documents for purposes of their inquiry, in aid of legislation, on the forging of bilateral trade and investment agreements with minimal public scrutiny and debate, as evinced in the title of **House Resolution No. 551, "Directing the Special Committee on Globalization to Conduct an Urgent Inquiry**

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[111] *Id.*

[112] See Comment, p. 2. The JPEPA is a comprehensive bilateral free trade agreement (FTA). FTAs cover both tariff and non-tariff barriers.

in Aid of Legislation on Bilateral Trade and Investment Agreements that Government Has Been Forging, with Far Reaching Impact on People's Lives and the Constitution But with Very Little Public Scrutiny and Debate."[113] In relation to this, the *ponencia* states, *viz*:

> Whether it can accurately be said that the Filipino people were not involved in the JPEPA negotiations is a question of fact which this Court need not resolve. Suffice it to state that respondents had presented documents purporting to show that public consultations were conducted on the JPEPA. Parenthetically, petitioners consider these "alleged consultations" as "woefully selective and inadequate."[114]

Precisely, the inquiry in aid of legislation under House Resolution No. 551 seeks to investigate the sufficiency of public scrutiny and debate on the JPEPA, considering its expansiveness, which is well within the foreign trade power of Congress. At this point, it is in fact impossible for petitioners to interfere with the JPEPA negotiations, whether directly or indirectly, as the negotiations have already been concluded. Be that as it may, the earlier discussion on the allocation of international trade powers between the Executive and Congress in U.S. jurisdiction has shown that it is not anathema to the preservation of the treaty-making powers of the President for Congress to indirectly participate in trade agreement negotiations.

Let us now proceed to respondents' argument that the subject JPEPA documents are covered by the diplomatic secrets privilege and should therefore be withheld from Congress. In so proceeding, it is important to bear in mind the interdependence of the power of Congress over foreign trade and the power of the executive over treaty negotiations.

C. The power of Congress to conduct inquiry in aid of legislation on foreign trade *vis-à-vis* executive privilege

In ***Senate v. Ermita***,[115] the Court defined "executive privilege" as the right of the President and high-level executive branch

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[113] *Id*. at 19; see also Annex C.

[114] *Ponencia*.

[115] G.R. No. 169777, April 20, 2006, 488 SCRA 1, 45.

officials to withhold information from Congress, the courts, and the public.

In the U.S., it is recognized that there are at least four kinds of executive privilege: (1) military and state secrets, (2) presidential communications, (3) deliberative process, and (4) law enforcement privileges.[116] In the case at bar, respondents invoke the state secrets privilege covering diplomatic or foreign relations and the deliberative process privilege. Let me first take up the diplomatic secrets privilege.

1. Diplomatic secrets privilege

In ***Almonte v. Vasquez,***[117] the Court recognized a common law governmental privilege against disclosure, with respect to state secrets bearing on diplomatic matters.[118] In ***Chavez v. PCGG,***[119] the Court also recognized the confidentiality of information on inter-government exchanges prior to the conclusion of treaties and executive agreements **subject to reasonable safeguards on the national interest**.[120] It also reiterated the privilege against disclosure of state secrets bearing on diplomatic matters, as held in **Almonte**. Citing ***Chavez, Senate v. Ermita*** also acknowledged the states secrets privilege bearing on diplomatic matters. In ***PMPF v. Manglapus***, the Court upheld the confidentiality of treaty negotiations. In that case, petitioners sought to compel the representatives of the President in the then **ongoing** negotiations of the **RP-U.S. Military Bases Agreement** to give them access to the negotiations, to treaty items already agreed upon, and to the R.P. and U.S. positions on items that were still being contested.

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[116] Iraola, R. "*Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*," 87 Iowa Law Review 1559, 1571 (2002).

[117] G.R. No. 95367, May 23, 1995, 244 SCRA 286.

[118] *Id*., citing 10 Anno., Government Privilege Against Disclosure of Official Information, 95 L. Ed. 3-4 and 7, pp. 427-29, 434.

[119] G.R. No. 130716, December 9, 1998, 299 SCRA 744.

[120] 5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 25.

In determining the applicability of the diplomatic secrets privilege to the case at bar, I **reiterate the primordial principle 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.** Thus, even while **Almonte** and ***Senate v. Ermita*** both recognized the state secrets privilege over diplomatic matters, and **Chavez** and ***PMPF v. Manglapus*** both acknowledged the confidentiality of inter-government exchanges **during** treaty negotiations, the validity of the claim of the diplomatic secrets privilege over the subject JPEPA documents shall be examined under the **particular circumstances of the case at bar**. I especially take note of the fact that unlike ***PMPF v. Manglapus,*** which involved a request for access to information **during negotiations** of a **military treaty**, the case at bar involves a request for information **after the conclusion of negotiations** of an **international trade agreement**. Bearing this context in mind, let me now delve into the merits of the invocation of executive privilege.

Almonte*, *Chavez, Senate v. Ermita,* and *PMPF v. Manglapus did not discuss the manner of invoking the diplomatic secrets privilege. For the proper invocation of this privilege, ***U.S. v. Reynolds***[121] is instructive. This case involved the military secrets privilege, which can be analogized to the diplomatic secrets privilege, insofar as they are both based on the nature and the content of the information withheld. I submit that we should follow the procedure laid down in **Reynolds** to determine whether the diplomatic secrets privilege is properly invoked, *viz*:

> 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 that 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.
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[121] 345 U.S. 1 (1953).

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.[122] (*emphasis supplied*) (footnotes omitted)

In the case at bar, the **reasons for nondisclosure** of the subject JPEPA documents are stated in the 23 June 2005 letter of respondent Secretary Ermita to Congressman Teves, Chairperson of the House Special Committee on Globalization, *viz*:

"Dear Congressman Teves,

x x x x x x x x x

In its letter dated 15 June 2005 (copy enclosed), DFA explains that the Committee's request to be furnished all documents on the JPEPA may be **difficult to accomplish at this time**, since the **proposed Agreement has been a work in progress for about three years. A copy of the draft JPEPA will however be forwarded** to the Committee **as soon** as the **text thereof is settled and complete**. (*emphasis supplied*)

In the meantime, DFA submits copies of the following documents:

- Joint Statement on the JPEPA issued in December 2002
- JPEPA Joint Coordinating Team Report dated December 2003
- Joint Announcement of the Philippine President and the Japanese Prime Minister issued in December 2003
- Joint Press Statement on the JPEPA issued in November 2004

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For your information.

Very truly yours,

(Signed)
Eduardo R. Ermita
Executive Secretary"[123]

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[122] *Id.* at 7-8, 10.

[123] Petition, Annex I.

Respondents' Comment further warned of the **danger of premature disclosure** of the subject JPEPA documents, *viz*:

… **At the time when the Committee was requesting the copies of such documents**, the **negotiations were ongoing as they are still now and the text of the proposed JPEPA is still uncertain and subject to change. Considering the status and nature of such documents then and now, these are evidently covered by executive privilege…**

Practical and strategic considerations likewise counsel against the disclosure of the "rolling texts" which may undergo radical change or portions of which may be **totally abandoned.** Furthermore, the negotiations of the representatives of the Philippines as well as of Japan must be **allowed to explore alternatives in the course of the negotiations…**[124]

The reasons cited by respondents for refusing to furnish petitioners the subject JPEPA documents demonstrate that these documents contain matters that should not be disclosed, lest the **ongoing negotiations** be hampered. As respondents further explain in their Comment, if premature disclosure is made **while negotiations are ongoing**, the Philippine panel and the President would be "hampered and embarrassed by criticisms or comments from persons with inadequate knowledge of the nuances of treaty negotiations or worse by publicity seekers or idle kibitzers."[125]

Without ruling on the confidentiality of the subject JPEPA documents during negotiations (as this is no longer in issue), I submit that **the reasons provided by respondents for invoking the diplomatic secrets privilege while the JPEPA negotiations were ongoing no longer hold now that the negotiations have been concluded.** That respondents were claiming confidentiality of the subject JPEPA documents **during — not after — negotiations** and providing reasons therefor is indubitable. The 23 June 2005 letter of respondent Secretary Ermita to

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[124] Comment, p. 21.

[125] *Id.* at 23.

Congressman Teves states that the "proposed Agreement has been a **work in progress for about three years**." Likewise, respondents' Comment states that "(a)t the time when the Committee was requesting the copies of such documents, **the negotiations were ongoing as they are still now**." Both statements show that the subject JPEPA documents were being withheld from petitioners **during and not after negotiations, and that the reasons provided for withholding them refer to the dangers of disclosure while negotiations are ongoing and not after they have been concluded.**

In fact, respondent Secretary Ermita's 23 June 2005 letter states that a "copy of the **draft JPEPA**" as soon as "the **text thereof is settled and complete**" would be forwarded to the Committee, which is precisely one of the subject JPEPA documents, *i.e.*, the **final text of the JPEPA prior to its signing by the President**. Similarly, in his letter dated 2 November 2005, respondent Undersecretary Aquino replied that the Committee would be provided the **latest draft** of the agreement "once the **negotiations are completed** and as soon as a thorough legal review of the proposed agreement has been conducted."[126] Both letters of Secretary Ermita and Undersecretary Aquino **refer to the draft texts of the JPEPA** that they would provide to the Committee once the **negotiations and text are completed, and not to the final text of the JPEPA after it has been signed by the President**. The discussion *infra* will show that in the case of the North American Free Trade Agreement (NAFTA), the complete text of the agreement was released **prior** to its signing by the Presidents of the U.S., Canada and Mexico. Likewise, **draft texts** of the Free Trade Area of the Americas (FTAA) have been **made accessible to the public**. It is **not a timeless absolute** in foreign relations that the text of an international trade agreement prior to its signing by the President should not be made public.

For a claim of diplomatic secrets privilege to succeed, it is **incumbent upon respondents** to satisfy the Court that the

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[126] *Id*. at 28, Annex P.

disclosure of the subject JPEPA documents **after the negotiations have been concluded would prejudice our national interest, and that they should therefore be cloaked by the diplomatic secrets privilege**. It is the task of the Executive to show the Court the reason for the privilege **in the context in which it is invoked**, as required by ***Senate v. Ermita,*** just as the U.S. government did in **Reynolds**.[127] Otherwise, the Court, which has the duty to determine with finality whether the circumstances are appropriate for a claim of privilege,[128] will not have any basis for upholding or rejecting respondents' invocation of the privilege. The requirement to show the reason for the privilege is especially important in the case at bar, considering that the subject JPEPA documents are part of **trade agreement negotiations,** which involve the **interdependent powers of the Executive over treaty negotiations and the legislature over foreign trade, as recognized in both Philippine and U.S. jurisdictions**. Upon the Executive's showing of the reason and circumstances for invoking the diplomatic secrets privilege, the Court can then consider whether the application of the privilege to the information or document in dispute is warranted. As the Executive is given the opportunity to show the applicability of the privilege, there is a **safeguard** for protecting what should rightfully be considered privileged information to uphold national interest.

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[127] In **Reynolds**, the Secretary of the Air Force filed a formal "Claim of Privilege" and objected 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." The Judge Advocate General of the U.S. Air Force also filed an affidavit, which claimed 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." On the record before the trial court, it appeared that the accident that gave rise to the case occurred to a military plane that had gone aloft to test secret electronic equipment. 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.

[128] 345 U.S. 1, 8 (1953).

With respondents' failure to provide **reasons** for claiming the diplomatic secrets privilege **after** the conclusion of negotiations, the **inevitable conclusion is that respondents cannot withhold the subject JPEPA documents.**

The contentions in the Concurring Opinion of **Justice Carpio** that a State may wish to keep its offers "confidential even after the signing of the treaty because it plans to negotiate similar treaties with other countries and it does not want its negotiating positions known beforehand by such countries," and that "(i)f the Philippines does not respect the confidentiality of the offers and counter-offers of its negotiating partner State, then other countries will be reluctant to negotiate in a candid and frank manner with the Philippines"[129] are **speculative** and matters for respondents to show the Court. The same holds true as regards the assertion in the Separate Opinion of **Justice Tinga** that "with respect to the subject treaty, the Government of the Philippines should expectedly heed Japan's normal interest in preserving the confidentiality of the treaty negotiations and conduct itself accordingly in the same manner that our Government expects the Japanese Government to observe the protocol of confidentiality."[130]

Respondents having failed in shielding the subject JPEPA documents with the diplomatic secrets privilege, let us now proceed to determine whether they can keep these documents secret under the **deliberative process privilege, which is a distinct kind of executive privilege.** The Separate Opinion of **Justice Tinga** asserts, however, that while there is a distinction between the diplomatic secrets privilege and the deliberative process privilege, "they should be jointly considered if the question at hand, as in this case, involves such diplomatic correspondences related to treaty negotiations…Thus, it would not be enough to consider the question of privilege from only one of these two perspectives as both species of privilege should be ultimately weighed and applied in conjunction with each other."

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[129] Concurring Opinion of Justice Antonio T. Carpio.

[130] Separate Opinion of Justice Dante O. Tinga.

Indeed, the diplomatic character of the JPEPA deliberations or negotiations and the subject JPEPA documents was considered in determining the applicability of the diplomatic secrets privilege in the above discussion. But as respondents have failed in protecting the subject JPEPA documents with this kind of privilege that considers the diplomatic character of negotiations, the next question to consider is whether another kind of privilege — that does not hinge on the diplomatic nature of negotiations, but on the deliberative status of information alone – can shield the subject JPEPA documents.

2. Deliberative process privilege

The "deliberative process privilege" was **not literally invoked** in the 23 June 2005 letter of respondent Secretary Ermita or in respondents' Comment. Nevertheless, Secretary Ermita's statement that "the Committee's request to be furnished all documents on the JPEPA may be difficult to accomplish at this time, since the proposed Agreement **has been a work in progress for about three years,** (a) copy of the draft JPEPA will however be forwarded to the Committee as soon as the **text thereof is settled and complete,"** and respondents' afore-quoted assertion of danger of premature disclosure[131] in their Comment show reliance on the deliberative process privilege.

In the U.S., it is settled jurisprudence that the **deliberative process privilege justifies** the government's withholding of documents and other materials that would reveal **"advisory opinions, recommendations** and **deliberations comprising part of a process by which governmental decisions** and policies are

[131] "… At the time when the Committee was requesting the copies of such documents, the negotiations were ongoing as they are still now and the text of the proposed JPEPA is still uncertain and subject to change. Considering the status and nature of such documents then and now, these are evidently covered by executive privilege…

… Practical and strategic considerations likewise counsel against the disclosure of the "rolling texts" which may undergo radical change or portions of which may be totally abandoned. Furthermore, the negotiations of the representatives of the Philippines as well as of Japan must be allowed to explore alternatives in the course of the negotiations…" Comment, p. 21.

formulated."[132] In 1958, the privilege was **first recognized** in a U.S. federal case, ***Kaiser Aluminum Chemical Corp. v. United States,***[133] in which the term "executive privilege" was also originally used.

Kaiser was a suit filed against the U.S. in the Federal Court of Claims. Plaintiff Kaiser sought documents from the General Services Administration in the context of an action for breach of the most favored purchaser clause of a contract for the sale of war aluminum plants to plaintiff. The Court of Claims held that the production of **advisory opinion on intra-office policy** in relation to the sale of aluminum plants to plaintiff and to another entity was contrary to public interest; thus, the U.S. must be allowed to claim the executive privilege of nondisclosure. The Court sustained the following justification of the government for withholding a document:

> The document . . . contains opinions that were rendered to the Liquidator of War Assets by a member of his staff concerning a proposed sale of aluminum plants. **Those opinions do not necessarily reflect the views of, or represent the position ultimately taken by, the Liquidator of War Assets. A disclosure of the contents of documents of this nature would tend to discourage the staffs of Government agencies preparing such papers from giving complete and candid advice and would thereby impede effective administration of the functions of such agencies.**[134] (*emphasis supplied*)

Thereupon, the Court etched out the **classic justification** of the **deliberative process privilege**,[135] *viz*:

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[132] *In re Sealed Case (Espy)*, 121 F.3d 729 (1997), p. 737, 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, 95 S.Ct. 1504, 1516-18, 44 L.Ed.2d 29 (1975); *EPA v. Mink*, 410 U.S. 73, 86-93, 93 S.Ct. 827, 835-39, 35 L.Ed.2d 119 (1973).

[133] 157 F. Supp. 939 (Ct. Cl. 1958).

[134] *Id.*, Note 4.

[135] Kennedy, M., "*Escaping the Fishbowl: A Proposal to Fortify the Deliberative Process Privilege*," 99 Northwestern University Law Review (hereafter Kennedy) 1769 (2005).

Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act.[136] (*emphasis supplied*)

The Court also threw in **public policy** and **public interest** as bases for the deliberative process privilege, *viz*:

…Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen…There is a **public policy involved in this claim of privilege for this advisory opinion -the policy of open, frank discussion between subordinate and chief concerning administrative action**.[137]

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… Viewing this claim of privilege for the intra-agency advisory opinion in its entirety, we determine that the Government's claim of privilege for the document is well-founded. It would be **definitely contrary to the public interest in our view for such an advisory opinion on governmental course of action to be produced by the United States** under the coercion of a bar against production of any evidence in defense of this suit for contract damages.[138] (*emphasis supplied*)

The Court also held that the **judicial branch**, and not the executive branch, is the **final arbiter of whether the privilege should apply**, contrary to the government's assertion that the head of the relevant agency should be allowed to assert the privilege unilaterally.[139]

Courts and scholars have identified **three purposes**[140] of the privilege: (1) to protect **candid discussions within an**

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[136] 157 F. Supp. 939 (Ct. Cl. 1958), pp. 945-946.

[137] *Id.* at 946.

[138] *Id.* at 947.

[139] *Id.* at 947-948.

[140] Kennedy, *supra* note 135 at 1769; see also Iraola, R. "*Congressional Oversight, Executive Privilege, and Requests for Information Relating*

agency;[141] (2) to **prevent public confusion from premature disclosure of agency opinions** before the agency has established a final policy;[142] and (3) to **protect against confusing the issues and misleading the public** by dissemination of documents suggesting **reasons and rationales for a course of action, when these were not in fact the ultimate reasons** for the agency's action.[143]

Two requisites are essential for a valid assertion of the privilege: the material must be **pre-decisional** and **deliberative**. To be "**pre-decisional**," a document must be **generated before the adoption of an agency policy**. To be "**deliberative**," it must reflect the give-and-take of the consultative process.[144] Both requirements stem from the privilege's "ultimate purpose (which) ... is to **prevent injury to the quality of agency decisions**" by allowing government officials freedom to debate alternative approaches in private.[145] The deliberative process privilege **does not shield documents that simply state or explain a decision** the government has already made; nor does the privilege cover material that is **purely factual**, unless the material is so inextricably intertwined with the deliberative sections of documents that its disclosure would inevitably reveal the government's deliberations.[146] There must also be a **formal assertion** of the privilege by the head of the department in control of the information based on his actual personal

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to Federal Criminal Investigations and Prosecutions," Iowa Law Review, vol. 87, no. 5, August 2002, pp. 1559 and 1578, citing *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 12 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

[141] *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

[142] *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

[143] *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

[144] *Id.*

[145] *In re Sealed Case (Espy)*, 121 F.3d 729 (1997), p. 736, citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975).

[146] *Id.* at 736.

consideration of the matter and an **explanation as to why the information sought falls within the scope of the privilege.**[147]

Once the agency has shown that the material is **both pre-decisional and deliberative,** the material enjoys a **qualified privilege that may be overcome by a sufficient showing of need,** as held in **In re Sealed Case (Espy).**[148] In general, **courts balance the need for information against the harm that may result from disclosure.** Thus, "each time (the deliberative process privilege) is asserted, the district court must undertake a fresh balancing of the competing interests," taking into account factors such as "the relevance of the evidence," "the availability of other evidence," "the seriousness of the litigation," "the role of the government," and the "possibility of future timidity by government employees."[149] These rulings were made in the context of the refusal of the White House to submit some documents sought by a grand jury subpoena.[150]

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[147] *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984).

[148] *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

[149] *Id.* at 737-38; see also *In re Subpoena Served Upon the Comptroller of the Currency*, 967 F.2d 630, 634 (D.C. Cir. 1992) (discussing how, in balancing competing interests, the court should consider a number of factors such as the relevance of the evidence, seriousness of the litigation, and availability of other evidence); Jensen, K., "*The Reasonable Government Official Test: A Proposal for the Treatment of Factual Information under the Federal Deliberative Process Privilege*," 49 Duke L.J. 561, 578-579 (1999) (discussing and identifying the factors).

[150] The *In re Sealed Case (Espy)* arose because of allegations that U.S. Secretary of Agriculture, Mike Espy, may have improperly accepted gifts from individuals and organizations with business before the U.S. Department of Agriculture. These allegations led to the appointment of an Independent Counsel, to investigate the allegations and to prosecute any related violations of federal law that the Office of the Independent Counsel (OIC) reasonably believed had occurred. The same allegations led the President of the United States to direct the White House Counsel to investigate Espy's conduct in order to advise the President on whether he should take executive action against Espy. The White House publicly released a report on Espy produced by the White House Counsel. Subsequently, a grand jury issued the subpoena *duces tecum* at issue in this case. The subpoena sought all documents on

In our jurisdiction, the Court has had no occasion to recognize and rule on the applicability of the deliberative process privilege. In the recent case ***Neri v. Senate Committees***,[151] the Court recognized the claim of the **presidential communications privilege,** which is closely associated with the deliberative process privilege.[152] In **In re Sealed Case (Espy)**, the distinction between the two privileges was explained, *viz*:

Both are executive privileges designed to **protect executive branch decision-making**, but one (deliberative process privilege) applies to **decision-making of executive officials generally**, the other specifically to **decision-making of the President**. The presidential privilege is rooted in **constitutional separation of powers principles and the President's unique constitutional role**; the deliberative process privilege is primarily a **common law privilege**… Consequently, congressional or judicial negation of the presidential communications privilege is subject to greater scrutiny than denial of the deliberative privilege… Unlike the deliberative process privilege (which covers only **material that is pre-decisional and deliberative**),[153] the presidential communications privilege applies to **documents in their entirety, and covers final and post-decisional materials as well as pre-deliberative** ones."[154] (*emphasis supplied*)

Espy and other subjects of the OIC's investigation that were "accumulated for, relating in any way to, or considered in any fashion, by those persons who were consulted and/or contributed directly or indirectly to all drafts and/or versions" of the White House Counsel's report. The subpoena specifically requested notes of any meetings in the White House concerning Espy and of any conversations between Espy or his counsel and White House employees. The White House produced several folders of documents, but withheld some on the basis mostly of deliberative process privilege.

[151] G.R. No. 180643, March 25, 2008.

[152] With respect to deliberative process privilege, only pre-decisional and deliberative materials are covered; hence, the agency must first show that the agency material sought is pre-decisional and deliberative for a qualified privilege to attach. With respect to presidential communications privilege, the presidential communications must be made in the performance of the President's responsibilities of his office and in the process of shaping policies and making decisions. Once this requisite is satisfied, a qualified privilege attaches to the presidential communication.

[153] *In re Sealed Case*, 121 F.3d. at 737.

[154] *Id*. at 745.

The distinction notwithstanding, there is no reason not to recognize in our jurisdiction the deliberative process privilege, which has essentially the same purpose as the presidential communications privilege, except that it applies to executive officials in general.

Let us now determine whether the deliberative process privilege will shield from disclosure the following JPEPA documents sought by petitioners: (1) the initial offers (of the Philippines and Japan) of the JPEPA, including all pertinent attachments and annexes thereto; and (2) the final text of the JPEPA prior to the signing by the President. **The answer is in the negative**.

It is my considered view that the subject JPEPA documents do not come within the purview of the kind of information which the deliberative process privilege shields in order to promote frank and candid discussions and protect **executive branch decision-making of the Philippine government**. The **initial offers** are not in the nature of "**advisory opinions**, **recommendations** and **deliberations**"[155] similar to those submitted by the subordinate to the chief in a government agency, as in the seminal case of **Kaiser**. The **initial offer of the Philippines** is not a document that offers alternative courses of action to an executive official to aid in the decision-making of the latter, but is instead a proposal to **another government**, the Japanese government, to institute negotiations. The end in view of these negotiations is not a decision or policy of the Philippine government, but a joint decision or agreement between the Philippine and the Japanese governments.

Likewise, the **final text of the JPEPA prior to signing** by the President is not in the nature of an advice or recommendation or deliberation by executive officials of the Philippine government,

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[155] *In re Sealed Case (Espy)*, 121 F.3d 729 (1997), p. 737, 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, 95 S.Ct. 1504, 1516-18, 44 L.Ed.2d 29 (1975); *EPA v. Mink*, 410 U.S. 73, 86-93, 93 S.Ct. 827, 835-39, 35 L.Ed.2d 119 (1973).

as it is the handiwork of **the Philippine and the Japanese negotiating panels working together.** The documents sought to be disclosed are **not of the same nature as internal deliberations** of the Department of Trade and Industry or the Philippine negotiating panel in crafting and deciding the initial offer of the Philippines or internal memoranda of Philippine government agencies to advise President Macapagal-Arroyo in her decision to sign the JPEPA. **Extending the mantle of protection of the deliberative process privilege to the initial offers of the Philippines and of Japan and the final JPEPA text prior to signing by President Macapagal-Arroyo will be tantamount to extending the protection of executive branch decision-making to the executive branch not only of the Philippine government, but also of the Japanese government, which, in trade agreement negotiations, represents an interest adverse to that of the Philippine government.** As seen from the rationale and history of the deliberative process privilege, this is **not the intent** of the deliberative process privilege.[156] Given the nature of the subject

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[156] This conclusion is in line with the ruling of the U.S. District Court of the District of Columbia in ***Center for International Environmental Law (CIEL) v. Office of the United States Trade Representative*** (237 F. Supp. 2d 17) which the *ponencia* discusses. However, **CIEL** was litigated under the Freedom of Information Act (FOIA) in the U.S. which requires that information/communication should be "inter-agency" for it to come within the protection of the deliberative process privilege. The FOIA does not have a counterpart in the Philippines. Instead, the above conclusion on the non-application of the deliberative process privilege to the subject JPEPA documents was reached by going back to the rationale and history of deliberative process privilege.

In **CIEL,** nonprofit groups monitoring international trade and environmental issues brought a Freedom of Information Act (FOIA) suit against the Office of the United States Trade Representative, seeking information related to the **negotiation of the U.S.-Chile Free Trade Agreement.** Under the FOIA, deliberative and pre-decisional communications **between and within agencies of the U.S. government are exempt from government duty to disclose information.** Accordingly, the U.S. District Court of the District of Columbia held that **communications between the U.S. and Chile, in the course of treaty negotiations, were not "inter-agency" within the meaning of FOIA exemption and thus should be disclosed to the nonprofit groups seeking access to them.**

JPEPA documents, it is the diplomatic secrets privilege that can properly shield them upon sufficient showing of reasons

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The District Court explained its ruling, *viz*:

For purposes of the **inter-agency requirement**, the Supreme Court has noted that the term **"'agency' means 'each authority of the Government of the United States**,' § 551(1), and 'includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government ..., or any independent regulatory agency,' § 522(f)." *Klamath Water Users*, 532 U.S. at 9, 121 S.Ct. 1060. In general, this definition establishes that **communications between agencies and outside parties are not protected under Exemption 5 (deliberative process privilege)**… See, *e.g.*, *Brownstein Zeidman & Schomer v. Dep't of the Air Force*, 781 F.Supp. 31, 35 (D.D.C.1991) ("While FOIA exemption 5 does protect intra-governmental deliberations, it **does not cover negotiations between the government and outside parties**."); see also *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d at 257-58 (policy objectives of Exemption 5 **not applicable to negotiations between agency and outside party**).

… Chilean officials are not "enough like the agency's own personnel to justify calling their communications 'intra-agency.' " *Klamath Water Users*, 532 U.S. at 12, 121 S.Ct. 1060. Nor did the documents that Chile submitted to USTR play "essentially the same part in [the] agency's process of deliberation as documents prepared by agency personnel might have done." …**It may be true, as defendants assert, that Chilean proposals and responses are essential to USTR's development of its own negotiating positions, but the role played by such documents is unmistakably different from the role of internally created documents; Chile shares its positions not in order to advise or educate USTR but in order to promote its own interests.** See Def. Mem. at 22 (acknowledging that "Chile seeks to achieve its own objectives through the negotiations"). Nor does the fact that USTR "needs to understand what is important to Chile in order to develop its own positions" confer inter-agency status on these external documents. Def. Mem. at 21. (237 F. Supp. 2d 17, 25).

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The decision in *Ryan v. Dep't of Justice*, 617 F.2d 781, also is distinguishable. In *Ryan*, the Court of Appeals held that communications produced by Senators in response to an agency questionnaire regarding nominating procedures for judicial candidates fell within the narrow ambit of Exemption 5 (deliberative process privilege). The court characterized the Senators as "temporary consultants" who were "solicited to give advice only for specific projects." … **In the instant case, by contrast, the Chilean officials were not solicited for advice but rather negotiated with and treated as adversaries openly seeking to advance their own interests**… (237 F. Supp. 2d 17, 28). (*emphasis supplied*)

for their confidentiality. Hence, the invocation of deliberative process privilege to protect the subject JPEPA documents must fail.

But this is not all. In ***Senate v. Ermita*,** the Court also required that executive privilege **must be invoked by the President, or the Executive Secretary "by order of the President,"** unlike in U.S. jurisdiction where, as afore-discussed, the formal assertion of the head of the department claiming the privilege suffices.[157] **In the case at bar**, the Executive Secretary invoked both the deliberative process privilege and the diplomatic secrets privilege **not "by order of the President,"** as his 23 June 2005 letter quoted above shows. Accordingly, the invocation of executive privilege was not properly made and was therefore without legal effect.

Senate v. Ermita was decided on **20 April 2006** and became final and executory on **21 July 2006**. Hence, it may be argued that it cannot be used as a yardstick to measure whether

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The District Court of the District of Columbia distinguished the **CIEL case** from ***Fulbright & Jaworski v. Dep't. of Treasury*** (545 F. Supp. 615 [D.D.C. 1982]), which also dealt with deliberative process privilege in relation to treaty negotiations (and which the *ponencia* likewise discussed), *viz*:

In that case (***Fulbright & Jaworski***), one of very few to consider Exemption 5 (deliberative process privilege) in the context of foreign relations, **individual notes taken by a United States negotiator during treaty discussions with France were protected from release under Exemption 5. The court held that "releasing these snapshot views of the negotiations would be comparable to releasing drafts of the treaty" and consequently would risk great harm to the negotiations process…** Despite the superficial similarity of context - the "give-and-take" of treaty negotiations - the **difference is that the negotiator's notes at issue in *Fulbright & Jaworski* were clearly internal.** The question of disclosure turned not on the inter-agency requirement of Exemption 5 but on whether or not the documents were part of the agency's pre-decisional deliberative process… Judge Green's discussion of the harm that could result from disclosure therefore is **irrelevant**, since the **documents at issue here are not inter-agency**, and **the Court does not reach the question of deliberative process**. (237 F. Supp. 2d 17, 29) (*emphasis supplied*)

[157] *U.S. v. Reynolds*, 345 U.S. 1 (1953); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984).

respondent Secretary Ermita properly invoked executive privilege in his **23 June 2005** letter. It must be noted, however, that the case at bar has been pending decision even after the finality of ***Senate v. Ermita***. During the time of its pendency, respondents failed to inform the Court whether Executive Secretary Ermita's position bore the imprimatur of the Chief Executive. The period of nearly two years from the time ***Senate v. Ermita*** became final up to the present is more than enough leeway for the respondents to comply with the requirement that executive privilege be invoked by the President, or the Executive Secretary "by order of the President." Contrary to the assertion of the *ponencia*,[158] the Court would not be overly strict in exacting compliance with the ***Senate v. Ermita*** requirement, considering the two-year margin the Court has afforded respondents.

Let us now determine whether the **public's constitutional right to information and participation** can be trumped by a claim of executive privilege over the documents sought to be disclosed.

II. The context: the question of the right of access of the petitioner private citizens to the subject JPEPA documents is raised in relation to international trade agreement negotiations on the strength of a constitutional right to information and participation

A. The developing openness of trade agreement negotiations in U.S. jurisdiction

The waning of the exclusivity of executive power over negotiations of international trade agreements *vis-à-vis* Congressional power over foreign trade was accompanied by a developing **openness to the public of international trade agreement negotiations** in U.S. jurisdiction.

Historically, the American public only had an **indirect participation** in the trade negotiation process. Public involvement primarily centered on electing representatives who were

[158] *Ponencia*.

responsible for shaping U.S. trade policy.[159] **From the 18th century until the early 1930s,** U.S. international trade relations[160] were largely left to the interplay between these public delegates in the legislative and the executive branches and similar officials in foreign nations.[161] But this **trend began to see changes** during

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[159] Schoenborn, B., "*Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At*?," 4 Minnesota Journal of Global Trade 103 (1995). "As delegates, elected representatives act on their constituents' behalf in both foreign and domestic affairs. Interested private parties or organizations meet with their elected officials to discuss U.S. foreign trade policy when current issues pertain to their particular businesses. Typically, these occasions arise when issues are 'intermestic.' Intermestic issues are those that effect both domestic and international policies. John W. Spanier & Eric M. Uslaner, *American Foreign Policy Making and the Democratic Dilemmas 28* (1994). Intermestic issues, such as trade and energy issues, attract increased interest group representation, articulation, and influence. Often 'so many groups have interests in the outcome of policies and see the stakes as so high that these groups may control much of the policy process. Businesses, banks, agriculture and shipping interests, and labor organizations have a natural interest in trade, foreign investment, and tariff issues.'" *Id.* at Note 10 (citations omitted).

[160] *Id.* "For most of U.S. history, international trade relationships were considered a relatively minor area of government activity. Generally, domestic issues are more important than foreign issues to Americans because the public considers those issues that most closely affect daily life to be most important to them. According to the Gallup Poll, since the late 1960s, Americans have consistently placed domestic issues far above foreign issues when considering the most important problem facing the country. Harold W. Stanley & Richard G. Niemi, *Vital Statistics on American Politics* 164 (4th ed. 1994). In most years after 1972, over 80% of those surveyed chose a domestic issue over a foreign one. While international trade most certainly affects life in the broad sense by creating new markets for goods and increasing the size of the economy, many Americans do not see it as a pressing issue, central to the way in which they live their lives." *Id.* at Note 11 (citations omitted).

[161] *Id.*, citing John Day Larkin, *Trade Agreements: A Study in Democratic Methods* 122-28 (1940). "For example, the Fordney-McCumber Act of 1922, though it delegated some congressional tariff-making powers to the President, still led to increased tariffs because the President found himself under too much congressional scrutiny to act in the best interests of the nation. Overall, when considering international trade agreements, most members of Congress may be divided into two groups: those who are protectionist at all times and give interest groups whatever they need to retain their tariffs; and those who do not, in principle, favor protectionism but feel they must not let their constituents

the **Great Depression** in the early 1930s and the enactment of the **Trade Agreements Act of 1934**,[162] under which regime the 1936 case **Curtiss-Wright** was decided.

As afore-discussed, the U.S. Congress passed the Reciprocal Trade Agreement Act of 1934 (the 1934 Act). As an economic stimulus, the 1934 Act authorized the President to address economic stagnation by reducing tariffs on foreign goods by as much as fifty percent.[163] When the President took such an action, America's trading partners reciprocated by reducing tariffs placed on U.S. goods, thereby stimulating the U.S. economy.[164] **Confronted with the Great Depression and the subsequent deterioration of the global economy, the 1934 Act called for a single, strong voice to deal effectively with foreign nations.** Thus, the President, with this Congressional mandate, became the **chief American trade negotiator** with complete and unrestricted authority to enter into binding international trade agreements.[165]

While the 1934 Act gave trading muscle to the President, it also **created the first formal method of public participation in the international trade negotiation process.** Section 4 of

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down while a tariff bill is pending. As a result, allowing legislative input into the process of enacting trade agreements led only to increased tariffs with relatively few instances of tariff reductions. To avoid the evils of logrolling and partisan politics, Congress enacted legislation establishing general policies to be carried out by the administration. This action was the only way to lower tariffs "in the public interest without opening up a logrolling orgy." *Id.* at Note 16 (citations omitted).

[162] *Id.* at 105-06.

[163] 19 U.S.C. §1351(a)(2) (1934) (current version at 19 U.S.C. §1351 [1988]) ("No proclamation shall be made increasing or decreasing by more than 50 per centum any existing rate of duty or transferring any article between the dutiable and free lists.").

[164] *Supra* note 159 at 108. "From 1934 to 1939, the reciprocal trade agreements stimulated the domestic economy enormously. Walter La Feber, *The American Age* 356 (1989). U.S. exports rose by nearly one billion dollars and the U.S. favorable trade imbalance increased from one-half billion dollars to one billion dollars." *Id.* at Note 21.

[165] *Id.*

the 1934 Act required **"reasonable public notice"** of the President's intention to enter into agreements with foreign states,[166] thereby giving American citizens the opportunity to **know with which foreign nations the U.S. government proposed to negotiate.** Pursuant to the 1934 Act, the President established the Trade Agreements Committee, which was composed of high-ranking members of the executive branch.[167] The Trade Agreements Committee, commonly known as the Committee for Reciprocity Information, conducted **public hearings** at which specific items up for negotiation with a particular country would be discussed.[168] But with the Congress left almost completely outside the trade negotiation process and **agreements being concluded and implemented in relative obscurity**, the attention of Congress and the public turned more toward the pressing domestic issues, at least until the dawn of the '70s.[169]

The **Cold War** and the lingering **Vietnam War made international relations increasingly significant to the general welfare of the U.S.** By the mid-1970s, the **post-World War II economic dominance of the U.S. began to deteriorate**.[170]

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[166] As codified in 19 U.S.C. §1354 (1934), the 1934 Act provided:

Before any foreign trade agreement is concluded with any foreign government or instrumentality thereof under the provisions of Part III of this title, reasonable public notice of the intention to negotiate an agreement with such government or instrumentality shall be given in order that any interested person may have an opportunity to present his views to the President, or to such agency as the President may designate, under such rules and regulations as the President may prescribe; and before concluding such agreement the President shall seek information and advice with respect thereto from the United States Tariff Commission, the Departments of State, Agriculture, and Commerce and from such other sources as he may deem appropriate. (current version at 19 U.S.C. §1354 [1988]).

[167] *Supra* note 159 at 109, citing Larkin, J.D., *Trade Agreements: A Study in Democratic Methods*, 48-58 (1940).

[168] *Id.* at 109, Note 24.

[169] *Id.* at 111-112.

[170] *Id.* at 112. "According to the Economic Report of the President, 1975 was the last year the United States experienced a merchandise trade surplus

Under Japan's lead, Asia began gaining economic strength, quickly joining Europe as a major global industrial competitor to the U.S. At the same time, **increased media coverage brought international trade issues to the public's attention**[171] and moved the public to **challenge the traditions, institutions, and authority of government with respect to trade issues.**

With the swell of public activism, the **U.S. Congress re-analyzed its transfer of powers over international trade issues.** Thus, as afore-discussed, in **1974**, after forty years of continuous presidential authority over international trade matters, Congress passed the Trade Act of 1974.[172] The **Trade Act of 1974 increased the levels of public involvement in international trade negotiations,** far beyond the requirement of notice of a proposed trading partner under the 1934 Act. The 1974 Act **required international agreements to include provisions creating domestic procedures through which interested public parties could participate in the international trade process**.[173] It also required the President to **seek information and advice**

(*i.e.*, the value of exports was greater than the value of imports). Stanley & Niemi, *Vital Statistics on American Politics* 370 (4th ed. 1994). Moreover, in 1974 and 1975, America's gross domestic and national products declined as the nation suffered a recession. *Id.* at 417." *Id.* at Note 34.

[171] "One issue that raised public awareness with regard to international trade was the oil embargo of 1973. The Organization of Petroleum Exporting Countries (OPEC) agreed on reduced production levels that increased world prices. This action was taken in retaliation for the U.S. support of Israel in the Arab-Israeli War. As a result of America's dependence on Middle-Eastern oil, prices skyrocketed and long lines at the gas pump led to a wave of economic insecurity across America. See generally Ibrahim F.I. Shihata, *The Case for the Arab Oil Embargo* (1975) (discussing the history and politics surrounding the 1973 Arab oil embargo)." *Id.* at Note 36.

[172] Trade Act of 1974, 19 U.S.C. §§2101-2487 (Supp. V 1975) (current version at 19 U.S.C. §§2101-2487 [1988]). With regard to the Act of 1974, Professors Jackson and Davey have stated that "[i]n many ways, the struggle of Congress to regain some authority over international economic affairs was best manifested in the passage of the 1974 Trade Act ..." Jackson & Davey, *Legal Problems of International Economic Relations* 77 (2d ed. 1986).

[173] 19 U.S.C. §2155 (Supp. V 1975) (current version at 19 U.S.C. §2155 [1988]).

from both private and public sectors.[174] For this purpose, it incorporated the use of **advisory committees** and included spontaneous opportunities for **acceptance of information from the public.**[175] Thus, the 1974 Act, supplemented by several amendments passed in 1979 and 1988, **opened the door to unprecedented formal and direct public participation**[176] in the negotiation of international trade agreements and contributed to a rekindled awareness of government activities and their impact on the public.[177]

Towards the latter half of the 1980s, government leaders and trade experts again began to advocate **reduced trade barriers as an answer to economic difficulty.** They became convinced that increased emphasis on free global trade was the key to future economic prosperity. The idea of increasing the size and strength of the national economy by reducing restrictions on foreign trade was the impetus behind trade agreements such as the 1993 North American Free Trade Agreement (NAFTA)[178] concluded among the U.S., Mexico and Canada. The launch of the NAFTA and the completion of the World Trade Organization's

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[174] The president must seek information and advice on negotiating objectives, bargaining positions, the operation of a trade agreement once entered into, and other matters arising in connection with the development, implementation, and administration of U.S. trade policy. 19 U.S.C. §2155(a).

[175] 19 U.S.C. §2155(a)-(c).

[176] Additionally, §2155 of the 1974 Act created the Advisory Council for Trade Policy and Negotiations (ACTPN). That group was established as a permanent group to provide constant policy advice on matters such as negotiating objectives, bargaining positions, and the operation of trade agreements. 19 U.S.C. §2155.

[177] Schoenborn, B., "*Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At*?," 4 Minnesota Journal of Global Trade 103, 113-114 (1995).

[178] *Id.* at 114-115. "As a result of a similar economic climate which, during the Great Depression, spurred the passage of the 1934 Act, the Reagan and Bush Administrations initiated the concept of reducing barriers to trade between Mexico, Canada, and the United States in order to increase the economies of all three nations involved. President Clinton supported and Congress passed the North American Free Trade Agreement in December 1993." *Id.* at Note 48.

(WTO) Uruguay round in the mid-'90s swept in a new era of unprecedented international collaboration on trade policy.[179]

In the 1990s, the **changing nature of world politics and economics focused international issues on economic well-being** rather than on political and military dominance. Fearing environmental destruction and increased unemployment, members of Congress, commentators, and special interest groups have **used trade agreements such as NAFTA and the mass media to heighten public awareness and participation in international trade relationships**.[180] The 1990s led the American public to realize that **international trade issues had a direct impact on their standard of living and way of life,**[181] **thus fomenting public participation in international trade negotiations**. With the growing concern over the far-reaching implications of bilateral and multilateral international trade agreements and the increased focus upon the processes by which

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[179] Katt, Jr., W., "*The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*," 106 Columbia Law Review 679, Note 2 (2006).

[180] Schoenborn, B., "*Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At*?," 4 Minnesota Journal of Global Trade 103, 116 (1995). "James O. Goldsborough notes that the public is becoming more engaged in U.S. foreign policy in the post-Cold War period. 'The idea is that foreign and domestic policy are becoming one, and that presidents no longer can treat foreign policy as their own privileged — and private — domain.' James O. Goldsborough, Whose View? Despite Heightened Public Interest in Foreign Policy, the President Must Prevail, San Diego Union-Trib., Jun. 14, 1993, at B5. Goldsborough also states that the public will continue to demand a stronger voice in international affairs.

In an era of free trade with Mexico, fair trade with Japan and environmental treaties that attempt to preserve the earth for future generations, foreign policy has achieved a domestic content it has not had before. There is nothing 'foreign' about such issues. They have a direct impact on the quality of life of individuals." *Id.* at Note 50.

[181] *Id.* at 116. "'(N)ow, for the first time, ordinary Americans are beginning to discover that national and international trade decisions have critical relevance to their daily lives. And as they increasingly seek a greater voice ... the trading game will never again be the same.' Charles Lewis, The Treaty No One Could Read: How Lobbyists and Business Quietly Forged NAFTA, Wash. Post, June 27, 1993, at C1." *Id.* at Note 52.

they are negotiated, calls for greater openness and public participation in their negotiation have come in many forms and from many corners, particularly in the U.S. **A central component of the demand for participation has been to gain access to negotiating documents shared by the U.S. with other governments prior to the conclusion of a free trade agreement**.[182]

The **1990s saw a continuous expansion of public access to the international trade agreement process**. Rather than simply being left to point out failures in already existing agreements, **individuals were now allowed to help shape future agreements.** In reemphasizing the open government mentality of the 1970s, **the 1990s marked the beginning of a new era in trade negotiations.** Private individuals now played an important role in many areas throughout the international trade agreement process.[183] The **Trade Act of 2002** was then passed, **enhancing transparency** through **increased and more timely access to information regarding trade issues and activities of international trade institutions; increased public access to meetings, proceedings, and submissions at the World Trade Organization (WTO); and increased and more timely public access to all notifications and supporting documentation by parties to the WTO.**[184]

Public participation in international trade negotiations affects trade negotiations in two distinct ways. **First**, it serves as a **check on the power of elected and bureaucratic leaders** by generating and limiting the issues that require government action. **Second**, it provides those in positions of power and influence with **specific, detailed information upon which to base their**

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[182] *Supra* note 179.

[183] Schoenborn, B., "*Public Participation In Trade Negotiations: Open Agreements, Openly Arrived At*?," 4 Minnesota Journal of Global Trade 103, 123 (1995).

[184] Katt, Jr., W., "*The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*," 106 Columbia Law Review (2006) 679, citing 19 U.S.C.A. §3802(b)(5).

decisions; for in the absence of public input, government officials risk making decisions based on **incomplete information**, thereby **compromising public policy**.[185]

The public participates in trade negotiations in various ways. Individuals influence governmental action by electing the President and members of Congress, joining special interest groups that lobby influential members of the executive and the legislative branches, initiating litigation, serving on presidentially appointed advisory committees, testifying at international trade commission hearings, and protesting individually or as a group. But **ultimately**, the degree of public involvement in any area of government policy **depends on the amount of available access**.[186]

Although the NAFTA negotiations have been criticized for being shrouded in much secrecy, the U.S. government released on 6 September 1992, the most recent text of the NAFTA, **prior to its signing** by Canadian Prime Minister Brian Mulroney, U.S. President George H.W. Bush and Mexican President Carlos Salinas on October 7, 1992.[187]

The negotiation of the Free Trade Area of the Americas (FTAA) that began in 1995 has also shown a changing landscape that allows for greater public participation in international trade negotiations. In their Santiago Summit in 1998, the heads of thirty-four Western Hemisphere states extended **principles of participation** explicitly to the FTAA:

> **The FTAA negotiating process will be transparent** . . . in order to create the opportunities for the full participation by all countries. We encourage **all segments of civil society to participate in and contribute to the process in a constructive manner**, through our respective mechanisms of dialogue and consultation and by presenting

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[185] *Supra* note 183 at 116.

[186] *Id.* at 122.

[187] Gregory, M. "*Environment, Sustainable Development, Public Participation and the NAFTA: A Retrospective*," 7 Journal of Environmental Law and Litigation (1992), 99, 101.

their views through the mechanism created in the FTAA negotiating process.[188]

The Santiago Declaration also includes a pledge to "promote the necessary actions for government institutions to become **more participatory structures**."[189] (*emphasis supplied*) In the Quebec Summit in 2001, the heads of State went even further and declared their commitment to "the full participation of all persons in the political, economic, social and cultural life of our countries."[190] They also addressed **participation** in the context of an FTAA and committed to –

> Ensure the **transparency of the negotiating process**, including through **publication of the preliminary draft FTAA Agreement** in the four official languages as soon as possible and the **dissemination of additional information on the progress of negotiations**; [and to] Foster through their respective national dialogue mechanisms and through appropriate FTAA mechanisms, a process of **increasing and sustained communication with civil society to ensure that it has a clear perception of the development of the FTAA negotiating process**; [and to] invite civil society to continue to contribute to the FTAA process . . .[191] (*emphasis supplied*)

Thus, the Presidential summits, which have established both the impetus and the context for an FTAA, unmistakably contemplate **public access to the negotiating process,** and the FTAA itself is a central part of that process.[192] In July 2001

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[188] Dannenmaier, E., "*Trade, Democracy, and the FTAA: Public Access to the Process of Constructing a Free Trade Area of the Americas*," 27 Fordham International Law Journal 1066, 1078 (2004) citing Second Summit of the Americas: Declaration of Principles and Plan of Action, Santiago, Chile, Apr. 19, 1998, reprinted in 37 I.L.M. 947, 950 (1998).

[189] *Id.* at 1078 citing Second Summit of the Americas: Declaration of Principles and Plan of Action, Santiago, Chile, Apr. 19, 1998, reprinted in 37 I.L.M. 947, 951 (1998).

[190] *Id.*, citing Third Summit of the Americas: Declaration of Principles, Quebec City, Canada, Apr. 22, 2001, available at http://www.ftaa-alca.org/summits/quebec/declara_ e.asp.

[191] *Id.*, citing Third Summit: Declaration of Principles; Plan of Action at 14-15.

[192] *Id.*

came the **first public release of the preliminary official text of the FTAA**. A **revised draft of the text was released** in November 2002 and again in 2003.[193] This notwithstanding, civil society organizations have expressed great concern for and emphasis on the timeliness of information given to the public and input given to negotiators. They have observed that the draft text is published long after issues are actually negotiated; they have thus proposed specific mechanisms for the timely release of negotiating documents, many of which were procedures already in place in the World Trade Organization (WTO).[194]

The **need to create meaningful public participation during negotiation and implementation** applies to both multilateral agreements, such as the FTAA, and to bilateral agreements.[195] **Public participation gives legitimacy to the process and result**, and it **strengthens the political will of populations who must support ratification and implementation once the text is finalized**. The wide range of expertise available outside of governmental corridors would also be more fully accessible to officials if an organic and meaningful exchange of ideas is part of the process. While it is true that participation implies resource allocation and sometimes delay, these are **investments in a democratic outcome** and should not be seen as costs.[196]

Secrecy has long played an integral but also controversial role in the negotiation of international agreements. It facilitates frank discussion, minimizes posturing and allows flexibility in negotiating positions. But it is also **prone to abuse** and is often assailed as undemocratic and facilitating abuse of power. I**n the public eye, excessive secrecy** can **weaken accountability and undermine the legitimacy of government action.**[197]

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[193] *Id.* at 1082-83.

[194] *Id.* at 1096.

[195] *Id.* at 1116.

[196] *Id.* at 1115.

[197] Katt, Jr., W., "*The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*," 106 Columbia Law Review 679, 681 (2006).

Generally, it can also **undermine the faith of the public in the need for secrecy**[198] for "secrecy can best be preserved only when credibility is truly maintained."[199]

The tension between secrecy and the demand for openness continues, but circumstances have changed, as the international trade agreements of today tend to be far more authoritative and comprehensive than those negotiated by Presidents Woodrow Wilson, George Washington and John Jay. These trade agreements have broader and more direct consequences on private conduct. As the trend on international trade agreements will only continue, it is important to **revisit the tension between secrecy and openness. The fact alone that secrecy shrouded negotiations of international agreements three hundred or even twenty-five years ago can no longer justify the continuation of that approach in today's era of the NAFTA, CAFTA (Central American Free Trade Agreement), and a prospective FTAA.**[200]

These developments in the openness to the public of international trade agreement negotiations show that **secrecy in the negotiation of treaties is not a rule written in stone**. Revisiting the balance between secrecy and openness is an imperative, **especially in the Philippines where the right to information has been elevated to a constitutional right essential to our democratic society.**

B. Democracy and the rights to information and participation

1. Philippine Constitutional provisions on information and transparency

Of all the organic laws of our country, the 1987 Constitution holds most sacrosanct the people's role in governance. As a first principle of government, the 1987 Constitution declares in

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[198] *Id.* at 697, citing Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act*, 37 Vill. L. Rev. 67, 93 (1992).

[199] *N.Y. Times Co. v. United States*, 403 U.S. 713, 729 (1971) (Stewart, *J.*, concurring).

[200] *Supra* note 197 at 681.

Article II, Section 1, Declaration of Principles and State Policies, that the **Philippines is not only a republican but also a democratic state.** The word "democratic" was added to "republican" as a "pardonable redundancy" to highlight the importance of the people's role in government, as evinced by the exchanges in the 1986 Constitutional Commission, *viz*:

MR. NOLLEDO. I am putting the word "democratic" because of the provisions that we are now adopting which are covering **consultations with the people**. For example, we have provisions on recall, initiative, the **right of the people even to participate in lawmaking and other instances that recognize the validity of interference by the people through people's organizations** . . .[201]

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MR. OPLE. The **Committee added the word "democratic" to "republican," and, therefore, the first sentence states: "The Philippines is a republican and democratic state."**

May I know from the committee the reason for adding the word "democratic" to "republican"? The constitutional framers of the 1935 and 1973 Constitutions were content with "republican." Was this done merely for the sake of emphasis?

MR. NOLLEDO. Madam President, that question has been asked several times, but being the proponent of this amendment, I would like the Commissioner to know that **"democratic" was added** because of the **need to emphasize** people power and the many provisions in the Constitution that we have approved related to recall, people's organizations, initiative and the like, which recognize the **participation of the people in policy-making** in certain circumstances."

MR. OPLE. I thank the Commissioner. That is a very clear answer and I think it does meet a need. . .

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MR. NOLLEDO. According to Commissioner Rosario Braid, "democracy" here is understood as participatory democracy.[202] (*emphasis supplied*)

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[201] 4 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 735.

[202] *Id.* at 752.

Of a similar tenor is the following exchange between **Commissioners Abraham Sarmiento and Adolfo Azcuna**:

MR. SARMIENTO. When we speak of republican democratic state, are we referring to representative democracy?

MR. AZCUNA. That is right.

MR. SARMIENTO. So, why do we not retain the old formulation under the 1973 and 1935 Constitutions which used the words "republican state" because "republican state" would refer to a democratic state where people choose their representatives?

MR. AZCUNA. We **wanted to emphasize the participation of the people in government**.[203] (*emphasis supplied*)

In line with this desideratum, our fundamental law enshrined in rubric the indispensability of the people's participation in government through **recall**,[204] **initiative**,[205] and **referendum**.[206]

Similarly, it expressly provided for the **people's right to effective and reasonable participation in Article XIII, Section 16, on Social Justice and Human Rights**, *viz*:

The **right** of the people and their organizations to **effective and reasonable participation** at all levels of social, political, and **economic decision-making** shall not be abridged. The State shall, by law, facilitate the establishment of adequate consultation mechanisms. (*emphasis supplied*)

To prevent the participation of the people in government from being a mere chimera, the 1987 Constitution also gave more muscle to their **right to information, protected in the Bill of Rights,** by strengthening it with the provision on transparency in government, and by underscoring the importance of communication.

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[203] *Id.* at 769.

[204] 1987 PHIL. CONST., Art. X, §3.

[205] 1987 PHIL. CONST., Art. VI, §32; Art. X, §3.

[206] 1987 PHIL. CONST., Art. VI, §32; Art. X, §3.

Thus, the 1987 Constitution provides in Article III, Section 7 of the Bill of Rights, *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 to information are the following provisions of the 1987 Constitution:

Article II, Section 28, Declaration of State Principles and Policies:

> 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*)

Article XI, Section 21, National Economy and Patrimony:

> Foreign loans may be incurred in accordance with law and the regulation of the monetary authority. **Information on foreign loans obtained or guaranteed by the Government shall be made available to the public**. (*emphasis supplied*)

The objective of the 1987 Constitution is to attain an **open and honest government** predicated on the people's right to know, as shown by the following portion of the deliberations of the 1986 Constitutional Commission, *viz:*

> MR. OPLE. Mr. Presiding Officer, this amendment is proposed jointly by Commissioners Ople, Rama, Treñas, Romulo, Regalado and Rosario Braid. It reads as follows: "SECTION 24. THE STATE SHALL ADOPT AND IMPLEMENT A POLICY OF FULL PUBLIC DISCLOSURE OF ALL ITS TRANSACTIONS SUBJECT TO REASONABLE SAFEGUARDS ON NATIONAL INTEREST AS MAY BE PROVIDED BY LAW."
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In the United States, President Aquino has made much of the point that the government should be open and accessible to the public.

This amendment is by way of providing an umbrella statement in the Declaration of Principles for all these safeguards for an **open and honest government** distributed all over the draft Constitution. **It establishes a concrete, ethical principle for the conduct of public affairs in a genuinely open democracy, with the people's right to know as the centerpiece.**[207] (*emphasis supplied*)

The correlative policy of public disclosure and the people's right to information were also expounded by Constitutional Commissioners **Joaquin Bernas** and **Napoleon Rama**, *viz*:

FR. BERNAS. Just one observation, Mr. Presiding Officer. I want to comment that Section 6 (referring to Section 7, Article III on the right to information) talks about the right of the people to information, and corresponding to every right is a duty. In this particular case, **corresponding to this right of the people is precisely the duty of the State to make available whatever information there may be needed that is of public concern. Section 6 is very broadly stated so that it covers anything that is of public concern**. It would seem also that the **advantage of Section 6 is that it challenges citizens to be active in seeking information rather than being dependent on whatever the State may release to them.**

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MR. RAMA. There is a difference between the provisions under the Declaration of Principles and the provision under the Bill of Rights. The basic difference is that the Bill of Rights contemplates collision between the rights of the citizens and the State. Therefore, it is **the right of the citizen to demand information**. While under the Declaration of Principles, **the State must have a policy, even without being demanded, by the citizens, without being sued by the citizen, to disclose information and transactions**. So there is a basic difference here because of the very nature of the Bill of Rights and the nature of the Declaration of Principles.[208] (*emphases supplied*)

Going full circle, the 1987 Constitution provides for the vital role of information in nation-building in the opening Declaration

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[207] 5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 24.

[208] *Id.* at 26.

of State Principles and Policies and in the General Provisions towards the end of the Constitution.

Article II, Section 24, provides, *viz*:

Sec. 24. The State recognizes the **vital** role of communication and **information in nation-building**. (*emphasis supplied*).

Article XVI, Section 10, General Provisions provides, *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*)

Constitutional Commissioner **Rosario Braid** explained the rationale of these provisions on information and communication in her sponsorship speech, *viz*:

MS. ROSARIO BRAID. We cannot talk of the functions of communication unless we have a philosophy of communication, unless we have a vision of society. Here we have a preferred vision where opportunities are provided for participation by as many people, where there is unity even in cultural diversity, for there is freedom to have options in a pluralistic society. **Communication and information provide the leverage for power. They enable the people to act, to make decisions, to share consciousness in the mobilization of the nation**.[209] (*emphasis supplied*)

With the constitutional provisions on transparency and information brightlined in neon as backdrop, we now focus on the people's right to information.

2. Focusing on the right to information

The constitutional provision on the people's right to information made its **maiden appearance** in the Bill of Rights of the 1973 Constitution, but without the phrase "as well as to government research data used as basis for policy development." The phrase

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[209] *Id.* at 83.

was added in the 1987 Constitution to stop the government practice during Martial Law of withholding social research data from the knowledge of the public whenever such data contradicted policies that the government wanted to espouse.[210]

Likewise, the framers of the 1987 Constitution expanded the scope of "transactions" that may be accessed, to include negotiations leading to the consummation of contracts and treaties, but subject to "reasonable safeguards on national interest."[211]

The intent of the constitutional right to information, as pointed out by Constitutional Commissioner Wilfrido V. Villacorta, is "to adequately inform the public so that nothing vital in state affairs is kept from them."[212] In ***Valmonte v. Belmonte***,[213] we explained the rationale of the right of access to information, *viz*:

An informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them,

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[210] 1 RECORDS OF THE CONSTITUTIONAL COMMISSION, pp. 708-710, 757-758, 760.

[211] The Records of the Constitutional Commission state, *viz*:

MR. SUAREZ. And when we say "transactions" which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?

MR. OPLE. The "transactions" used here, I suppose, is generic and, therefore, it can **cover both steps leading to a contract, and already a consummated contract**, Mr. Presiding Officer.

MR. SUAREZ. This contemplates **inclusion of negotiations leading to the consummation of the transaction**?

MR. OPLE. Yes, **subject to reasonable safeguards on the national interest.**

MR. SUAREZ. Thank you. Will the **word "transactions" here also refer to treaties, executive agreements** and service contracts particularly?

MR. OPLE. I suppose that is **subject to reasonable safeguards on national interest** which include the national security. (*emphasis supplied*) (5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 25)

[212] 1 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 709.

[213] G.R. No. 74930, February 13, 1989, 170 SCRA 256 (1989).

and the free exchange of ideas and discussion of issues thereon is vital to the democratic government envisioned under our Constitution. The cornerstone of this republican system of government is delegation of power by the people to the State. In this system, governmental agencies and institutions operate within the limits of the authority conferred by the people. Denied access to information on the inner workings of government, the citizenry can become prey to the whims and caprices of those to whom the power had been delegated…

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…The right of access to information ensures that these freedoms are not rendered nugatory by the government's monopolizing pertinent information. For an essential element of these freedoms is to keep open a continuing dialogue or process of communication between the government and the people. It is in the interest of the State that the channels for free political discussion be maintained to the end that the government may perceive and be responsive to the people's will. Yet, this **open dialogue can be effective only to the extent that the citizenry is informed and thus able to formulate its will intelligently. Only when the participants in a discussion are aware of the issues and have access to information relating thereto can such bear fruit**.

The right to information is an essential premise of a meaningful right to speech and expression. But this is not to say that the right to information is merely an adjunct of and therefore restricted in application by the exercise of the freedoms of speech and of the press. Far from it. **The right to information goes hand-in-hand with the constitutional policies of *full public disclosure* (footnote omitted) and *honesty in the public service* (footnote omitted). It is meant to enhance the widening role of the citizenry in governmental decision-making as well as in checking abuse in government.**[214] (*emphases supplied*)

Notably, the right to information was written in broad strokes, as it merely required that information sought to be disclosed must be a **matter of public concern.**[215] In ***Legaspi v. Civil***

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[214] *Id*. at 264-266.

[215] Bernas, *J*., *The 1987 CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A Commentary* (hereafter Bernas) (2003), p. 372.

Service Commission,[216] the Court elucidated on the meaning of "matters of public concern," *viz*:

> In determining whether or not a particular information is of public concern, there is no rigid test which can be applied. "Public concern" like "public interest" is a term that eludes exact definition. Both terms embrace a broad spectrum of subjects which the public may want to know, either because these **directly affect their lives, or simply because such matters naturally arouse the interest of an ordinary citizen.** In the final analysis, it is for the courts to determine on a case by case basis whether the **matter at issue is of interest or importance, as it relates to or affects the public**.[217] (*emphasis supplied*)

Under both the 1973 and the 1987 Constitutions, the right to information is **self-executory**. It is a public right that belongs to and can be invoked by the people. Consequently, **every citizen** has the "standing" to challenge any violation of the right and may seek its enforcement.[218] The **self-executory status** and the significance in a democracy of the right of access to information were emphasized by the Court in ***Gonzales v. Narvasa,***[219] *viz*:

> Under both the 1973 (footnote omitted) and 1987 Constitutions, this (the right to information) is a **self-executory provision which can be invoked by any citizen before the courts…**
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> Elaborating on the significance of the right to information, the Court said in *Baldoza v. Dimaano* (71 SCRA 14 [1976]…) that "[t]he incorporation of this right in the Constitution is a **recognition of the fundamental role of free exchange of information in a democracy. There can be no realistic perception by the public of the nation's problems, nor a meaningful democratic decision-making if they are denied access to information of general interest. Information is needed to enable the members of society to cope with the exigencies of the times**."[220] (*emphases supplied*)

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[216] G.R. No. 72119, May 29, 1987, 150 SCRA 530.

[217] *Id.* at 541.

[218] *Id.* at 371.

[219] G.R. No. 140835, August 14, 2000, 337 SCRA 733.

[220] *Id.* at 746-747.

Prior to the 1973 Constitution, this right was merely statutory in character, as stressed in ***Subido v. Ozaeta.***[221] In said case, Subido was an editor of the **Manila Post**. He filed a petition for *mandamus* to compel the respondents Secretary of Justice and Register of Deeds of Manila to furnish him the list of real estate properties sold to aliens and registered with the Register of Deeds of Manila since the promulgation of Department of Justice Circular No. 128, or to allow him to examine all records in the respondents' custody relative to the said transactions, after his requests to the Secretary of Justice and the Register of Deeds were denied.

The Court upheld the contention of the respondents that the 1935 Constitution did not guarantee freedom of information or freedom to obtain information for publication. The Court ruled that "**the right to examine or inspect public records is purely a question of statutory construction**."[222] Section 56 of Act No. 496, as amended by Act No. 3300, saved the day for Subido, as it provided that "all records relating to registered lands in the office of the Register of Deeds shall be open to the public subject to such reasonable regulations as may be prescribed by the Chief of the General Land Registration Office with the approval of the Secretary of Justice." Hence, the petition for *mandamus* was granted.

The **Subido Court's** interpretation of the 1935 Constitution followed U.S. jurisprudence **that did not and continues not to recognize a constitutional right of access to information on matters of public concern.** Let us briefly examine the right of access to information in U.S. and other jurisdictions.

3. Right to information in U.S. and other jurisdictions

a. U.S. jurisdiction

The U.S. Supreme Court has recognized a constitutional **right to receive information** integral to the **freedom of speech** under

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[221] 80 Phil. 383 (1948).

[222] *Id.*

the First Amendment to the U.S. Constitution. It has ruled, however, that the **right of access to information is not constitutionally mandated, but statutorily granted**.[223]

The U.S. Supreme Court first identified a constitutional **right to receive information** in the **1936 case *Grosjean v. American Press Company***.[224] In that case, the U.S. High Court, citing Judge Cooley, held that a free and general discussion of public matters is essential to prepare the people for an intelligent exercise of their rights as citizens.[225] In the **1976** case ***Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council,***[226] widely considered to be the seminal "right to receive" case,[227] a Virginia statute forbidding pharmacists from advertising the prices of prescription drugs was held unconstitutional by the U.S. High Court. It reasoned that the free speech guarantee of the **First Amendment covered not only the speaker, but also the recipient of the speech**. While commercial speech was involved in that case, the Court left no doubt that the constitutional protection for **receipt of information** would apply with even more force when more directly related to self-government and public policy.[228]

On the premise that information is a prerequisite to meaningful participation in government, the U.S. Congress passed the **Freedom of Information Act of 1966 (FOIA)**.[229] In the leading FOIA case, ***Environmental Protection Agency v. Mink***,[230] the

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[223] Dissenting Opinion of Justice Reynato S. Puno in *Tolentino v. COMELEC, et al*., G.R. No. 148334, January 21, 2004, 420 SCRA 438, 489.

[224] 297 U.S. 233 (1936).

[225] *Id.* at 249-250, citing 2 Cooley, *Const. Lim.* 8th ed. p. 886.

[226] 425 U.S. 748 (1976).

[227] Bunker, M., Splichal, S., Chamberlin, B., Perry, L., "*Access to Government-Held Information in the Computer Age: Applying Legal Doctrine to Emerging Technology*," 20 Florida State Law Review 543, 549 (1993).

[228] 425 U.S. 748, 765, Note 19 (1976).

[229] Wilcox, W., "*Access to Environmental Information in the United States and the United Kingdom*," 23 Loyola of Los Angeles International & Comparative Law Review 121, 124-125 (2001).

[230] 410 U.S. 73 (1973).

U.S. Supreme Court held that the FOIA "seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands."[231] In ***Department of Air Force v. Rose***,[232] the same Court held that the basic purpose of the law was "to open agency action to the light of public scrutiny." In ***National Labor Relations Board v. Robbins Tire & Rubber Co.***,[233] the U.S. High Court ruled that the basic purpose of the FOIA "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[234]

Under the FOIA, the reason for the request for information has no bearing on the merits of the request.[235] But while the FOIA promotes a policy of public disclosure, it recognizes certain exemptions from disclosure, among which are matters "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."[236]

Still and all, the U.S. Supreme Court characterized the **right of access to information as statutory and not constitutional in *Houchins v. KQED, Inc., et al.***,[237] *viz*: "**(T)here is no constitutional right to have access to particular government information, or to require openness from the bureaucracy.** . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act."[238] **Neither the U.S. courts nor the U.S. Congress**

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[231] *Id.* at 80.

[232] 425 U.S. 352, 372 (1976).

[233] 437 U.S. 214 (1978).

[234] *Id.* at 242.

[235] *EPA v. Mink*, 410 U.S. 73 (1973).

[236] 5 U.S.C. 552 (b)(1).

[237] 438 U.S. 1 (1978).

[238] *Id.* at 14, citing *Pell v. Procunier*, 417 U.S. 817 (1974) and Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975).

recognizes an affirmative constitutional obligation to disclose information concerning governmental affairs; such a duty cannot be inferred from the language of the U.S. Constitution itself.[239]

Like the U.S., other countries also recognize a statutory right to information as discussed below.

b. Other jurisdictions
(*i.e.*, UK, Australia and New Zealand)

In the **United Kingdom**, the last four decades of the 20th century saw a gradual increase in the rights of the individual to elicit information from the public authorities.[240] This trend culminated in the passage of the "Freedom of Information Act 2000" (FOIA 2000). FOIA 2000 conferred a right of access to official information to every person, irrespective of that person's interest in the information. It covers all information, regardless of subject matter, but also provides for specific exemptions.

Exemptions under FOIA 2000 can be either **absolute** or **qualified**. When the exemption is absolute, the right to disclosure does not apply; but when it is **qualified, the right will not be applied only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information**.[241] The weighing of the public interest must be carried out by reference to the **particular circumstances** existing at the time a request for information is made. "The central question in every case is the content of the particular information in question. **Every decision is specific to the particular facts and circumstances under consideration**."[242] Thus, while a public authority may properly

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[239] Note, "The Rights of the Public and the Press to Gather Information," 87 Harvard Law Review 1505, 1512-13 (1974).

[240] Coppel, P., *Information Rights* (2007), p. 2.

[241] *Id.*, pp. 4-5, 8, 505; Freedom of Information Act 2000, §2(2)(b).

[242] *Export Credits Guarantee Department v. Friends of the Earth*, [2008] EWHC 638 (Admin), citing *Department for Education and Skills v. Information Commissioner and the Evening Standard* (2007) UKIT EA 2006 0006 at [20].

refuse to disclose information subject to a qualified exemption, a change in surrounding circumstances may result in the public authority being obliged to disclose the information upon a subsequent request.[243]

Among the **qualified exemptions** are information that "would be **likely to prejudice**…relations between the United Kingdom and any other State"[244] and "confidential information obtained from a State other than the United Kingdom…"[245]

Ahead of the United Kingdom, the **Commonwealth of Australia** passed its "Freedom of Information Act 1982 (Act 1982)." Act 1982 gives every person a legally enforceable right to obtain access to information of a public agency without requirement to demonstrate a need to know.[246] At the same time, it recognizes two basic kinds of exemptions: (1) exemptions which protect a document of a particular class or kind **without a need to refer to the effects of disclosure** (**class exemption**), and (2) exemptions which depend on **demonstrating a certain likelihood that a particular harm would result from disclosure** of a document (**harm-based exemption**).

Covered by the **harm-based exemptions** are documents that "would, or could reasonably be expected to, **cause damage** to…the international relations of the Commonwealth" or "would divulge any information or matter communicated in confidence by or on behalf of a foreign government, an authority of a foreign government or an international organization to the Government of the Commonwealth, to an authority of the Commonwealth or to a person receiving the communication on behalf of the Commonwealth or of an authority of the Commonwealth."[247]

Almost simultaneous with Australia, **New Zealand** enacted the "Official Information Act 1982 (OIA)," which allows its

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[243] Coppel, P., *supra* note 240 at 550.

[244] Freedom of Information Act 2000, §27(1)(a).

[245] *Id.* at §27(2).

[246] Freedom of Information Act 1982, §11(2).

[247] *Id.* at §33.

citizens, residents, persons in New Zealand, and companies incorporated in New Zealand to request official information. Under the OIA, exemptions may be divided into two broad classes: (1) "those that are engaged upon their terms being satisfied," and (2) "those that will be disengaged if, in the circumstances, the withholding of particular information is outweighed by other considerations which render it desirable in the public interest to make that information available."[248] Among the exemptions included in the first class is information that would be likely to **prejudice** the entrusting of information to the Government of New Zealand on a basis of confidence by the government of any other country or any agency of such government.[249]

Taking into account the higher constitutional status of the right of access to information in Philippine jurisdiction compared with the statutorily granted right of access to information in U.S. and other jurisdictions, let me now turn to the question of whether executive privilege can constitute an exception to the right of access and be used to withhold information from the public.

C. Adjudicating the constitutional right to information *vis-à-vis* executive privilege in Philippine jurisdiction

1. The general rule and the exception

With the elevation of the right to information to constitutional stature, the starting point of the inquiry is the **general rule** that the public has a right to information on matters of public concern and the State has a corresponding duty to allow public access to such information. It is recognized, however, that the constitutional guarantee admits of **exceptions** such as "limitations as may be provided by law."[250] Thus, as held in **Legaspi**, "in every case, the availability of access to a particular public record" is circumscribed by two

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[248] Coppel, P., *supra* note 240 at 67.

[249] Official *INFORMATION ACT* 1982, §§6(b) and 27(1); Coppel, *supra* note 240, pp. 68-69.

[250] 1987 PHIL. CONST. Art. III, §7.

elements: (1) the information is "of **public concern** or one that involves public interest," and, (2) it is "**not exempt** by law from the operation of the constitutional guarantee."[251]

The question of access is first addressed to the government agency having custody of the information sought. **Should the government agency deny access, it "has the burden of showing that the information requested is not of public concern, or, if it is of public concern, that the same has been exempted by law from the operation of the guarantee"** because "(t)o hold otherwise will serve to dilute the constitutional right. As aptly observed, '…the government is in an advantageous position to marshal and interpret arguments against release…' (87 Harvard Law Review 1511 [1974])."[252] Furthermore, the Court ruled that "(t)o safeguard the constitutional right, every denial of access by the government agency concerned is subject to review by the courts."[253]

There is **no dispute that the subject JPEPA documents are matters of public concern** that come within the purview of Article III, Section 7 of the Bill of Rights. **The thorny issue is whether these documents, despite being of public concern, are exempt** from being disclosed to petitioner private citizens on the ground that they are covered by executive privilege.[254]

Unlike the U.S., U.K., Australia, and New Zealand, the Philippines does not have a comprehensive freedom of information

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[251] G.R. No. 72119, May 29, 1987, 150 SCRA 530.

[252] *Id.* Analogously, in the U.S., the Freedom of Information Act (FOIA) was enacted to facilitate public access to government documents. The statute was designed "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." Consistent with this purpose and the plain language of the FOIA, the burden is on the government agency to justify the withholding of any requested documents. (references omitted) *U.S. Department of State v. Ray, et al.*, 502 U.S. 164, 173 (1991).

[253] G.R. No. 72119, May 29, 1987, 150 SCRA 530.

[254] See *Legaspi v. Civil Service Commission*, G.R. No. 72119, May 29, 1987, 150 SCRA 530, 541; See also Comment, pp. 15-21.

law that enumerates the exceptions or sources of exceptions[255] to the right to information. In our jurisdiction, various laws provide exceptions from the duty to disclose information to the public, such as Republic Act No. 8293 or the "Intellectual Property Code," Republic Act No. 1405 or the "Secrecy of Bank Deposits Act," and Republic Act No. 6713 or the "Ethical Standards Act."[256]

Respondents contend that Executive Order 464 (E.O. 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,"[257] provides basis for exemption of the subject JPEPA

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[255] For example, the U.S. FOIA provides for the following sources of exceptions from the duty to disclose information, *viz*:

(b) This section (referring to the FOIA) does not apply to matters that are—

(1) (A) specifically authorized under criteria established by an **Executive order** to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

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(3) specifically exempted from disclosure by **statute** (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld… (5 U.S.C. 552 [b][1] and [3])

[256] BERNAS, pp. 372-73.

[257] Issued by President Gloria Macapagal-Arroyo on September 28, 2005. E.O. 464 provides in relevant part, *viz*:

Section 1. Appearance by Heads of Departments Before Congress. In accordance with Article VI, Section 22 of the Constitution and to implement the Constitutional provisions on the separation of powers between co-equal branches of the government, all heads of departments of the Executive Branch of the government shall secure the consent of the President prior to appearing before either House of Congress.

When the security of the State or the public interest so requires and the President so states in writing, the appearance shall only be conducted in executive session.

documents from the operation of the constitutional guarantee of access to information. They argue that while ***Senate v. Ermita***

Section 2. Nature, Scope and Coverage of Executive Privilege.

(a) Nature and Scope. - The rule of confidentiality based on executive privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995). Further, Republic Act No. 6713 or the Code of Conduct and Ethical Standards for Public Officials and Employees provides that 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 to prejudice the public interest.

Executive privilege covers all confidential or classified information between the President and the public officers covered by this executive order, including: Conversations and correspondence between the President and the public official covered by this executive order (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995; *Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002);

Military, diplomatic and other national security matters which in the interest of national security should not be divulged (*Almonte vs. Vasquez*, G.R. No. 95367, 23 May 1995; *Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998).

Information between inter-government agencies prior to the conclusion of treaties and executive agreements (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);

Discussion in close-door Cabinet meetings (*Chavez v. Presidential Commission on Good Government*, G.R. No. 130716, 9 December 1998);

Matters affecting national security and public order (*Chavez v. Public Estates Authority*, G.R. No. 133250, 9 July 2002).

(b) Who are covered. The following are covered by this executive order:

Senior officials of executive departments who in the judgment of the department heads are covered by the executive privilege;

Generals and flag officers of the Armed Forces of the Philippines and such other officers who in the judgment of the Chief of Staff are covered by the executive privilege;

Philippine National Police (PNP) officers with rank of chief superintendent or higher and such other officers who in the judgment of the Chief of the PNP are covered by the executive privilege;

Senior national security officials who in the judgment of the National Security Adviser are covered by the executive privilege; and

Such other officers as may be determined by the President.

struck down Sections 2(b) and 3 of E.O. 464 as unconstitutional, Section 2(a), which enumerates the scope of executive privilege including information prior to the conclusion of treaties, was spared from a declaration of constitutional infirmity.[258] However, it is easily discernible from the title and provisions of E.O. 464 that **this presidential issuance applies to executive privilege invoked against the legislature in the context of inquiries in aid of legislation, and not to executive privilege invoked against private citizens asserting their constitutional right to information.**[259] It thus cannot be used by respondents to discharge their burden of showing basis for exempting the subject JPEPA documents from disclosure to petitioners suing as private citizens.

Respondents also rely on ***Almonte***, ***Chavez v. PCGG***, ***Senate v. Ermita***, and ***PMPF v. Manglapus*** to carve out from the coverage of the right to information the subject JPEPA documents. Let us put these cases under the lens of scrutiny to determine the correctness of respondents' reliance upon them.

As noted earlier, **Almonte** recognized a common law governmental privilege against disclosure, with respect to **state secrets bearing on military and diplomatic matters**.[260] This case involved an investigation by the Office of the Ombudsman

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Section 3. Appearance of Other Public Officials Before Congress. All public officials enumerated in Section 2 (b) hereof shall secure prior consent of the President prior to appearing before either House of Congress to ensure the 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 inquiries in aid of legislation.

[258] Comment, pp. 18-20.

[259] The Court ruled in *Senate v. Ermita, viz:*

E.O 464 is concerned only with the demands of Congress for the appearance of executive officials in the hearings conducted by it, and not with the demands of citizens for information pursuant to their right to information on matters of public concern.

[260] G.R. No. 95367, May 23, 1995, 244 SCRA 286, citing 10 Anno., Government Privilege Against Disclosure of Official Information, 95 L. Ed. 3-4 and 7, pp. 427-29, 434.

that required the Economic Intelligence and Investigation Bureau (EIIB) to produce records pertaining to their personnel. As the Court found that no military or diplomatic secrets would be disclosed by the production of these records and there was no law making them classified, it held that disclosure of the records to the Office of the Ombudsman was warranted. In arriving at this conclusion, the Court noted that **the case did not concern a demand by a citizen for information under the freedom of information guarantee of the Constitution**, but involved the power of the Office of the Ombudsman to obtain evidence in connection with an investigation conducted by it *vis-a-vis* the claim of privilege of an agency of the Government. It is thus not difficult to see that the facts and issue of **Almonte** starkly differ from the **case of petitioner private citizens who are enforcing their constitutional right to information**. Given this distinction, I submit that **Almonte** cannot provide the backbone for exemption of the subject JPEPA documents from disclosure. The same holds true with respect to ***Senate v. Ermita*** in which the constitutionality of E.O. 464 was at issue, and the Court ruled, *viz*:

> E.O 464 is concerned only with the **demands of Congress for the appearance of executive officials in the hearings** conducted by it, and **not with the demands of citizens for information pursuant to their right to information** on matters of public concern.[261] (*emphasis supplied*)

In ***Chavez v. PCGG***, the Court, citing the above-quoted exchanges of the Constitutional Commissioners regarding the constitutional right to information, recognized that "information on **inter-government exchanges prior** to the conclusion of treaties and executive agreements may be **subject to reasonable safeguards** for the sake of national interest." Be that as it may,

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[261] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006). The right to information was involved in that case only "(t)o the extent that investigations in aid of legislation are generally conducted in public;" thus, "any executive issuance tending to unduly limit disclosures of information in such investigations necessarily deprives the people of information which, being presumed to be in aid of legislation, is presumed to be a matter of public concern."

in ***Chavez v. PCGG,*** the Court resolved the issue whether the government, through the Presidential Commission on Good Government (PCGG), could be compelled to disclose the proposed terms of a **compromise agreement with the Marcos heirs** as regards their alleged ill-gotten wealth. **The Court did not have occasion to rule on the diplomatic secrets privilege *vis-à-vis* the constitutional right to information**.

It was in ***PMPF v. Manglapus*** that the Court was confronted with a collision between a citizen's constitutional right to information and executive secrecy in foreign affairs. As afore-discussed, the Court, in denying the petition in an unpublished Resolution, quoted at length **Curtiss-Wright's** disquisition on the necessity of secrecy in foreign negotiations. Again, the relevant portion of that quote, which was cited by respondents, reads, *viz*:

> In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but **he alone negotiates**. **Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.** As Marshall said in his great argument of March 7, 1800, in the House of Representatives, 'The **President is the sole organ of the nation in its external relations**, and its **sole representative with foreign nations**.' Annals, 6th Cong., col. 613.
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> It is important to bear in mind that **we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations - a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.** It is quite apparent that if, in the maintenance of our international relations, embarrassment -perhaps serious embarrassment- is to be avoided and success for our aims achieved, congressional legislation which

is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. **Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results.** Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty - a refusal the wisdom of which was recognized by the House itself and has never since been doubted.[262] *(emphasis supplied)*

The Court followed this quote with the **conclusion** that "**(w)e have the same doctrine of separation of powers** in the Constitution and the same grant of authority in foreign affairs to the President as in the American system. The same reasoning applies to treaty negotiations by our Government."

Taking a hard look at the facts and circumstances of ***PMPF v. Manglapus,*** it cannot escape one's eye that this **case did not involve a question of separation of powers arising from a legislative inquiry**, as in the case of the House of Representative's demand on President Washington for papers relating to the Jay Treaty. In ***PMPF v. Manglapus***, petitioners invoked their right to information under Article III, Section 7; and freedom of speech and the press under Article III, Section 4. They sought to compel the representatives of the President of the Philippines in the then ongoing negotiations of the **RP-U.S. Military Bases Agreement** to (1) open to petitioners the negotiations/sessions of respondents with their U.S. counterparts on the RP-U.S. Military Agreement; (2) reveal and/or give petitioners access to the items which they (respondents) had already agreed upon with their American counterparts relative

[262] *PMPF v. Manglapus*, G.R. No. 84642, September 13, 1988, pp. 5-6.

to the review of the RP-U.S. Military Bases Agreement; and (3) reveal and/or make accessible to petitioners the respective positions of respondents and their U.S. counterparts on items they had not agreed upon, particularly the compensation package for the continued use by the U.S. of their military bases and facilities in the Philippines. The above quote from **Curtiss-Wright,** referring to a conflict between the executive and the legislative branches of government, was therefore **different** from the factual setting of ***PMPF v. Manglapus*****.** The latter case which involved a collision between governmental power over the conduct of foreign affairs with its secrecy prerogative on the one hand, and the citizen's right to information under the Constitution on the other.

The **PMPF Court** did stress that secrecy of negotiations with foreign countries did not violate freedom of access to information and freedom of speech and of the press. Significantly, it quoted ***The New American Government and Its Work,*** *viz*:

> The nature of diplomacy requires centralization of authority and expedition of decision which are inherent in executive action. Another essential characteristic of diplomacy is its confidential nature. Although much has been said about "open" and "secret" diplomacy, with disparagement of the latter, Secretaries of State Hughes and Stimson have clearly analyzed and justified the practice. In the words of Mr. Stimson:
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> "A complicated negotiation… cannot be carried through without many, many private talks and discussions, man to man; many tentative suggestions and proposals. Delegates from other countries come and tell you in confidence of their troubles at home and of their differences with other countries and with other delegates; they tell you of what they do under certain circumstances and would not do under other circumstances… If these reports…should become public…who would ever trust American Delegations in another conference? (United States Department of State, Press Releases, June 7, 1930, pp. 282-284).
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> "There is frequent criticism of the secrecy in which negotiation with foreign powers on nearly all subjects is concerned. This, it is

claimed, is incompatible with the substance of democracy. As expressed by one writer, 'It can be said that there is no more rigid system of silence anywhere in the world.' (E.J. Young, *Looking Behind the Censorship*, J.B. Lippincott Co., 1938) President Wilson in starting his efforts for the conclusion of the World War declared that we must have 'open covenants, openly arrived at.' He quickly abandoned his thought.

"No one who has studied the question believes that such a method of publicity is possible. In the moment that negotiations are started, pressure groups attempt to 'muscle in.' An ill-timed speech by one of the parties or a frank declaration of the concessions which are extracted or offered on both sides would quickly lead to widespread propaganda to block the negotiations. After a treaty has been drafted and its terms are fully published, there is ample opportunity for discussion before it is approved." (*The New American Government and Its Work*, James T. Young, 4th edition, p. 194)[263] (*emphasis supplied*)

It is worth noting that while the above quote speaks of the evil of "open" diplomacy, it does not discuss the value of the right of access to information; much less, one that is constitutional in stature. The ***New American Government and Its Work*** was published in 1940, **long before** the Freedom of Information Act was passed in the U.S. in 1966. It did not and could not have taken into account the expanded statutory right to information in FOIA. **It is more doubtful if this book can be used to calibrate the importance of the right of access to information in the Philippine setting, considering its elevation as a constitutional right.**

Be that as it may, I submit that as both ***Chavez v. PCGG*** and ***PMPF v. Manglapus*** are **extant case law recognizing the constitutionally-based diplomatic secrets privilege over treaty negotiations,** respondents have discharged the burden of showing the bases for exempting the subject JPEPA documents from the scope of the constitutional right to information.

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[263] *PMPF v. Manglapus*, G.R. No. 84642, September 13, 1988, pp. 3-4.

Prescinding from these premises, the next question to grapple with is whether the exemption or diplomatic secrets privilege over treaty negotiations as recognized in ***Chavez v. PCGG*** and ***PMPF v. Manglapus*** is absolute or qualified.

2. Diplomatic secrets privilege covering treaty negotiations:
An absolute or qualified exemption?

It is my considered view that the diplomatic secrets privilege is a qualified privilege or qualified exemption from the coverage of the right to information. In ***Chavez v. PCGG***, the Court cited the following deliberations of the 1986 Constitutional Commission in recognizing that "inter-government exchanges prior to the conclusion of treaties and executive agreements may be subject to reasonable safeguards for the sake of national interest," *viz*:

MR. SUAREZ. And when we say "transactions" which should be distinguished from contracts, agreements, or treaties or whatever, does the Gentleman refer to the steps leading to the consummation of the contract, or does he refer to the contract itself?

MR. OPLE. The "transactions" used here, I suppose, is generic and, therefore, it can **cover both steps leading to a contract, and already a consummated contract**, Mr. Presiding Officer.

MR. SUAREZ. This contemplates **inclusion of negotiations leading to the consummation of the transaction**?

MR. OPLE. Yes, **subject to reasonable safeguards on the national interest.**

MR. SUAREZ. Thank you. Will the **word "transactions" here also refer to treaties, executive agreements** and service contracts particularly?

MR. OPLE. I suppose that is **subject to reasonable safeguards on national interest** which include the national security."[264] (*emphasis supplied*)

The above deliberations show that negotiation of treaties and executive agreements may or may not come within the purview

[264] 5 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 25.

of "transactions" covered by the right to information, **subject to reasonable safeguards to protect national interest**.[265] In other words, the diplomatic secrets privilege over treaty negotiations may provide a ground for exemption, but **may be overcome if there are reasonable safeguards to protect the national interest**. It is thus **not an absolute exemption or privilege, but a qualified one.**

The Freedom of Information Act 2000 of the **United Kingdom** provides that when an exemption is **qualified, the right to information will not be upheld only if the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.** The Act treats as **qualified exemptions** information that "would be **likely to prejudice**…relations between the United Kingdom and any other State"[266] and "confidential information obtained from a State other than the United Kingdom…." [267] As such, these exemptions may be overcome by a higher public interest in disclosure.

It may be argued that the subject JPEPA documents consist of information similar to information covered by the above-cited qualified exemptions under the Freedom of Information Act 2000. The qualification of the above exemptions in the United Kingdom is made in the context of a statutory grant of a right to information. In the Philippines where the right to information has more force and effect as a constitutional right, there is all the more reason to give it stronger muscle by qualifying the diplomatic secrets privilege exemption. This approach minimizes the risk of unjustifiably withholding diplomatic information that is of public concern but covered by overly broad absolute exemptions.

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[265] With respect to the disclosure of the subject JPEPA documents to the House Special Committee on Globalization conducting an inquiry in aid of legislation, the "reasonable safeguard(s) for the sake of national interest" is that the said documents are released only after employing a "balancing of interests test" as will subsequently be shown.

[266] Freedom of Information Act 2000, §27(1)(a).

[267] *Id*. at §27(2).

We thus come to the **task of cobbling the appropriate test** to weigh the **public interest in maintaining the exemption or privilege over diplomatic secrets and the public interest in upholding the constitutional right to information and disclosing the subject JPEPA documents.**

3. The test to use in adjudicating the constitutional right to information *vis-à-vis* executive privilege is the "balancing of interests," and not the "showing of need"

While I agree with the *ponencia's* treatment of the diplomatic secrets privilege as a qualified privilege and its recognition of the need to formulate a weighing test, it is my humble view that, contrary to its position, we cannot use the test laid down in ***U.S. v. Nixon***,[268] ***Senate Select Committee v. Nixon***,[269] and **In re Sealed Case (Espy)**[270] that the Court should determine whether there is a "sufficient showing of need" for the disclosure of disputed documents. **None of these three cases can provide the proper test**. The requirement of "showing of need" applies when executive privilege is invoked against an **evidentiary need for information, such as in the case of another government entity seeking information in order to perform its function;** that is, the court in ***U.S. v. Nixon***, the Senate in **Senate Select Committee**, and the grand jury in **In re Sealed Case (Espy)**.

In the adjudication of rights guaranteed in the Constitution, however, the Court has never used "showing of need" as a test to uphold rights or allow inroads into them. I respectfully submit that we ought not to weigh the need to exercise the right to free speech or free assembly or free practice of religion. These are freedoms that have been won by all for the benefit of all, without the requisite showing of need for entitlement. When we valuate these constitutional rights, we do not consider their necessity for the performance of a function, as in the case of government branches

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[268] 418 U.S. 683 (1974).

[269] 498 F.2d 725, 162 U.S. App. D.C. 183.

[270] 121 F.3d 729, 326 App. D.C. 276.

and entities. The **question** in the adjudication of constitutional rights is whether the incursion into a right is **peripheral or essential**, as when there is only a "**soft restraint**" on the potential extraditee's right to procedural due process;[271] or whether there is a **heavier public interest** that must prevail over a constitutional right in order to preserve an ordered society, such as when there is a "**clear and present danger**" of a substantive evil that the State has a right to prevent as demonstrated in free speech cases,[272] or when there is a "**compelling state interest**" that must override the free exercise of religion.[273]

The right to information lies at the heart of a government that is not only republican but also democratic. For this reason, Article III, Section 7[274] of the 1987 Constitution, calls for "an informed citizenry with access to the diverse currents in political, moral and artistic thought and data relative to them, and the free exchange of ideas and discussion of issues thereon is vital to the democratic government envisioned under our Constitution."[275] Thus, employing the **"balancing of interests" test**, the public interest in upholding this constitutional right of the public to information must be carefully **balanced** with the public interest in nondisclosure of information in relation to treaty negotiations. This test is in line with the approach adopted in the right to access statute of the United Kingdom and New Zealand.

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[271] *Secretary of Justice v. Lantion*, G.R. No. 139465, October 17, 2000, 322 SCRA 160.

[272] *Cabansag v. Fernandez*, 102 Phil. 152; *Gonzales v. COMELEC*, 137 Phil. 489 (1969); *Bradenburg v. Ohio*, 395 U.S. 444 (1969).

[273] *Estrada v. Escitor*, A.M. No. P-02-1651, August 4, 2003, 408 SCRA 1.

[274] 1987 PHIL. CONST. Art. III, §7 provides, *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.

[275] *Valmonte, supra* at 264.

There is a **world of difference** between employing the "balancing of interests" test and the "showing of need" test adopted by the *ponencia* from ***U.S. v. Nixon***, ***Senate Select Committee v. Nixon***, and **In re Sealed Case (Espy)**. In ***U.S. v. Nixon***, the "showing of need" was necessary, as the information was being sought by a court as **evidence in a criminal proceeding**. In **Senate Select Committee**, the information was being sought by the Senate to **resolve conflicting testimonies in an investigation conducted in the exercise of its oversight functions over the executive branch and in aid of legislation pertaining to executive wrongdoing.** Finally, in **In re Sealed Case (Espy)**, the information was being sought by the grand jury to **investigate whether a government official had committed a crime**.

In weighing the "showing of need" in all three cases, the courts considered the relevance of the evidence, the availability of other evidence, and the criticality of the information sought in the performance of the functions of the court, the Senate, and the grand jury, respectively. These considerations have no meaning in petitioners' assertion of their right to information, for there is no proceeding in relation to which these considerations can be measured. It easily leaps to the eye that these considerations do not apply to adjudication on the constitutional right to information in relation to executive privilege, but the *ponencia* does not state what the "showing of need" consists of in the context of the public's assertion of the right to information.

Insofar as the constitutional right of access is concerned, the writing on the wall indicates that it **suffices that information is of public concern for it to be covered by the right, regardless of the public's need for the information** – whether to assess the performance of the JPEPA Philippine negotiating panel and express satisfaction or dissatisfaction, or to protest the inclusion of repulsive provisions in the JPEPA, or to keep public officials on their toes by making them aware that their actions are subject to public scrutiny – **or regardless of the public's lack of need**

for the information, if they simply want to know it because it interests them.[276]

The right to information is a constitutional right **in and of itself** and does not derive its significance only in relation to the exercise of another right, such as the right to free speech or a free press if that is the kind of "function" of an individual that can be equated with the functions of government agencies in the above cases cited by the *ponencia*. To reiterate, **Valmonte** teaches that the right to information is not merely an adjunct of the right to free speech and a free press. Stated another way, **the right to information is an end in itself,** even as it may be exercised in furtherance of other rights or purposes of an individual. To say that one exercises the right to information simply to be informed, and not because of a particular need, is not a meaningless tautology. Thus, instead of using "showing of need" as a passport to access purportedly privileged information, as in the case of government entities needing information to perform a **constitutionally mandated duty**, the yardstick with respect to individuals exercising a **constitutionally granted right** to information should be the importance of the right and the public interest in upholding it.

Prescinding from these premises, I respectfully submit that the test laid down by the *ponencia* — which predicates access to information on a "showing of need" understood in the context of ***U.S. v. Nixon***, ***Senate Select Committee v. Nixon***, and **In re Sealed Case (Espy) —** will have the **pernicious effect** of subverting the nature, purpose and wisdom of including the "right to information on matters of public concern" in the Bill of Rights as shown in the above-quoted deliberations of the 1986 Constitutional Commission. It sets an **emasculating precedent** on the interpretation of this all-important constitutional right and **throws into perdition** the philosophy of an open government, painstakingly enshrined by the framers of the 1987

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[276] Similarly, as afore-discussed, the statutes on the right of access to information of the United States, United Kingdom, and Australia, among others, do not require a demonstration of need or reason to access information.

Constitution in the many scattered provisions from beginning to end of our fundamental law.

Applying the **balancing of interests test** to the case at bar leads to the ineluctable conclusion that the scale must be tilted in favor of the people's right to information for, as shown earlier, the **records are bereft of basis for finding a public interest to justify the withholding of the subject JPEPA documents after the negotiations** have been concluded. Respondents have **not shown a sufficient and specific public interest** to defeat the recognized public interest in exercising the constitutional right to information to **widen the role of the citizenry in governmental decision-making by giving them a better perspective of the vital issues confronting the nation,**[277] **and to check abuse in government**.[278]

As aforestated, the **negotiations are already concluded** and the JPEPA has been submitted to the Senate for its concurrence. The **treaty has thus entered the ultimate stage** in which the people can exercise their right to participate in the discussion on whether the Senate should concur in its ratification or not. **This right will be diluted, unless the people can have access to the subject JPEPA documents.**

The *ponencia* cites ***PMPF v. Manglapus***, ***Chavez v. PCGG and Chavez v. Public Estates Authority***[279] **and *Senate v. Ermita*** as authorities for holding that the subject JPEPA documents are traditionally privileged; and emphasizes that "(t)he privileged character accorded to diplomatic negotiations does not *ipso facto* lose all force and effect simply because the same privilege is now being claimed under different circumstances."[280] This approach espoused by the *ponencia*, however, deviates from the fundamental teaching of ***Senate v. Ermita*** that a claim of executive privilege may be

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[277] *Legaspi v. Civil Service Commission*, G.R. No. 72119, May 29, 1987, 150 SCRA 530, 541; 1 RECORDS OF THE CONSTITUTIONAL COMMISSION, p. 709.

[278] G.R. No. 74930, February 13, 1989, 170 SCRA 256, 266.

[279] 433 Phil. 506 (2002).

[280] *Ponencia*.

held "valid or not **depending on the ground invoked to justify it and the context in which it is made**."

In ***U.S. v. Nixon***, the leading U.S. case on executive privilege, the U.S. Supreme Court was careful to delineate the applicability of the principles of the case in stating that "(w)e are not here 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. 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."[281] I respectfully submit that the **Court likewise ought to take half a pause in making comparisons and distinctions between the above Philippine cases cited by the *ponencia* and the case at bar; and examine the underlying reasons for these comparisons and distinctions, lest we mistake apples for oranges**.

That the application of the "showing of need" test to executive privilege cases involving branches of government and of the "balancing of interests" test to cases involving the constitutional right to information could yield different results is not an absurdity. The difference in results would not be any more absurd than it would be for an accused to be adjudged innocent in a criminal action but liable in a civil action arising from one and the same act he committed.[282] There is no absurdity when a distinction is made where there are real differences.

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[281] 418 U.S. 683, 712 at Note 19.

[282] Similarly, the application of the U.S. Freedom of Information Act (FOIA) can yield different results between a request for information by the public and by the legislature. The FOIA requires executive agencies to make documents available to the public, but sets forth nine exemptions from the Act, including matters that are specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order… These exemptions justify denial to the public of information from executive agencies, but **they do not apply to Congress**. FOIA specifically provides that these exemptions do not constitute authority to withhold information from Congress.

Indeed, it is recognized that executive privilege is also constitutionally based. Proceeding from the respondents' and the *ponencia's* reliance on **Curtiss-Wright**, even this case, as aforestated, makes a qualification that the foreign relations power of the President, "**like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution**."[283] In drawing the contours and restrictions of executive privilege, which finds its origins in the U.S., the constitutional status of the right to information in the Philippines — which is not true of the statutory right to information in the U.S. — must at the same time be given life, **especially considering the many contested provisions of the JPEPA as shown in the ensuing discussion**.

D. Right to information, informed debate, and the contested provisions of the JPEPA

The exercise of the right to information and informed debate by the public on the JPEPA are crucial in light of the comprehensiveness and impact of this agreement. It is an amalgam of two distinct agreements - a bilateral free trade agreement and a bilateral investment agreement. Thus, international and constitutional law expert Justice Florentino P. Feliciano cautions that we must be **"twice as awake, twice as vigilant"** in examining very carefully the provisions of the agreement.[284] The nearly 1,000-page JPEPA contains 16 chapters, 165 articles and eight annexes covering a **wide range of economic cooperation** including trade in goods, rules of origin, customs procedures, paperless trading, mutual recognition, trade in services, investment, movement of natural persons, intellectual property, government procurement, competition, improvement of the business environment, cooperation and dispute avoidance and settlement.

The JPEPA's comprehensive scope is paralleled by the **widespread expression of concern** over its ratification. **In the**

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[283] *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936).

[284] TSN, Hearing of the House of Representatives Special Committee on Globalization and WTO, 12 October 2005, p. 11.

Senate, there is a move to concur in the President's ratification **provided** that the JPEPA comply with our constitutional provisions on public health, protection of Filipino enterprises, ownership of public lands and use of natural resources, ownership of private lands, reservation of certain areas of investment to Filipinos, giving to Filipinos preference in the national economy and patrimony, regulation of foreign investments, operation of public utilities, preferential use of Filipino labor and materials, practice of professions, ownership of educational institutions, state regulation of transfer of technology, ownership of mass media, and ownership of advertising firms.

Among scholars and the public, not a few have registered strong reservations on the ratification of the JPEPA for its being studded with provisions that are **detrimental to the Filipino interest**.[285] While the executive branch and other groups have expressed support for the JPEPA, these contested provisions, at the very least, **merit public debate and access to the subject JPEPA documents, for they have far-reaching effects on the public's interest and welfare.**

Two highly contested JPEPA provisions are Articles 89 and 94. Advocates against the JPEPA contend that these provisions run afoul of the 1987 Constitution, primarily Article XII, on the National Economy and Patrimony. Article 89 of the JPEPA provides for National Treatment, *viz*:

> Article 89
> National Treatment
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> Each Party shall accord to investors of the other Party and to their investments treatment **no less favorable than that it accords, in like circumstances, to its own investors and to their investments** with respect to the establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale, or other disposition of investments.

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[285] See Salazar, M., "*JPEPA Concerns*," Manila Bulletin, 2 June 2008; Aning, J., "*Santiago slammed for "conditional" stance on JPEPA*," Philippine Daily Inquirer (www.inq7.net), 26 April 2008.

In the opinion rendered by **Justice Feliciano** in response to the invitation to deliver a statement at a hearing of the Senate Joint Committee on Foreign Relations and the Committee on Trade and Commerce, he explained that the "national treatment" obligation requires the Philippines to "treat Japanese investors as if they were Philippine nationals, and to treat Japanese investments in the Philippines as if such investments were owned by Philippine nationals."[286] This provision raises serious constitutional questions and need untrammeled discussion by the public, as entry into certain sectors of economic activity in our country is restricted to natural persons who are Philippine citizens or to juridical persons that are at least sixty, seventy or one hundred percent owned by Philippine citizens. Among these constitutional provisions are Article XII, Section 2 on the utilization of lands and other natural resources of the Philippines;[287] Article XII,

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[286] Memorandum of Justice Florentino P. Feliciano on the Constitutional Law Aspects of the Japan-Philippines Economic Partnership Agreement (JPEPA), Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007, p. 7.

[287] 1987 PHIL. CONST. Art. XII, §2 provides, *viz*:

Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty *per centum* of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

The Congress may, by law, allow small-scale utilization of natural resources by Filipino citizens, as well as cooperative fish farming, with priority to subsistence fishermen and fish workers in rivers, lakes, bays, and lagoons.

Section 11 on the operation of public utilities;[288] Article XII, Section 14, paragraph 2 on the practice of professions;[289] and Article XIV, Section 4(2),[290] among others.[291]

The President may enter into agreements with foreign-owned corporations involving either technical or financial assistance for large-scale exploration, development, and utilization of minerals, petroleum, and other mineral oils according to the general terms and conditions provided by law, based on real contributions to the economic growth and general welfare of the country. In such agreements, the State shall promote the development and use of local scientific and technical resources.

The President shall notify the Congress of every contract entered into in accordance with this provision, within thirty days from its execution.

[288] 1987 PHIL. CONST. Art. XII, §11 provides, *viz*:

Section 11. No franchise, certificate, or any other form of authorization for the operation of a public utility shall be granted except to citizens of the Philippines or to corporations or associations organized under the laws of the Philippines, at least sixty *per centum* of whose capital is owned by such citizens; nor shall such franchise, certificate, or authorization be exclusive in character or for a longer period than fifty years. Neither shall any such franchise or right be granted except under the condition that it shall be subject to amendment, alteration, or repeal by the Congress when the common good so requires. The State shall encourage equity participation in public utilities by the general public. The participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital, and all the executive and managing officers of such corporation or association must be citizens of the Philippines.

[289] 1987 PHIL. CONST. Art. XII, §14 provides in relevant part, *viz*:

… The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law.

[290] 1987 PHIL. CONST. Art. XIV, §4(2) provides, *viz*:

Section 4…. (2) Educational institutions, other than those established by religious groups and mission boards, shall be owned solely by citizens of the Philippines or corporations or associations at least sixty *per centum* of the capital of which is owned by such citizens. The Congress may, however, require increased Filipino equity participation in all educational institutions.

The control and administration of educational institutions shall be vested in citizens of the Philippines.

No educational institution shall be established exclusively for aliens and no group of aliens shall comprise more than one-third of the enrollment in any school. The provisions of this subsection shall not apply to schools established for foreign diplomatic personnel and their dependents and, unless otherwise provided by law, for other foreign temporary residents.

[291] *Supra* note 286 at 7-8.

To be sure, Article 94 of the JPEPA provides for an option on the part of the Philippines to uphold the constitutional and statutory provisions referred to above despite their collision with the "national treatment" obligation in Article 89. That option is exercised by listing, in the Schedule to Part I of Annex 7 of the JPEPA, the existing non-conforming constitutional and legal provisions that the Philippines would like to maintain in effect, notwithstanding the requirements of Article 89 of the JPEPA.[292] The Philippines exercised that option by attaching its Schedule to Part I of Annex 7 of the JPEPA. Be that as it may, some scholars note that the Philippine Schedule is not a complete list of all the currently existing constitutional and statutory provisions in our legal system that provide for exclusive access to certain economic sectors by Philippine citizens and Philippine juridical entities that have a prescribed minimum Philippine equity content. They claim that the most dramatic example of an omission is the aforementioned Article XII, Section 11 of the Constitution, relating to the operation of public utilities. They cite other examples: the afore-mentioned Article XII, Section 14 relating to the practice of all professions, save in cases prescribed by law; Article XIV, Section 4(2) relating to ownership and administration of educational institutions; Article XVI, Section 11(1)[293] relating to mass media; and Article XVI, Section 11(2)[294] relating to the advertising industry.[295]

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[292] *Id.* at 8.

[293] 1987 PHIL. CONST. Art. XVI, §11 (1) provides, *viz*:

Section 11. (1) The ownership and management of mass media shall be limited to citizens of the Philippines, or to corporations, cooperatives or associations, wholly-owned and managed by such citizens.

[294] 1987 PHIL. CONST. Art. XVI, §11 (1) provides, *viz:*

Sec. 11. (2) The advertising industry is impressed with public interest, and shall be regulated by law for the protection of consumers and the promotion of the general welfare.

Only Filipino citizens or corporations or associations at least seventy *per centum* of the capital of which is owned by such citizens shall be allowed to engage in the advertising industry.

The participation of foreign investors in the governing body of entities in such industry shall be limited to their proportionate share in the capital thereof, and all the executive and managing officers of such entities must be citizens of the Philippines.

[295] *Supra* note 286 at 8-9.

On **trade and investment**, former **U.P. College of Law Dean Merlin Magallona**, an international law expert, explained as resource person in the hearing of the Senate Joint Committee on Foreign Relations and the Committee on Trade and Commerce that, under Articles 96 and 98 of the JPEPA, the Philippines stands as an insurance company for Japanese investments against private acts.[296]

Articles 96 and 98 of the JPEPA provide, *viz*:

Article 96
Protection from Strife

1. Each Party shall accord to investors of the other Party that have suffered loss or damage relating to their investments in the Area of the former Party due to armed conflict or state of emergency such as revolution, insurrection, civil disturbance or any other similar event in the Area of that former Party, treatment, as regards restitution, indemnification, compensation or any other settlement, that is no less favorable than the most favorable treatment which it accords to any investors.

2. Any payments made pursuant to paragraph 1 above shall be effectively realizable, freely convertible and freely transferable.

Article 98
Subrogation

1. If a Party or its designated agency makes a payment to any of its investors pursuant to an indemnity, guarantee or insurance contract, arising from or pertaining to an investment of that investor within the Area of the other Party, that other Party shall:

(a) recognize the assignment, to the former Party or its designated agency, of any right or claim of such investor that formed the basis of such payment; and
(b) recognize the right of the former Party or its designated agency to exercise by virtue of subrogation any such right or claim to the same extent as the original right or claim of the investor.

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[296] Dean Merlin Magallona, TSN, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007; see also Position Paper of Magkaisa Junk JPEPA, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 4 October 2007, p. 8, citing Dean Merlin Magallona's August 14 Senate lecture on the Constitutional and Legal Implications of the JPEPA.

2. Articles 95, 96 and 97 shall apply *mutatis mutandis* as regards payment to be made to the Party or its designated agency first mentioned in paragraph 1 above by virtue of such assignment of right or claim, and the transfer of such payment.

Dean Magallona pointed out that under Articles 96 and 98 of the JPEPA, the Japanese government may execute with a Japanese investor in the Philippines a contract of indemnity, guaranty, or insurance over loss or damage of its investments in the Philippines due to revolution, insurrection, or civil disturbance. Compensation by the Japanese government to its investor under such contract will give rise to the right of the Japanese government to be subrogated to the right or claim of the Japanese investor against the Philippine government. The Philippines recognizes explicitly this assignment of right or claim of the Japanese investor against the Philippine Government under Article 98. In effect, he warns that the Philippines has made itself liable for acts of private individuals engaged in revolution, insurrection or civil disturbance. He submits that this is an abdication of sovereign prerogative, considering that under general or customary international law, the Philippines is subject to international responsibility only by reason of its own sovereign acts, not by acts of private persons.[297]

Environmental concerns have also been raised in relation to several provisions of the JPEPA, among which is Article 29 on Originating Goods, which provides, *viz*:

Article 29
Originating Goods

1. Except as otherwise provided for in this Chapter, a good shall qualify as an originating good of a Party where:

(a) the good is wholly obtained or produced entirely in the Party, as defined in paragraph 2 below;

(b) the good is produced entirely in the Party exclusively from originating materials of the Party; or

(c) the good satisfies the product specific rules set out in Annex 2, as well as all other applicable requirements of this Chapter, when the good is produced entirely in the Party using nonoriginating materials.

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[297] *Id.*

2. For the purposes of subparagraph 1(a) above, the following goods shall be considered as being wholly obtained or produced entirely in a Party:

x x x x x x x x x

(i) articles collected in the Party which can no longer perform their original purpose in the Party nor are capable of being restored or repaired and which are fit only for disposal or for the recovery of parts or raw materials;

(j) scrap and waste derived from manufacturing or processing operations or from consumption in the Party and fit only for disposal or for the recovery of raw materials;

(k) parts or raw materials recovered in the Party from articles which can no longer perform their original purpose nor are capable of being restored or repaired; and

(l) goods obtained or produced in the Party exclusively from the goods referred to in subparagraphs (a) through (k) above.

Annex 1[298] of the JPEPA reduced the tariff rates for these goods to zero percent, below the minimum set forth in the current Philippine schedule, JPEPA opponents point out.[299] There are allegations from the public that the above provisions on **trade of toxic and hazardous wastes** were **deleted** in the working draft text of the JPEPA as of 21 April 2003, but these provisions found their way back into the final text signed by President

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[298] Some of these goods provided in Annex 1 of the JPEPA are the following:

Heading No.	Description
2620.60 00	Ash and residues (other than from the manufacture of iron or steel) containing arsenic, mercury, thallium or their mixtures, of a kind used for the extraction of arsenic or those metals or for the manufacture of their chemical compounds
2621.1000	Ash and residues from the incineration of municipal waste
3006.80	Waste pharmaceuticals
3825.5000	Wastes of metal pickling liquors, hydraulic fluids, brake fluids and anti-freeze fluids

[299] Position Paper of Magkaisa Junk JPEPA, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 4 October 2007, p. 3.

Macapagal-Arroyo. If true, it would be in the public's interest to know why said provisions were put back, as they affect the public welfare; and how it is in the Philippine interest to include them in the JPEPA.[300]

Various concerned sectors have also expressed their objection to some provisions of the JPEPA. A substantial number of **fishermen** harp on the inadequacy of protection given to their sector and the violation of the Philippine Constitution with respect to deep-sea fishing. In Annex 7, 2B (Schedule of the Philippines)[301] of the JPEPA, the Philippine government made a reservation on national treatment by invoking Article 12 of the 1987 Constitution under the heading: "Sector: Fisheries, Sub-sector: Utilization of Marine Resource."[302] The measures invoked by the Philippine government are: 1) no foreign participation is allowed for small-scale utilization of marine resources in

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[300] Position Paper of Magkaisa Junk JPEPA, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 4 October 2007, citing provisions of the working draft text of the JPEPA as of 21 April 2003 (accessed through the Philippine Institute for Development Studies, the government research institution tasked to study the JPEPA) and Article 29 of the JPEPA signed by President Gloria Macapagal-Arroyo.

[301] Annex 7, 2B of the JPEPA provides, *viz*:

2B: Schedule of the Philippines

1. Sector: Fisheries
Sub-Sector: Utilization of Marine Resource
Industry Classification:
Type of National Treatment (Article 89)
Reservation:
Measures: The Constitution of the Republic of the Philippines, Article XII
Description: 1. No foreign participation is allowed for small-scale utilization of marine resources in archipelagic waters, territorial sea and exclusive economic zones.
2. For deep-sea fishing, corporations, associations or partnerships with maximum 40 percent foreign equity can enter into coproduction, joint venture or production sharing agreement with the Philippine Government. (*emphasis supplied*)

[302] Position Paper of Pambansang Lakas ng Kilusang Mamamalakaya ng Pilipinas (Pamalakaya), Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007, p. 4.

archipelagic waters, territorial sea and Exclusive Economic Zones; 2) for deep-sea fishing corporations, associations or partnerships having a maximum 40 percent foreign equity can enter into co-production, joint venture or production-sharing agreement with the Philippine government.[303] Concerned sectors contend, however, that the second measure violates Article XII, Section 2 of the Philippine Constitution which mandates, without qualification, the protection of the nation's marine wealth in Philippine archipelagic waters, territorial sea and EEZ; and reserves "its use and enjoyment exclusively to Filipino citizens."[304]

The **food sector** also complains about the insufficiency of protection from export subsidies under Article 20 of the JPEPA, which, according to it, makes it possible for Japan to engage in **agriculture dumping**, one of the most trade-distorting practices of rich countries.[305] Article 20 of the JPEPA, provides *viz*:

> Article 20
> Export Duties
>
> Each Party shall exert its **best efforts** to eliminate its duties on goods exported from the Party to the other Party. (*emphasis supplied*)

This sector raises the objection that while the JPEPA only requires "best efforts," both the Japan-Indonesia Economic Partnership Agreement (JIEPA) and the Japan-Malaysia Economic Partnership Agreement (JMEPA) disallow the introduction or the maintenance of agriculture export subsidies.[306]

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[303] *Id*.

[304] Position Paper of Magkaisa Junk JPEPA Coalition, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 14 September 2007, p. 14.

1987 PHIL. CONST. Art. XII, §2 provides in relevant part, *viz*:

> The State shall protect the nation's marine wealth in its archipelagic waters, territorial sea, and exclusive economic zone, and reserve its use and enjoyment exclusively to Filipino citizens.

[305] Position Paper of Task Force Food Sovereignty and the Magkaisa Junk JPEPA Coalition, Hearing of the Senate Joint Committee on Foreign Relations and Committee on Trade and Commerce, 8 October 2007, p. 4.

[306] *Id*.

Without adjudging the merits of objections to the above provisions of the JPEPA, the fact that these concerns are raised and that these provisions will impact on the lives of our people stress the need for an **informed debate** by the public on the JPEPA. Rooted in the unique Philippine experience, **the 1987 Constitution strengthened participatory democracy not only in our political realm but also in the economic arena. Uninformed participation in the governance of the country impairs the right of our people to govern their lives while informed debate serves as the fountainhead from which truth and the best interest of the country will spring.**

By upholding the constitutional right to information over the invocation of executive privilege in the instant case, it is my considered view that **the subject JPEPA documents** should be disclosed considering the **particular circumstances of the case at bar**. In arriving at this conclusion, a **balancing of interests test** has to be employed which will allow the executive to show the public interest it seeks to protect in invoking executive privilege. The test serves as a **safeguard** against disclosure of information that should properly be kept secret. There is thus no foundation for the fears expressed in the Separate Opinion of **Justice Tinga**, *viz*: "(The ruling) would establish a general rule that diplomatic negotiations of treaties and other international agreements…belong to the public record since it is encompassed within the constitutional right to information…if indeed the Philippines would become unique among the governments of the world in establishing that these correspondences related to treaty negotiations are part of the public record, I fear that such doctrine would impair the ability of the Philippines to negotiate treaties or agreements with foreign countries." As afore-discussed, allowing public access to trade agreement negotiations and draft texts, in various degrees and ways, has gained momentum in the landscape of U.S. diplomatic and foreign relations. I submit that, when warranted, **we must overcome the entropy of the old tradition of secrecy**.

Contrary to the Separate Opinion of Justice Tinga, the Executive as the custodian of records of negotiations of treaties

and other international agreements has the **discretion** to classify information as confidential in accordance with applicable laws, and not let it become part of the public record of a government in the sunshine. But when the executive is haled to court to enforce a constitutional right to this information, it is the court's task **in each particular case to balance the executive's need for secrecy in treaty negotiations with the constitutional right to information**, and decide whether that particular information should be disclosed or kept confidential.[307] Finally, the discussion in the Separate Opinion of Justice Tinga on the application of Article 32, Supplementary Means of Interpretation, of the Vienna Convention on the Law of Treaties[308] and the question of whether the subject JPEPA documents constitute "preparatory work" under this provision are **premature,** as the Philippine Senate has not concurred in the ratification of the JPEPA; hence, it has not entered into force. I submit that the question is not relevant to the resolution of the case at bar, as we are not here engaged in an interpretation of the JPEPA.

In sum, transparency and opacity are not either-or propositions in the conduct of international trade agreement negotiations. The degree of confidentiality necessary in a particular negotiation is a point in a continuum where complete disclosure and absolute secrecy are on opposite ends.[309] In assigning this fulcrum point,

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[307] This approach is similar to the observation in the Separate Opinion of Justice Tinga that it can be deduced from an 18 July 1997 decision of the International Criminal Tribunal for the former Yugoslavia that the "invocation of states secrets cannot be taken at face value but must be assessed by the courts."

[308] The Vienna Convention on the Law of Treaties provides in Article 32, *viz*:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31 (General rule of interpretation), or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

[309] Katt, Jr., W., "*The New Paper Chase: Public Access to Trade Agreement Negotiating Documents*," 106 Columbia Law Review 679, 693 (2006).

it is my humble view that the Court should balance the need for secrecy of the Executive and the demand for information by the legislature or the public. The balancing act in every case safeguards against disclosure of information prejudicial to the public interest and upholds the fundamental principle enunciated in ***Senate v. Ermita***[310] **—** 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.**"[311]

We elevated the right to information to constitutional stature not without reason. In a democracy, debate — by the people directly or through their representatives in Congress – is a discussion of and by the informed and not an exchange of surpluses of ignorance.[312] **In the arena of economic governance, the right to debate and participate is exercised not as an end in itself. Especially for the powerless whose sword and shield against abuse is their voice, the exercise of the right is not merely rhetoric. It is a fight from the gut to satisfy basic human needs and lead a humane life.**

I vote to grant the petition.

SEPARATE DISSENTING OPINION

AZCUNA, *J.*:

I fully agree with the Dissenting Opinion of Chief Justice Reynato S. Puno.

The *ponencia* regrettably assumes that the power of Congress, when it investigates, is either in aid of legislation or by way of

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[310] G.R. No. 169777, April 20, 2006, 488 SCRA 1 (2006).

[311] *Id.* at 51.

[312] In the words of Thomas Jefferson, "if a nation expects to be ignorant and free in a state of civilization, it expects what never was and will never be." 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).

oversight. What appears to have been forgotten is an equally important and fundamental power and duty of Congress and that is its informing function by way of investigating for the purpose of enlightening the electorate.

Arthur M. Schlesinger, in THE IMPERIAL PRESIDENCY, aptly quotes Wilson on CONGRESSIONAL GOVERNMENT on this power:

> Congress's "only whip," Wilson said, "is investigation," and that "the chief purpose of investigation, even more than the direction of affairs, was the enlightenment of the electorate. The inquisitiveness of such bodies as Congress is the best conceivable source of information…. The informing function of Congress should be preferred even to its legislative function." For "the only really self-governing people is that people which discusses and interrogates its administration."[1]

This is all the more compelling in our polity because our Constitution is replete and suffused with provisions on transparency, accountability and the right of the people to know the facts of governance, as pointed out by the Chief Justice. Neither is the Philippines the only country that has done this. Only last year, 2007, Mexico amended its Constitution to raise to the level of a fundamental right the public's right to know the truth, thereby providing that: "All information in the possession of any federal, state and municipal authority, entity, body or organization is public xxxx." The amendment reads:

> The Amendment to Article 6 of the Constitution
>
> The Permanent Commission of the Honorable Congress, in full use of the power bestowed on it by Article 135 of the Constitution, and after approval by both the Chamber of Deputies and the Senate of Mexico, as well as the legislatures, decrees:
>
> A second paragraph with seven subsections is hereby added to Article 6 of the Mexican Constitution.

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[1] Schlesinger, 10, 76-77 quoting: Wilson, *CONGRESSIONAL GOVERNMENT*, 278, 279, 299, 301, 303. (Emphasis supplied.)

Single Article. A second paragraph with seven subsections is added to Article 6 of the Mexican Constitution, which will now read as follows:

Article 6…

For purposes of the exercise of the right to access to information, the federal government, the states of the Federal District, each in their respective jurisdictions, will comply with the following principles and bases:

I. All information in the possession of any federal, state and municipal authority, entity, body and organism [organs] is public and may only be temporarily withheld in the public interest in accordance with legislation. In interpreting this right, the principle of the maximum public-ness must prevail.

II. Information referring to individual's private lives and personal data shall be protected as stipulated in and with the exceptions established by law.

III. Without having to show any involvement in the topic or justify its use, all individuals will have access, free of charge, to public information, his/her personal data, or to the rectification of said data.

IV. Mechanisms for access and expeditious review procedures shall be established. These procedures will be substantiated before specialized, impartial bodies with operational, managerial and decision-making autonomy.

V. Entities herein mandated shall preserve their documents in updated administrative archives and shall publish in the available electronic media complete, updated information about their management indicators and the exercise of public resources.

VI. Legislation will determine the manner in which those mandated to comply will make public the information about public resources given to individuals or entities.

VII. Incompliance [Noncompliance] with the stipulations regarding access to public information will be sanctioned accordingly to the law.

TRANSITORY ARTICLES

First. The present Decree shall go into effect the day after its publication in the Official Federal Gazette.

Second. The federal government, the states and the Federal District, in their respective jurisdictions, shall issue legislation about access to public information and transparency, or make the necessary changes no later than one year after this Decree goes into effect.

Third. The federal government, the states and the Federal District must establish electronic systems so that any person can use from a distance the mechanisms for access to information and the review procedures mentioned in this Decree. Said systems must be functioning no later than two years after the Decree goes into effect. State laws shall establish whatever is needed for municipalities with more than 60,000 inhabitants and the territorial sub-divisions of the Federal District to have their own electronic systems within that same period of time. [Emphasis supplied.][2]

Transparency is in fact the prevalent trend and non-disclosure is the diminishing exception. The reason lies in the recognition under international law of the fundamental human right of a citizen to take part in governance, as set forth in the 1948 United Nations Universal Declaration of Human Rights, a right that cannot be realized without access to information.

And even in the United States from where the privilege originated no President has claimed a general prerogative to withhold but rather the Executive has claimed particular exceptions to the general rule of unlimited executive disclosure:

Conceding the idea of Congress as the grand inquest of the nation, Presidents only claimed particular exceptions to the general rule of unlimited executive disclosures – Washington, the protector of the exclusive constitutional jurisdiction of one house of Congress against invasion by the other house; Jefferson, the protector of presidential relationship within the executive branch and the defense of that branch against congressional harassment; Taylor, the protection

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[2] Ricardo Becerra, *Mexico*: *Transparency and the Constitution*, Voices of Mexico, Issue 80, Sept.-Dec. 2007, pp. 11-14.

of ongoing investigation and litigation; Polk, the protection of state secrets in intelligence and negotiation. While exceptions might accumulate, no President had claimed a general and absolute prerogative to withhold.[3]

The President, therefore, has the burden to show that a particular exception obtains in every case where the privilege is claimed. This has not been done in the present case. All that the Senate is asking for are copies of the starting offers of the Philippines and of Japan. What is the deep secret in those papers? If the final product is and has been disclosed, why cannot the starting offers be revealed? How can anyone, the Senate or the electorate included, fathom – to use the favorite word of a counsel – the end product if one is not told the starting positions?

Furthermore, Executive Secretary Ermita did not really invoke the privilege. All he said was that, at the time of the request, negotiations were on-going, so that it was difficult to provide all the papers relative to the proposed Treaty (which was then the request of the Senate). He did not say it was privileged or secret or confidential but that it was difficult at the time to comply with the request as the Executive understandably had its hands full in the midst of the negotiations.

Now the negotiations are over. The proposed treaty has been signed and submitted to the Senate for ratification. There is no more difficulty in complying with the now reduced request of giving copies of the starting offers of the Philippines and of Japan.

Since the privilege is an exception to the rule, it must be properly, seasonably and clearly invoked. Otherwise, it cannot be applied and sustained.

Finally, as *Ex parte Milligan*[4] sums it:

A country preserved at the sacrifice of all the cardinal principles of liberty is not worth the cost of preserving.[5]

I vote to compel disclosure of the requested documents.

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[3] *Op cit.*, note 1 at 83.

[4] 4 Wall. 120, 126 (1866).

[5] See, A.M. Schlesinger, Jr., *THE IMPERIAL PRESIDENCY*, 1973, p. 70.

EN BANC

[G.R. No. 177597. July 16, 2008]

BAI SANDRA S. A. SEMA, *petitioner, vs.* **COMMISSION ON ELECTIONS and DIDAGEN P. DILANGALEN,** *respondents.*

[G.R. No. 178628. July 16, 2008]

PERFECTO F. MARQUEZ, *petitioner, vs.* **COMMISSION ON ELECTIONS,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; PROHIBITION; APPROPRIATE REMEDY TO TEST THE CONSTITUTIONALITY OF ELECTION LAWS, RULES AND REGULATIONS.— The purpose of the writ of *Certiorari* is to correct grave abuse of discretion by "any tribunal, board, or officer exercising judicial or quasi-judicial functions." On the other hand, the writ of *Mandamus* will issue to compel a tribunal, corporation, board, officer, or person to perform an act "which the law specifically enjoins as a duty." True, the COMELEC did not issue Resolution No. 7902 in the exercise of its judicial or quasi-judicial functions. Nor is there a law which specifically enjoins the COMELEC to exclude from canvassing the votes cast in Cotabato City for representative of "Shariff Kabunsuan Province with Cotabato City." These, however, do not justify the outright dismissal of the petition in G.R. No. 177597 because Sema also prayed for the issuance of the writ of Prohibition and we have long recognized this writ as proper for testing the constitutionality of election laws, rules, and regulations.

2. POLITICAL LAW; CONSTITUTIONAL LAW; LOCAL GOVERNMENT; THREE CONDITIONS THAT MUST BE COMPLIED WITH IN THE CREATION OF LOCAL GOVERNMENT UNITS, EXPLAINED.— The creation of local government units is governed by Section 10, Article X of the Constitution, which provides: Sec. 10. No province, city, municipality, or *barangay* may be created, divided, merged,

abolished or its boundary substantially altered except in accordance with the criteria established in the local government code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected. Thus, the creation of any of the four local government units – province, city, municipality or *barangay* – must comply with three conditions. First, the creation of a local government unit must follow the criteria fixed in the Local Government Code. Second, such creation must not conflict with any provision of the Constitution. Third, there must be a plebiscite in the political units affected.

3. ID.; ID.; ID.; ID.; CONGRESS MAY DELEGATE TO LOCAL LEGISLATIVE BODIES THE POWER TO CREATE LOCAL GOVERNMENT UNITS.— There is neither an express prohibition nor an express grant of authority in the Constitution for Congress to delegate to regional or local legislative bodies the power to create local government units. However, under its plenary legislative powers, Congress can delegate to local legislative bodies the power to create local government units, subject to reasonable standards and provided no conflict arises with any provision of the Constitution. In fact, Congress has delegated to provincial boards, and city and municipal councils, the power to create *barangays* within their jurisdiction, subject to compliance with the criteria established in the Local Government Code, and the plebiscite requirement in Section 10, Article X of the Constitution. However, under the Local Government Code, "only x x x an Act of Congress" can create provinces, cities or municipalities.

4. ID.; ID.; ID.; ID.; ID.; CREATION OF A PROVINCE OR CITY INHERENTLY INVOLVES CREATION OF A LEGISLATIVE DISTRICT.— There is no provision in the Constitution that conflicts with the delegation to regional legislative bodies of the power to create municipalities and *barangays*, provided Section 10, Article X of the Constitution is followed. However, the creation of provinces and cities is another matter. Section 5 (3), Article VI of the Constitution provides, "Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative" in the House of Representatives. Similarly, Section 3 of the Ordinance appended to the Constitution provides, "Any province that may hereafter be created, or any

city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member x x x." Clearly, a province cannot be created without a legislative district because it will violate Section 5 (3), Article VI of the Constitution as well as Section 3 of the Ordinance appended to the Constitution. For the same reason, a city with a population of 250,000 or more cannot also be created without a legislative district. Thus, the power to create a province, or a city with a population of 250,000 or more, requires also the power to create a legislative district. Even the creation of a city with a population of less than 250,000 involves the power to create a legislative district because once the city's population reaches 250,000, the city automatically becomes entitled to one representative under Section 5 (3), Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. **Thus, the power to create a province or city inherently involves the power to create a legislative district.** For Congress to delegate validly the power to create a province or city, it must also validly delegate at the same time the power to create a legislative district.

5. ID.; ID.; ID.; ID.; LEGISLATIVE DISTRICT IS CREATED OR REAPPORTIONED BY AN ACT OF CONGRESS; REASON.— Under the present Constitution, as well as in past Constitutions, the power to increase the allowable membership in the House of Representatives, and to reapportion legislative districts, is vested exclusively in Congress. Section 5 (1), Article VI of the Constitution vests in Congress the power to increase, through a law, the allowable membership in the House of Representatives. Section 5 (4) empowers Congress to reapportion legislative districts. The power to reapportion legislative districts necessarily includes the power to create legislative districts out of existing ones. Congress exercises these powers through a law that Congress itself enacts, and not through a law that regional or local legislative bodies enact. The allowable membership of the House of Representatives can be increased, and new legislative districts of Congress can be created, only through a national law passed by Congress. In *Montejo v. COMELEC*, we held that the "power of redistricting x x x is traditionally regarded as part of the power (of Congress) to make laws," and thus is vested exclusively in Congress. This textual commitment to Congress of the exclusive power to create or reapportion legislative districts is logical. Congress is

a national legislature and any increase in its allowable membership or in its incumbent membership through the creation of legislative districts must be embodied in a national law. Only Congress can enact such a law. It would be anomalous for regional or local legislative bodies to create or reapportion legislative districts for a national legislature like Congress. An inferior legislative body, created by a superior legislative body, cannot change the membership of the superior legislative body.

6. ID.; ID.; ID.; ID.; CREATION OF THE PROVINCE OF SHARIFF KABUNSUAN BY THE ARMM REGIONAL ASSEMBLY PURSUANT TO R.A. 9054 IS UNCONSTITUTIONAL.— The creation of the ARMM, and the grant of legislative powers to its Regional Assembly under its organic act, did not divest Congress of its exclusive authority to create legislative districts. This is clear from the Constitution and the ARMM Organic Act, as amended. **Nothing in Section 20, Article X of the Constitution authorizes autonomous regions, expressly or impliedly, to create or reapportion legislative districts for Congress.** On the other hand, Section 3, Article IV of RA 9054 amending the ARMM Organic Act, provides, "***The Regional Assembly may exercise legislative power x x x except on the following matters: x x x (k) National election.*** x x x." Since the ARMM Regional Assemby has no legislative power to enact laws relating to national elections, it cannot create a legislative district whose representative is elected in national elections. Whenever Congress enact a law creating a legislative district, the first representative is always elected in the "next national elections" from the effectivity of teh law. Indeed, the office of a legislative district representative to Congress is a **national office**, and its occupant, a Member of the House of Representatives, is a **national official**. It would be incongruous for a regional legislative body like the ARMM Regional Assembly to create a national office when its legislative powers extend only to its regional territory. The office of a district representative is maintained by national funds and the salary of its occupant is paid out of national funds. It is a self-evident inherent limitation on the legislative powers of every local or regional legislative body that it can only create local or regional offices, respectively, and it can never create a

national office. To allow the ARMM Regional Assembly to create a national office is to allow its legislative powers to operate outside the ARMM's territorial jurisdiction. **This violates Section 20, Article X of the Constitution which expressly limits the coverage of the Regional Assembly's legislative powers "[w]ithin its territorial jurisdiction** x x x**."** The ARMM Regional Assembly itself, in creating Shariff Kabunsuan, recognized the exclusive nature of Congress' power to create or reapportion legislative districts by abstaining from creating a legislative district for Shariff Kabunsuan. Section 5 of MMA Act 201 provides that: **Except as may be provided by national law**, the existing legislative district, which includes Cotabato City as a part thereof, shall remain. (Emphasis supplied) However, a province cannot legally be created without a legislative district because the Constitution mandates that "each province shall have at least one representative." Thus, the creation of the Province of Shariff Kabunsuan without a legislative district is unconstitutional.

TINGA, *J., dissenting and concurring*:

1. POLITICAL LAW; CONSTITUTIONAL LAW; STATUTES; CONSTITUTIONALITY; A PARTY CHALLENGING THE CONSTITUTIONALITY OF A LAW, ACT, OR STATUTE MUST SHOW NOT ONLY THAT IT IS INVALID BUT ALSO THE IMMINENT DANGER OF SUSTAINING AN INJURY AS A RESULT OF ITS ENFORCEMENT; CASE AT BAR.— It would indeed be difficult to assess injury for purposes of *locus standi* on the part of Sema by reason of the assailed COMELEC Resolution, which after all, reaffirms the very legislative district whose seat in Congress she had sought to be elected to. Her standing to raise the present petition is materially affected by her express consent and active campaign for election from the legislative district which she now seeks to invalidate. A party challenging the constitutionality of a law, act or statute must show "not only that the law is invalid, but also that he or she has sustained or is in immediate, or imminent danger of sustaining some direct injury as a result of its enforcement," that party has been or is about to be, denied some right or privilege to which he or she is lawfully entitled. Sema's prior avowal that she was running for the Shariff Kabunsuan with Cotabato City legislative district, and her campaign for election to that district, belie the existence of injury on her

part caused by the COMELEC resolution that affirmed that very legislative district.

2. ID.; ID.; ID.; ID.; COURT'S POWER TO REVIEW A CONSTITUTIONAL CASE MAY NOT BE EXERCISED WHEN THE PETITION WAS NOT TIMELY FILED.— [A]mong the requisites for the Court to be able to exercise judicial review in constitutional cases is that the exercise of judicial review is pleaded at the earliest possible opportunity. Clearly, his petition was not timely filed at the earliest possible opportunity, which would have been at a point prior to the May 2007 elections. Worse, he filed his petition after the voters in the affected districts had already elected a candidate of their choosing, a sovereign act which he seeks to annul. Considering the grave implications of the step he seeks, as well as the fact that such recourse usually smacks of opportunism and bad faith, it is but proper for the Court to decline review unless all the established requisites for judicial review for constitutional cases have indeed been met. Marquez does not meet this Court's exacting standards.

3. ID.; ID.; ID.; ID.; A CONSTITUTIONAL CASE IS DISMISSIBLE FOR LACK OF CAUSE OF ACTION AND FOR NOT IMPLEADING THE REAL PARTY-IN-INTEREST.— [M]arquez does not have a valid cause of action before this Court. His prayer is to compel the COMELEC to provide for new congressional elections for Cotabato City.The relief sought does not lie simply because Rep. Dilangalen, by virtue of his electoral victory, lawfully represents the City in addition to the Province of Shariff Kabunsuan. From another perspective, the COMELEC does not have the requisite power to call elections, as the same is part of the plenary legislative power. Only Congress, which was not impleaded as a party to Marquez's petition, has the power to set congressional elections only for Cotabato City, if ever. Even assuming that Congress was impleaded, it would be improper for this Court to compel Congress by judicial fiat to pass a law or resolution for the holding of such elections.

4. ID.; ID.; ID.; ID.; THE EXCEPTION IN EXERCISING JUDICIAL REVIEW OF CONSTITUTIONAL CASES DOES NOT APPLY IN CASE AT BAR.— One might argue that it is imperative for the Court to resolve the substantive issues, since the situation may emerge again. However, the exception in exercising judicial review if the case is capable of repetition yet evading review applies only if the case is "moot and

academic," and not when the petitioners lack the requisite standing, have no cause of action, and have failed to join a proper party, which is the case here. In addition, it is entirely possible that between now and the next elections, either Congress or the Regional Assembly would pass new legislation concerning the composition or status of Shariff Kabunsuan, thereby changing the legal complexion and factual milieu of the situation. If that occurs, the questions that will be facing the Court then should a challenge be mounted may very well be different from those currently befacing us.

5. ID.; ID.; LEGISLATIVE DEPARTMENT; NON-DELEGATION OF LEGISLATIVE POWERS; STRICT APPLICATION THEREOF SHOULD BE RELAXED.— [T]he strict application of the non-delegation doctrine has, in recent times, been relaxed, if not minimized altogether, particularly in the context of regulatory jurisdiction of administrative agencies. In every industrialized nation, administrative agencies, which are generally part of the executive branch, have been granted considerable lawmaking power. "Given the volume and variety of interactions in today's society, it is doubtful if the legislature can promulgate laws that will deal adequately with and respond promptly to the minutiae of everyday life. Hence, the need to delegate to administrative bodies—the principal agencies tasked to execute laws in their specialized fields—the authority to promulgate rules and regulations to implement a given statute and effectuate its policies."

6. ID.; ID.; ID.; ID.; FUNCTIONS WHICH CAN NOT BE DELEGATED BY CONGRESS, ENUMERATED.— Notwithstanding the exceptions that have been carved to the rule of non-delegation, it bears notice that while our Constitution broadly endows legislative powers to Congress it also specifically conditions the emergence of certain rights, duties and obligations upon the enactment of a law oriented towards such constitutional predicate. These include the prohibition of political dynasties as may be defined by law, the reasonable conditions prescribed by law relating to full public disclosure of all the State's transactions involving public interest; the manner by which Philippine citizenship may be lost or reacquired; the date of regular elections for members of Congress; the manner of conduct of special elections to fill in congressional vacancies; the authorization of the President to exercise emergency powers; the system for initiative and referendum; the salaries of the President and Vice-President;

the creation and allocation of jurisdiction of lower courts; and on many other matters of grave import. May these specified functions be delegated by Congress to another body? These specific functions are non-delegable, for they are textually committed by the Constitution to Congress. Perhaps it is possible to segregate these particular functions to those which would, even absent constitutional definition, anyway fall within the plenary legislative power, and those which are not plenary in nature but were especially designated to Congress by the Constitution. Still, in either case, only Congress, and no other body, can carry out that function. As to those powers which would normally fall within the plenary legislative power, the Constitution has decided to doubly emphasize that it is the Congress which is so empowered to perform such tasks. With respect to the non-plenary functions assigned to Congress, it is clear that the assignment implies the delegation by the Constitution to Congress of specific, wholly original functions.

7. ID.; ID.; ID.; ID.; CONGRESS MAY DELEGATE TO THE REGIONAL ASSEMBLY THE POWER TO CREATE PROVINCES.— There should be little debate on the origins of the power to create provinces, which had existed as a political unit in the Philippines since the Spanish colonial period, and which all our Constitutions have recognized as a basic level of local governments. Ever since the emergence of our tripartite system of democratic government, the power to create provinces have always been legislative in character. They are created by the people through their representatives in Congress, subject to direct affirmation by the very people who stand to become the constituents of the new putative province. **May such power be delegated by Congress to a local legislative body such as the Regional Assembly? Certainly, nothing in the Constitution bars Congress from doing so. In fact, considering the constitutional mandate of local autonomy for Muslim Mindanao, it can be said that such delegation is in furtherance of the constitutional design**. The only constitutional provision that concerns with the creation of provinces is Section 10, Article X, which reads: Section 10. No province, city, municipality or *barangay* may be created, divided, merged, abolished, or its boundary substantially altered, except in accordance with the criteria established in the local government code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected.

Nothing in this provision specifically limits the power to create provinces, cities, municipalities or *barangays* to Congress alone. The provision does embody a significant limitation – that the creation of these political subdivisions must be in accordance with the criteria established in the local government code, a law which is enacted by Congress. It would thus be proper to say that the Constitution limits the ability to set forth the standards for the creation of a province exclusively to Congress. But to say that the Constitution confines to Congress alone the power to establish the criteria for creating provinces is vastly different from saying that the Constitution confines to Congress alone the power to create provinces. There is nothing in the Constitution that supports the latter proposition. Section 10, Article X does not specifically designate Congress as the body with the power to create provinces. As earlier stated, the power to create these political subdivisions is part of the plenary legislative power, hence such power can be exercised by Congress even without need of specific constitutional assignation. At the same time, the absence of constitutional language committing Congress with the function of creating political subdivisions ultimately denotes that such legislative function may be delegated by Congress. In fact, the majority actually concedes that Congress, under its plenary legislative powers, "can delegate to local legislative bodies the power to create local government units, subject to reasonable standards and provided no conflict arises with any provision of the Constitution." As pointed out, such delegation is operationalized by the LGC itself, which confers to provincial boards and city and municipal councils, the general power to create *barangays* within their respective jurisdictions. The Constitution does not confine the exercise of such powers only to the national legislature, and indeed if that were the case, the power to create *barangays* as granted by the LGC to local legislative bodies would be unconstitutional

8. ID.; ID.; LOCAL AUTONOMY; LOCAL GOVERNMENT RULE IS DESIGNED TO COUNTERBALANCE THE RULE OF THE NATIONAL GOVERNMENT.— Section 2, Article X guarantees that the territorial and political subdivisions in the Philippines shall enjoy local autonomy. The guarantee of local autonomy is actualized through a local government code that delineates the structure and powers of local governments, and through constitutional measures that entitle local government units to generate their own revenue stream and assure the same

to their fair share in the national internal revenue. Local government rule, in constitutional contemplation, is a live being that exists to counterbalance the rule of the national government, and is not a mere palliative established in the Constitution to soothe the people with the illusion of having a more direct say in their governance.

9. ID.; ID.; ID.; WHAT THE CONSTITUTION CONTEMPLATED WITH RESPECT TO THE ARMM WAS POLITICAL AUTONOMY.— What the Constitution contemplated with respect to the ARMM was political autonomy. As explained by Justice Cortes for the Court: It must be clarified that the constitutional guarantee of local autonomy in the Constitution [Art. X, Sec. 2] refers to the administrative autonomy of local government units or, cast in more technical language, the decentralization of government authority. Local autonomy is not unique to the 1987 Constitution, it being guaranteed also under the 1973 Constitution [Art. II, Sec. 10]. And while there was no express guarantee under the 1935 Constitution, the Congress enacted the Local Autonomy Act (R.A. No. 2264) and the Decentralization Act (R.A. No. 5185), which ushered the irreversible march towards further enlargement of local autonomy in the country. **On the other hand, the creation of autonomous regions in Muslim Mindanao and the Cordilleras, which is peculiar to the 1987 Constitution, contemplates the grant of political autonomy and not just administrative autonomy to these regions.** Thus, the provision in the Constitution for an autonomous regional government with a basic structure consisting of an executive department and a legislative assembly and special courts with personal, family and property law jurisdiction in each of the autonomous regions [Art. X, Sec. 18].

10. ID.; ID.; R.A. 9054, WHICH DELEGATES TO THE REGIONAL ASSEMBLY THE POWER TO CREATE SHARIFF KABUNSUAN, IS CONSTITUTIONAL.— Attuned with enhanced local government rule, Congress had, through Rep. Act No. 9054, taken the bold step of delegating to a local legislative assembly the power to create provinces, albeit prudently withholding any ability to create legislative districts as well. x x x Because this empowerment scheme is in line with a policy preferred by the Constitution, it becomes utterly necessary to pinpoint a specific constitutional prohibition that bars Congress from authorizing the Regional Assembly to create provinces. **No**

such constitutional limitation exists, and it is not the province, duty or sensible recourse of this Court to nullify an act of Government in furtherance of a constitutional mandate and directly ratified by the affected people if nothing in the Constitution proscribes such act. The constitutionality of the delegated power of the Regional Assembly to create provinces is further affirmed by the provisions in the Constitution concerning the mandatory creation of autonomous regions in Muslim Mindanao, as found in Sections 15 to 21, Article X. The organic act enacted by Congress for the autonomous region is to define the basic structure of government. Section 20 specifically allows the organic act of autonomous regions to provide for legislative powers over, among others, administrative organization; creation of sources of revenues; economic, social and tourism development; and such other matters as may be authorized by law for the promotion of the general welfare of the people of the region. The creation of provinces within the autonomous region precisely assists these constitutional aims under Section 20, enhancing as it does the basic administration of government, the delivery of government services, and the promotion of the local economy. In addition, Section 17, Article X states that "[a]ll powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government." The original Organic Act for Muslim Mindanao did not grant to the regional government the power to create provinces, thus at that point, such power was properly exercised by the National Government. But the subsequent passage of Rep. Act No. 9054 granted to the Regional Assembly the power, function and responsibility to create provinces and other local government units which had been exercised by the National Government. The majority does not point to any specific constitutional prohibition barring Congress from delegating to the Regional Assembly the power to create provinces. It does cite though that Article 460 of the LGC provides that only by an Act of Congress may a province be created, divided, merged, abolished or its boundary substantially altered. However, Republic Act No. 9054, which was passed ten (10) years after the LGC, unequivocally granted to the ARMM Regional Assembly the power to create provinces, cities, municipalities and *barangays* within the ARMM. Any argument that the LGC confines to Congress the creation of provinces is muted by the fact that

ten years after the LGC was enacted by Congress, the same legislative body conferred on the Assembly that same power within its territorial jurisdiction, thus amending the LGC to the extent of accommodating these newly-granted powers to the Assembly. There actually is an obvious unconstitutional dimension to Section 19, albeit one which is not in point in this case. The provision states in part "[t]hat Regional Assembly may prescribe standards lower than those mandated by Republic Act No. 7160, the Local Government Code of 1991, in the creation, division, merger, abolition, or alteration of the boundaries of provinces, cities, municipalities, or *barangays*." That proviso is squarely inconsistent with Section 10, Article X, which accords to the LGC the sole criteria for the creation, division, merger, abolition or alteration of boundaries of local government units. Said proviso thus cannot receive recognition from this Court. It bears noting that there is no contention presented thus far that the creation of Shariff Kabunsuan was not in accordance with the criteria established in the LGC, thus this aspect of unconstitutionality of Rep. Act No. 9054 may not be material to the petitions at bar.

11. ID.; ID.; ID.; R.A. 9054 DOES NOT EMPOWER THE REGIONAL ASSEMBLY TO CREATE LEGISLATIVE DISTRICTS.— The majority unfortunately asserts that Congress may not delegate to the Regional Assembly the power to create provinces, despite the absence of any constitutional bar in that respect. The reasons offered for such conclusion are actually the same reasons it submits why the Regional Assembly could not create legislative districts, as if the power to create provinces and the power to create legislative districts were one and the same. In contrast, I propose to pinpoint a specific constitutional provision that prohibits the Regional Assembly from creating, directly or indirectly, any legislative district without affecting that body's delegated authority to create provinces. Let us review this issue as presented before us. Notably, Republic Act No. 9054 does not empower the Regional Assembly to create legislative districts, and MMA Act No. 201, which created Shariff Kabunsuan, specifically disavows the creation of a new district for that province and maintains the old legislative district shared with Cotabato City. It is the thesis though of the petitioners that following *Felwa v. Salas*, the creation of the new province *ipso facto* established as well an exclusive legislative district for Shariff Kabunsuan, "by operation of the Constitution."

APPEARANCES OF COUNSEL

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D E C I S I O N

CARPIO, *J.*:

The Case

These consolidated petitions[1] seek to annul Resolution No. 7902, dated 10 May 2007, of the Commission on Elections (COMELEC) treating Cotabato City as part of the legislative district of the Province of Shariff Kabunsuan.[2]

The Facts

The Ordinance appended to the 1987 Constitution apportioned two legislative districts for the Province of Maguindanao. The first legislative district consists of Cotabato City and eight municipalities.[3] Maguindanao forms part of the Autonomous

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[1] In G.R. No. 177597, for the writs of *certiorari*, prohibition and *mandamus*; in G.R. No. 178628, for "declaratory relief" and for the writs of prohibition and *mandamus*.

[2] The petitioner in G.R. No. 177597, Bai Sandra S. A. Sema (Sema), further seeks to compel the COMELEC to exclude from the canvassing the votes cast in Cotabato City for representative of the legislative district in question in the 14 May 2007 elections. On the other hand, the petitioner in G.R. No. 178628, Perfecto Marquez, prays that the Court order the COMELEC to conduct a special election for representative of the "First District of Maguindanao with Cotabato City."

[3] Barira, Buldon, Datu Odin Sinsuat, Kabuntalan, Matanog, Parang, Sultan Kudarat, and Upi. The second legislative district is composed of 19 municipalities (Talitay, Talayan, Guindulungan, Datu Saudi Ampatuan, Datu Piang, Shariff Aguak, Datu Unsay, Mamasapano, South Upi, Ampatuan, Datu Abdullah Sangki, Buluan, Datu Paglas, Gen, S.K. Pendatun, Sultan Sa Barongis, Rajah Buayan, Pagalungan, Pagagawan and Paglat).

Region in Muslim Mindanao (ARMM), created under its Organic Act, Republic Act No. 6734 (RA 6734), as amended by Republic Act No. 9054 (RA 9054).[4] Although under the Ordinance, Cotabato City forms part of Maguindanao's first legislative district, it is not part of the ARMM but of Region XII, having voted against its inclusion in the ARMM in the plebiscite held in November 1989.

On 28 August 2006, the ARMM's legislature, the ARMM Regional Assembly, exercising its power to create provinces under Section 19, Article VI of RA 9054,[5] enacted Muslim Mindanao Autonomy Act No. 201 (MMA Act 201) creating the Province of Shariff Kabunsuan composed of the eight

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[4] The enactment of the organic acts for the autonomous regions of the Cordilleras and Muslim Mindanao is mandated under Sections 18 and 19, Article X of the 1987 Constitution.

[5] The provision reads:

SECTION 19. Creation, Division or Abolition of Provinces, Cities, Municipalities or *Barangay*. — **The Regional Assembly may create**, divide, merge, abolish, or substantially alter boundaries of **provinces**, cities, municipalities, or *barangay* in accordance with the criteria laid down by Republic Act No. 7160, the Local Government Code of 1991, subject to the approval by a majority of the votes cast in a plebiscite in the political units directly affected. **The Regional Assembly may prescribe standards lower than those mandated by Republic Act No. 7160, the Local Government Code of 1991, in the creation,** division, merger, abolition, or alteration of the boundaries **of provinces**, cities, municipalities, or *barangay*. Provinces, cities, municipalities, or *barangay* created, divided, merged, or whose boundaries are altered without observing the standards prescribed by Republic Act No. 7160, the Local Government Code of 1991, shall not be entitled to any share of the taxes that are allotted to the local governments units under the provisions of the Code.

The financial requirements of the provinces, cities, municipalities, or *barangay* so created, divided, or merged shall be provided by the Regional Assembly out of the general funds of the Regional Government.

The holding of a plebiscite to determine the will of the majority of the voters of the areas affected by the creation, division, merger, or whose boundaries are being altered as required by Republic Act No. 7160, the Local Government Code of 1991, shall, however, be observed.

The Regional Assembly may also change the names of local government units, public places and institutions, and declare regional holidays. (Emphasis supplied)

municipalities in the first district of Maguindanao. MMA Act 201 provides:

> Section 1. The Municipalities of Barira, Buldon, Datu Odin Sinsuat, Kabuntalan, Matanog, Parang, Sultan Kudarat, Sultan Mastura, and Upi are hereby separated from the Province of Maguindanao and constituted into a distinct and independent province, which is hereby created, to be known as the Province of Shariff Kabunsuan.
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> x x x x x x x x x
>
> Sec. 5. The corporate existence of this province shall commence upon the appointment by the Regional Governor or election of the governor and majority of the regular members of the Sangguniang Panlalawigan.
>
> The incumbent elective provincial officials of the Province of Maguindanao shall continue to serve their unexpired terms in the province that they will choose or where they are residents: Provided, that where an elective position in both provinces becomes vacant as a consequence of the creation of the Province of Shariff Kabunsuan, all incumbent elective provincial officials shall have preference for appointment to a higher elective vacant position and for the time being be appointed by the Regional Governor, and shall hold office until their successors shall have been elected and qualified in the next local elections; Provided, further, that they shall continue to receive the salaries they are receiving at the time of the approval of this Act until the new readjustment of salaries in accordance with law. Provided, furthermore, that there shall be no diminution in the number of the members of the Sangguniang Panlalawigan of the mother province.
>
> Except as may be provided by national law, the existing legislative district, which includes Cotabato as a part thereof, shall remain.

Later, three new municipalities[6] were carved out of the original nine municipalities constituting Shariff Kabunsuan, bringing its

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Before the enactment of RA 9054, the power to create provinces, cities, municipalities, and *barangays* was vested in Congress (for provinces, cities and municipalities) and in the *sangguniang panlalawigan* and *sangguniang panlungsod* (for *barangays*). (See Sections 384, 448, and 460 of Republic Act No. 7160 or the Local Government Code of 1991.)

[6] Sultan Mastura (created from Sultan Kudarat), Northern Kabuntulan (created from Kabuntulan) and Datu Blah Sinsuat (created from Upi).

total number of municipalities to 11. Thus, what was left of Maguindanao were the municipalities constituting its second legislative district. Cotabato City, although part of Maguindanao's first legislative district, is not part of the Province of Maguindanao.

The voters of Maguindanao ratified Shariff Kabunsuan's creation in a plebiscite held on 29 October 2006.

On 6 February 2007, the Sangguniang Panlungsod of Cotabato City passed Resolution No. 3999 requesting the COMELEC to "clarify the status of Cotabato City in view of the conversion of the First District of Maguindanao into a regular province" under MMA Act 201.

In answer to Cotabato City's query, the COMELEC issued Resolution No. 07-0407 on 6 March 2007 "maintaining the status quo with Cotabato City as part of Shariff Kabunsuan in the First Legislative District of Maguindanao." Resolution No. 07-0407, which adopted the recommendation of the COMELEC's Law Department under a Memorandum dated 27 February 2007,[7] provides in pertinent parts:

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[7] The Memorandum reads in pertinent parts:

The record shows the former province of Maguindanao was divided into two new provinces (Shariff Kabunsuan and Maguindanao), in view of Muslim Mindanao Autonomy Act (MMAA) No. 201, which authority was conferred to under Section 17, Article VI of Republic Act No. 9054 giving the ARMM, thru its Regional Legislative Assembly, the power to legislate laws including the enactment of the Local Government Code of ARMM.

The newly created province of Shariff Kabunsuan comprises the municipalities of Barira, Buldon, Datu Odin Sinsuat, Kabuntalan, Matanog, Parang, Sultan Kudarat, Sultan Mastura, Upi and Datu Blah, including Cotabato City [which] belongs to the first district of Maguindanao province.

It must be emphasized that Cotabato City is not included as part of ARMM although geographically located within the first district of the former Maguindanao province. Cotabato City is not voting for provincial officials. This is the reason why Cotabato City was not specifically mentioned as part of the newly created province of Shariff Kabunsuan.

Geographically speaking since [sic] Cotabato City is located within the newly created province of Shariff Kabunsuan having been bounded by municipalities of Sultan Kudarat, Datu Odin Sinsuat and Kabuntalan as its

Considering the foregoing, the Commission RESOLVED, as it hereby resolves, to adopt the recommendation of the Law Department that **pending the enactment of the appropriate law by Congress**, to maintain the status quo with Cotabato City as part of Shariff Kabunsuan in the First Legislative District of Maguindanao. (Emphasis supplied)

However, in preparation for the 14 May 2007 elections, the COMELEC promulgated on 29 March 2007 Resolution No. 7845 stating that Maguindanao's first legislative district is composed only of Cotabato City because of the enactment of MMA Act 201.[8]

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nearest neighbors. Following the rule in establishing legislative district, it shall comprise, as far as practicable, contiguous, compact and adjacent territory.

However, legally speaking, it may arise question of legality [sic] if Cotabato City will be appended as part of the newly created Shariff Kabunsuan province. Under our Constitution [it is] only Congress that shall make a reapportionment of legislative districts based on the standards provided for under Section 5(1) of Article VI.

x x x x x x x x x

In order to avoid controversy on the matter, pending the enactment of appropriate law by Congress, it would be prudent and logically feasible to maintain status quo with Cotabato City as part of Shariff Kabunsuan in the first district of Maguindanao.

[8] Resolution No. 7845 pertinently provides:

WHEREAS, the Province of Maguindanao consists of two legislative districts, with Cotabato City as part of the first legislative district.

WHEREAS, Muslim Mindanao Autonomy Act No. 201 provided for the creation of the new Province of Shariff Kabunsuan comprising the municipalities of Barira, Buldon, Datu Odin Sinsuat, Kabuntalan, Matanog, Parang, Sultan Kudarat, Sultan Mastura and Upi, all of the first legislative district of the mother Province of Maguindanao, except Cotabato City which is not part of the Autonomous Region in Muslim Mindanao; while the remaining municipalities of Talisay, Talayan, Guindulungan, Datu Saudi Ampatuan, Datu Piang, Shariff Aguak, Datu Unsay, Mamasapano, South Upi, Ampatuan, Datu Abdullah Sangki, Buluan, Datu Paglas, Gen. S. K. Pendatun, Sultan Sa Barongis, Rajah Buayan, Pagalungan, Pagagawan, and Paglat, all of the second legislative district of the mother Province of Maguindanao, shall remain with said province;

WHEREAS, the last paragraph of Section 5 of Muslim Mindanao Autonomy (MMA) Act No. 201 provides that "(e)xcept as may be provided by national law, the existing legislative district, which includes Cotabato City as a part thereof, shall remain.";

On 10 May 2007, the COMELEC issued Resolution No. 7902, subject of these petitions, amending Resolution No. 07-0407 by renaming the legislative district in question as "Shariff Kabunsuan Province with Cotabato City (formerly First District of Maguindanao with Cotabato City)."[9]

In G.R. No. 177597, Sema, who was a candidate in the 14 May 2007 elections for Representative of "Shariff Kabunsuan

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WHEREAS, by reason of said provision of MMA Act No. 201, the first legislative district of the Province of Maguindanao is now made up of Cotabato City only, and its second legislative district, the municipalities of Talisay, Talayan, Guindulungan, Datu Saudi Ampatuan, Datu Piang, Shariff Aguak, Datu Unsay, Mamasapano, South Upi, Ampatuan, Datu Abdullah Sangki, Buluan, Datu Paglas, Gen. S. K. Pendatun, Sultan Sa Barongis, Rajah Buayan, Pagalungan, Pagagawan, and Paglat[.] (Emphasis supplied)

In the earlier Resolution No. 7801, dated 11 January 2007, the COMELEC allocated one legislative seat each for the provinces of Maguindanao and Shariff Kabunsuan for the 14 May 2007 elections.

[9] Resolution No. 7902 reads in full:

This pertains to the amendment of Minute Resolution No. 07-0407 dated March 6, 2007, entitled, "IN THE MATTER OF THE MEMORANDUM OF ATTY. WYNNE B. ASDALA, ACTING DIRECTOR III, LAW DEPARTMENT, RELATIVE TO THE STUDY/RECOMMENDATION OF SAID DEPARTMENT RE: CONVERSION OF THE FIRST DISTRICT OF MAGUINDANAO INTO A REGULAR PROVINCE PER MINUTE RESOLUTION NO. 07-0297 DATED FEBRUARY 20, 2007." The dispositive portion of which reads:

"Considering the foregoing, the Commission RESOLVED, as it hereby RESOLVES, to adopt the recommendation of the Law Department that pending the enactment of the appropriate law by Congress, to maintain status quo with Cotabato City as part of Shariff Kabunsuan in the First District of Maguindanao."

The Commission RESOLVED, as it hereby RESOLVES, to amend the pertinent portion of Minute Resolution No. 07-0407 to now read, as follows[:]

["]Considering the foregoing, the Commission RESOLVED, as it hereby RESOLVES, **that the district shall be known as Shariff Kabunsuan Province with Cotabato City (formerly First District of Maguindanao with Cotabato City)**."

Let the Executive Director advise the Sangguniang Panlalawigan of Cotabato City accordingly. (Emphasis in the original)

with Cotabato City," prayed for the nullification of COMELEC Resolution No. 7902 and the exclusion from canvassing of the votes cast in Cotabato City for that office. Sema contended that Shariff Kabunsuan is entitled to one representative in Congress under Section 5 (3), Article VI of the Constitution[10] and Section 3 of the Ordinance appended to the Constitution.[11] Thus, Sema asserted that the COMELEC acted without or in excess of its jurisdiction in issuing Resolution No. 7902 which maintained the status quo in Maguindanao's first legislative district despite the COMELEC's earlier directive in Resolution No. 7845 designating Cotabato City as the lone component of Maguindanao's reapportioned first legislative district.[12] Sema further claimed that in issuing Resolution No. 7902, the COMELEC usurped Congress' power to create or reapportion legislative districts.

In its Comment, the COMELEC, through the Office of the Solicitor General (OSG), chose not to reach the merits of the case and merely contended that (1) Sema wrongly availed of the writ of *certiorari* to nullify COMELEC Resolution No. 7902 because the COMELEC issued the same in the exercise of its administrative, not quasi-judicial, power and (2) Sema's

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[10] "Each legislative district shall comprise, as far as practicable, contiguous, compact, and adjacent territory. Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative."

[11] "Any province that may hereafter be created, or any city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member or such number of Members as it may be entitled to on the basis of the number of its inhabitants and according to the standards set forth in paragraph (3), Section 5 of Article VI of the Constitution. The number of Members apportioned to the province out of which such new province was created or where the city, whose population has so increased, is geographically located shall be correspondingly adjusted by the Commission on Elections but such adjustment shall not be made within one hundred and twenty days before the election."

[12] Consistent with her claim that Cotabato City is not part of Shariff Kabunsuan's legislative district, petitioner filed with the COMELEC a petition for the disqualification of respondent Dilangalen as candidate for representative of that province (docketed as SPA No. A07-0).

prayer for the writ of prohibition in G.R. No. 177597 became moot with the proclamation of respondent Didagen P. Dilangalen (respondent Dilangalen) on 1 June 2007 as representative of the legislative district of Shariff Kabunsuan Province with Cotabato City.

In his Comment, respondent Dilangalen countered that Sema is estopped from questioning COMELEC Resolution No. 7902 because in her certificate of candidacy filed on 29 March 2007, Sema indicated that she was seeking election as representative of "Shariff Kabunsuan including Cotabato City." Respondent Dilangalen added that COMELEC Resolution No. 7902 is constitutional because it did not apportion a legislative district for Shariff Kabunsuan or reapportion the legislative districts in Maguindanao but merely renamed Maguindanao's first legislative district. Respondent Dilangalen further claimed that the COMELEC could not reapportion Maguindanao's first legislative district to make Cotabato City its sole component unit as the power to reapportion legislative districts lies exclusively with Congress, not to mention that Cotabato City does not meet the minimum population requirement under Section 5 (3), Article VI of the Constitution for the creation of a legislative district within a city.[13]

Sema filed a Consolidated Reply controverting the matters raised in respondents' Comments and reiterating her claim that the COMELEC acted *ultra vires* in issuing Resolution No. 7902.

In the Resolution of 4 September 2007, the Court required the parties in G.R. No. 177597 to comment on the issue of whether a province created by the ARMM Regional Assembly under Section 19, Article VI of RA 9054 is entitled to one

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[13] Respondent Dilangalen asserts, and petitioner does not dispute, that as of 2000, Cotabato City had a population of 163,849, falling short of the minimum population requirement in Section 5 (3), Article VI of the Constitution which provides: "Each legislative district shall comprise, as far as practicable, contiguous, compact, and adjacent territory. **Each city with a population of at least two hundred fifty thousand,** or each province, **shall have at least one representative**." (Emphasis supplied)

representative in the House of Representatives without need of a national law creating a legislative district for such new province. The parties submitted their compliance as follows:

(1) Sema answered the issue in the affirmative on the following grounds: (a) the Court in *Felwa v. Salas*[14] stated that "when a province is created by statute, the corresponding representative district comes into existence neither by authority of that statute — which cannot provide otherwise — nor by apportionment, but by operation of the Constitution, without a reapportionment"; (b) Section 462 of Republic Act No. 7160 (RA 7160) "affirms" the apportionment of a legislative district incident to the creation of a province; and (c) Section 5 (3), Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution mandate the apportionment of a legislative district in newly created provinces.

(2) The COMELEC, again represented by the OSG, apparently abandoned its earlier stance on the propriety of issuing Resolution Nos. 07-0407 and 7902 and joined causes with Sema, contending that Section 5 (3), Article VI of the Constitution is "self-executing." Thus, every new province created by the ARMM Regional Assembly is *ipso facto* entitled to one representative in the House of Representatives even in the absence of a national law; and

(3) Respondent Dilangalen answered the issue in the negative on the following grounds: (a) the "province" contemplated in Section 5 (3), Article VI of the Constitution is one that is created by an act of Congress taking into account the provisions in RA 7160 on the creation of provinces; (b) Section 3, Article IV of RA 9054 withheld from the ARMM Regional Assembly the power to enact measures relating to national elections, which encompasses the apportionment of legislative districts for members of the House of Representatives; (c) recognizing a legislative district in every province the ARMM Regional Assembly creates will lead to the disproportionate representation of the ARMM in the House of Representatives as the Regional Assembly can

[14] 124 Phil. 1226 (1966).

create provinces without regard to the requirements in Section 461 of RA 7160; and (d) Cotabato City, which has a population of less than 250,000, is not entitled to a representative in the House of Representatives.

On 27 November 2007, the Court heard the parties in G.R. No. 177597 in oral arguments on the following issues: (1) whether Section 19, Article VI of RA 9054, delegating to the ARMM Regional Assembly the power to create provinces, is constitutional; and (2) if in the affirmative, whether a province created under Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such new province.[15]

In compliance with the Resolution dated 27 November 2007, the parties in G.R. No. 177597 filed their respective Memoranda on the issues raised in the oral arguments.[16] On the question of the constitutionality of Section 19, Article VI of RA 9054, the parties in G.R. No. 177597 adopted the following positions:

(1) Sema contended that Section 19, Article VI of RA 9054 is constitutional (a) as a valid delegation by Congress to the ARMM of the power to create provinces under Section 20 (9), Article X of the Constitution granting to the autonomous regions, through their organic acts, legislative powers over "other matters as may be authorized by law for the promotion of the general welfare of the people of the region" and (b) as an amendment to Section 6 of RA 7160.[17] However, Sema concedes that, if

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[15] As provided in the Resolution of 16 October 2007.

[16] The Court also required Sema to submit with her Memorandum the certifications from the Department of Finance, the Lands Management Bureau, the National Statistics Office, and the Department of Interior and Local Government that at the time of the creation of Shariff Kabunsuan on 28 August 2006 it met the requisites for the creation of a province under Section 461 of RA 7160.

[17] "SEC. 6. *Authority to Create Local Government Units*. - A local government unit may be created, divided, merged, abolished, or its boundaries substantially altered either by law enacted by Congress in the case of a province, city or municipality, or any other political subdivision, or by ordinance passed

taken literally, the grant in Section 19, Article VI of RA 9054 to the ARMM Regional Assembly of the power to "prescribe standards lower than those mandated" in RA 7160 in the creation of provinces contravenes Section 10, Article X of the Constitution.[18] Thus, Sema proposed that Section 19 "should be construed as prohibiting the Regional Assembly from prescribing standards x x x that do not comply with the minimum criteria" under RA 7160.[19]

(2) Respondent Dilangalen contended that Section 19, Article VI of RA 9054 is unconstitutional on the following grounds: (a) the power to create provinces was not among those granted to the autonomous regions under Section 20, Article X of the Constitution and (b) the grant under Section 19, Article VI of RA 9054 to the ARMM Regional Assembly of the power to prescribe standards lower than those mandated in Section 461 of RA 7160 on the creation of provinces contravenes Section 10, Article X of the Constitution and the Equal Protection Clause; and

(3) The COMELEC, through the OSG, joined causes with respondent Dilangalen (thus effectively abandoning the position the COMELEC adopted in its Compliance with the Resolution of 4 September 2007) and contended that Section 19, Article VI of RA 9054 is unconstitutional because (a) it contravenes Section 10 and Section 6,[20] Article X of the Constitution and (b) the power to create provinces was withheld from the

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by the *sangguniang panlalawigan* or *sangguniang panlungsod* concerned in the case of a *barangay* located within its territorial jurisdiction, subject to such limitations and requirements prescribed in this Code."

[18] "SECTION 10. No province, city, municipality, or *barangay* may be created, divided, merged, abolished, or its boundary substantially altered, except in accordance with the criteria established in the Local Government Code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected."

[19] *Rollo*, p. 229.

[20] "SECTION 6. Local government units shall have a just share, as determined by law, in the national taxes which shall be automatically released to them."

autonomous regions under Section 20, Article X of the Constitution.

On the question of whether a province created under Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such new province, Sema and respondent Dilangalen reiterated in their Memoranda the positions they adopted in their Compliance with the Resolution of 4 September 2007. The COMELEC deemed it unnecessary to submit its position on this issue considering its stance that Section 19, Article VI of RA 9054 is unconstitutional.

The pendency of the petition in G.R. No. 178628 was disclosed during the oral arguments on 27 November 2007. Thus, in the Resolution of 19 February 2008, the Court ordered G.R. No. 178628 consolidated with G.R. No. 177597. The petition in G.R. No. 178628 echoed Sema's contention that the COMELEC acted *ultra vires* in issuing Resolution No. 7902 depriving the voters of Cotabato City of a representative in the House of Representatives. In its Comment to the petition in G.R. No. 178628, the COMELEC, through the OSG, maintained the validity of COMELEC Resolution No. 7902 as a temporary measure pending the enactment by Congress of the "appropriate law."

The Issues

The petitions raise the following issues:

I. In G.R. No. 177597:

(A) Preliminarily –

(1) whether the writs of *Certiorari*, Prohibition, and *Mandamus* are proper to test the constitutionality of COMELEC Resolution No. 7902; and

(2) whether the proclamation of respondent Dilangalen as representative of Shariff Kabunsuan Province with Cotabato City mooted the petition in G.R. No. 177597.

(B) On the merits –

(1) whether Section 19, Article VI of RA 9054, delegating to the ARMM Regional Assembly the power to create provinces, cities, municipalities and barangays, is constitutional; and

(2) if in the affirmative, whether a province created by the ARMM Regional Assembly under MMA Act 201 pursuant to Section 19, Article VI of RA 9054 is entitled to one representative in the House of Representatives without need of a national law creating a legislative district for such province.

II. In G.R No. 177597 and G.R No. 178628, whether COMELEC Resolution No. 7902 is valid for maintaining the status quo in the first legislative district of Maguindanao (as "Shariff Kabunsuan Province with Cotabato City [formerly First District of Maguindanao with Cotabato City]"), despite the creation of the Province of Shariff Kabunsuan out of such district (excluding Cotabato City).

The Ruling of the Court

The petitions have no merit. We rule that (1) Section 19, Article VI of RA 9054 is unconstitutional insofar as it grants to the ARMM Regional Assembly the power to create provinces and cities; (2) MMA Act 201 creating the Province of Shariff Kabunsuan is void; and (3) COMELEC Resolution No. 7902 is valid.

On the Preliminary Matters

The Writ of Prohibition is Appropriate to Test the Constitutionality of Election Laws, Rules and Regulations

The purpose of the writ of *Certiorari* is to correct grave abuse of discretion by "any tribunal, board, or officer exercising judicial or quasi-judicial functions."[21] On the other hand, the writ of *Mandamus* will issue to compel a tribunal, corporation, board, officer, or person to perform an act "which the law specifically enjoins as a duty."[22] True, the COMELEC did not

[21] Section 1, Rule 65 of the 1997 Rules of Civil Procedure.

[22] Section 3, Rule 65 of the 1997 Rules of Civil Procedure.

issue Resolution No. 7902 in the exercise of its judicial or quasi-judicial functions.[23] Nor is there a law which specifically enjoins the COMELEC to exclude from canvassing the votes cast in Cotabato City for representative of "Shariff Kabunsuan Province with Cotabato City." These, however, do not justify the outright dismissal of the petition in G.R. No. 177597 because Sema also prayed for the issuance of the writ of Prohibition and we have long recognized this writ as proper for testing the constitutionality of election laws, rules, and regulations.[24]

Respondent Dilangalen's Proclamation Does Not Moot the Petition

There is also no merit in the claim that respondent Dilangalen's proclamation as winner in the 14 May 2007 elections for representative of "Shariff Kabunsuan Province with Cotabato City" mooted this petition. This case does not concern respondent Dilangalen's election. Rather, it involves an inquiry into the validity of COMELEC Resolution No. 7902, as well as the constitutionality of MMA Act 201 and Section 19, Article VI of RA 9054. Admittedly, the outcome of this petition, one way or another, determines whether the votes cast in Cotabato City for representative of the district of "Shariff Kabunsuan Province with Cotabato City" will be included in the canvassing of ballots. However, this incidental consequence is no reason for us not to proceed with the resolution of the novel issues raised here. The Court's ruling in these petitions affects not only the recently concluded elections but also all the other succeeding elections for the office in question, as well as the power of the ARMM Regional Assembly to create in the future additional provinces.

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[23] See, however, *Macabago v. Commission on Elections* (440 Phil. 683 [2002]) where the Court held that a petition for *certiorari* under Rule 65 will lie to question the constitutionality of an election regulation if the COMELEC has acted capriciously or whimsically, with grave abuse of discretion amounting to lack or excess of jurisdiction.

[24] *Social Weather Stations, Inc. v. COMELEC*, 409 Phil. 571 (2001); *Mutuc v. Commission on Elections*, G.R. No. L-32717, 26 November 1970, 36 SCRA 228.

On the Main Issues

Whether the ARMM Regional Assembly Can Create the Province of Shariff Kabunsuan

The creation of local government units is governed by Section 10, Article X of the Constitution, which provides:

> Sec. 10. No province, city, municipality, or *barangay* may be created, divided, merged, abolished or its boundary substantially altered except in accordance with the criteria established in the local government code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected.

Thus, the creation of any of the four local government units – province, city, municipality or *barangay* – must comply with three conditions. First, the creation of a local government unit must follow the criteria fixed in the Local Government Code. Second, such creation must not conflict with any provision of the Constitution. Third, there must be a plebiscite in the political units affected.

There is neither an express prohibition nor an express grant of authority in the Constitution for Congress to delegate to regional or local legislative bodies the power to create local government units. However, under its plenary legislative powers, Congress can delegate to local legislative bodies the power to create local government units, subject to reasonable standards and provided no conflict arises with any provision of the Constitution. In fact, Congress has delegated to provincial boards, and city and municipal councils, the power to create *barangays* within their jurisdiction,[25] subject to compliance with the criteria established in the Local Government Code, and the plebiscite requirement in Section 10, Article X of the Constitution. However, under the Local Government Code, "only x x x an Act of Congress" can create provinces, cities or municipalities.[26]

Under Section 19, Article VI of RA 9054, Congress delegated to the ARMM Regional Assembly the power to create provinces,

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[25] Sections 385 and 386, RA 7160.

[26] Sections 441, 449 and 460, RA 7160.

cities, municipalities and *barangays* within the ARMM. Congress made the delegation under its plenary legislative powers because the power to create local government units is not one of the express legislative powers granted by the Constitution to regional legislative bodies.[27] In the present case, the question arises whether the delegation to the ARMM Regional Assembly of the power to create provinces, cities, municipalities and *barangays* conflicts with any provision of the Constitution.

There is no provision in the Constitution that conflicts with the delegation to regional legislative bodies of the power to create municipalities and *barangays*, provided Section 10, Article X of the Constitution is followed. However, the creation of provinces and cities is another matter. Section 5 (3), Article VI of the Constitution provides, "Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative" in the House of Representatives. Similarly, Section 3 of the Ordinance appended to the Constitution provides, "Any province that may hereafter be created, or any city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member x x x."

Clearly, a province cannot be created without a legislative district because it will violate Section 5 (3), Article VI of the Constitution as well as Section 3 of the Ordinance appended to the Constitution. For the same reason, a city with a population of 250,000 or more cannot also be created without a legislative district. Thus, the power to create a province, or a city with a population of 250,000 or more, requires also the power to create a legislative district. Even the creation of a city with a population of less than 250,000 involves the power to create a legislative district because once the city's population reaches 250,000, the city automatically becomes entitled to one representative under Section 5 (3), Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. **Thus, the power to create a province or city inherently involves the power to create a legislative district.**

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[27] Section 20, Article X, Constitution.

For Congress to delegate validly the power to create a province or city, it must also validly delegate at the same time the power to create a legislative district. The threshold issue then is, can Congress validly delegate to the ARMM Regional Assembly the power to create legislative districts for the House of Representatives? The answer is in the negative.

Legislative Districts are Created or Reapportioned Only by an Act of Congress

Under the present Constitution, as well as in past[28] Constitutions, the power to increase the allowable membership in the House of Representatives, and to reapportion legislative districts, is vested exclusively in Congress. Section 5, Article VI of the Constitution provides:

> SECTION 5. (1) The House of Representatives shall be composed **of not more than two hundred and fifty members, unless otherwise fixed by law**, who shall be elected from legislative districts apportioned among the provinces, cities, and the Metropolitan Manila area in accordance with the number of their respective inhabitants, and on the basis of a uniform and progressive ratio, and those who, as provided by law, shall be elected through a party-list system of registered national, regional, and sectoral parties or organizations.
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> x x x x x x x x x
>
> (3) Each legislative district shall comprise, as far as practicable, contiguous, compact, and adjacent territory. Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative.
>
> (4) Within three years following the return of every census, **the Congress shall make a reapportionment of legislative districts** based on the standards provided in this section. (Emphasis supplied)

Section 5 (1), Article VI of the Constitution vests in Congress the power to increase, through a law, the allowable membership in the House of Representatives. Section 5 (4) empowers Congress

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[28] See Section 2, Article VIII of the 1973 Constitution and Section 5, Article VI of the 1935 Constitution.

to reapportion legislative districts. The power to reapportion legislative districts necessarily includes the power to create legislative districts out of existing ones. Congress exercises these powers through a law that Congress itself enacts, and not through a law that regional or local legislative bodies enact. The allowable membership of the House of Representatives can be increased, and new legislative districts of Congress can be created, only through a national law passed by Congress. In *Montejo v. COMELEC*,[29] we held that the "power of redistricting x x x is traditionally regarded as part of the power (of Congress) to make laws," and thus is vested exclusively in Congress.

This textual commitment to Congress of the exclusive power to create or reapportion legislative districts is logical. Congress is a national legislature and any increase in its allowable membership or in its incumbent membership through the creation of legislative districts must be embodied in a national law. Only Congress can enact such a law. It would be anomalous for regional or local legislative bodies to create or reapportion legislative districts for a national legislature like Congress. An inferior legislative body, created by a superior legislative body, cannot change the membership of the superior legislative body.

The creation of the ARMM, and the grant of legislative powers to its Regional Assembly under its organic act, did not divest Congress of its exclusive authority to create legislative districts. This is clear from the Constitution and the ARMM Organic Act, as amended. Thus, Section 20, Article X of the Constitution provides:

> SECTION 20. Within its territorial jurisdiction and subject to the provisions of this Constitution and national laws, the organic act of autonomous regions shall provide for legislative powers over:
> (1) Administrative organization;
> (2) Creation of sources of revenues;
> (3) Ancestral domain and natural resources;
> (4) Personal, family, and property relations;
> (5) Regional urban and rural planning development;

[29] 312 Phil. 492, 501 (1995).

(6) Economic, social, and tourism development;

(7) Educational policies;

(8) Preservation and development of the cultural heritage; and

(9) Such other matters as may be authorized by law for the promotion of the general welfare of the people of the region.

Nothing in Section 20, Article X of the Constitution authorizes autonomous regions, expressly or impliedly, to create or reapportion legislative districts for Congress.

On the other hand, Section 3, Article IV of RA 9054 amending the ARMM Organic Act, provides, "**The Regional Assembly may exercise legislative power** x x x **except on the following matters:** x x x **(k) National elections**. x x x." Since the ARMM Regional Assembly has no legislative power to enact laws relating to national elections, it cannot create a legislative district whose representative is elected in national elections. Whenever Congress enacts a law creating a legislative district, the first representative is always elected in the "next national elections" from the effectivity of the law.[30]

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[30] Section 48 of Republic Act No. 8507 (Charter of Parañaque City) provides:

Section 48. Legislative District. — As a highly-urbanized city, the City of Parañaque shall have its own legislative district with the first representative to be elected **in the next national election** after the passage of this Act. (Emphasis supplied)

Section 50 of Republic Act No. 7839 (Charter of City of Pasig) provides:

Section 50. Legislative District. — As highly urbanized, the City of Pasig shall have its own legislative district with the first representative to be elected **in the next national elections** after the passage of this Act. (Emphasis supplied)

Section 58 of Republic Act No. RA 9230 provides:

Section 58. Representative District. — The City of San Jose del Monte shall have its own representative district to commence **in the next national election** after the effectivity of this Act. (Emphasis supplied)

Section 7 of Republic Act No. 9355 provides:

Section 7. Legislative District. — The Province of Dinagat Islands shall constitute one, separate legislative district to commence in **the next national election** after the effectivity of this Act. (Emphasis supplied)

Indeed, the office of a legislative district representative to Congress is a **national office**, and its occupant, a Member of the House of Representatives, is a **national official**.[31] It would be incongruous for a regional legislative body like the ARMM Regional Assembly to create a national office when its legislative powers extend only to its regional territory. The office of a district representative is maintained by national funds and the salary of its occupant is paid out of national funds. It is a self-evident inherent limitation on the legislative powers of every local or regional legislative body that it can only create local or regional offices, respectively, and it can never create a national office.

To allow the ARMM Regional Assembly to create a national office is to allow its legislative powers to operate outside the ARMM's territorial jurisdiction. **This violates Section 20, Article X of the Constitution which expressly limits the coverage of the Regional Assembly's legislative powers "[w]ithin its territorial jurisdiction** x x x**."**

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[31] In his Concurring Opinion in *Paras v. Commission on Elections* (332 Phil. 56, 66 [1996]), then Associate Justice (later Chief Justice) Hilario G. Davide, Jr. stated:

> The term "regular local election" must be confined to the regular election of elective local officials, as distinguished from the regular election of national officials. **The elective national officials are the President, Vice-President, Senators and Congressmen**. The elective local officials are Provincial Governors, Vice-Governors of provinces, Mayors and Vice-Mayors of cities and municipalities, Members of the Sanggunians of provinces, cities and municipalities, *punong barangays* and members of the *sangguniang barangays*, and the elective regional officials of the Autonomous Region of Muslim Mindanao. These are the only local elective officials deemed recognized by Section 2(2) of Article IX-C of the Constitution, which provides:
>
> SEC. 2. The Commission on Elections shall exercise the following powers and functions:
>
> x x x x x x x x x
>
> (2) Exercise exclusive original jurisdiction over all contests relating to the elections, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over all contests involving elective municipal officials decided by trial courts of general jurisdiction, or involving elective *barangay* officials decided by trial courts of limited jurisdiction. (Emphasis supplied)

The ARMM Regional Assembly itself, in creating Shariff Kabunsuan, recognized the exclusive nature of Congress' power to create or reapportion legislative districts by abstaining from creating a legislative district for Shariff Kabunsuan. Section 5 of MMA Act 201 provides that:

> **Except as may be provided by national law**, the existing legislative district, which includes Cotabato City as a part thereof, shall remain. (Emphasis supplied)

However, a province cannot legally be created without a legislative district because the Constitution mandates that "each province shall have at least one representative." Thus, the creation of the Province of Shariff Kabunsuan without a legislative district is unconstitutional.

Sema, petitioner in G.R. No. 177597, contends that Section 5 (3), Article VI of the Constitution, which provides:

> Each legislative district shall comprise, as far as practicable, contiguous, compact, and adjacent territory. **Each city with a population of at least two hundred fifty thousand, or each province, shall have at least one representative**. (Emphasis supplied)

and Section 3 of the Ordinance appended to the Constitution, which states:

> **Any province that may hereafter be created**, **or any city whose population may hereafter increase to more than two hundred fifty thousand shall be entitled in the immediately following election to at least one Member or such number of Members as it may be entitled to on the basis of the number of its inhabitants and according to the standards set forth in paragraph (3), Section 5 of Article VI of the Constitution**. The number of Members apportioned to the province out of which such new province was created or where the city, whose population has so increased, is geographically located shall be correspondingly adjusted by the Commission on Elections but such adjustment shall not be made within one hundred and twenty days before the election. (Emphasis supplied)

serve as bases for the conclusion that the Province of Shariff Kabunsuan, created on 29 October 2006, is automatically entitled to one member in the House of Representatives in the 14 May 2007 elections. As further support for her stance, petitioner invokes the statement in *Felwa* that "when a province is created by statute, the corresponding representative district comes into existence neither by authority of that statute — which cannot provide otherwise — nor by apportionment, but by operation of the Constitution, without a reapportionment."

The contention has no merit.

First. The issue in *Felwa*, among others, was whether Republic Act No. 4695 (RA 4695), creating the provinces of Benguet, Mountain Province, Ifugao, and Kalinga-Apayao and providing for congressional representation in the old and new provinces, was unconstitutional for "creati[ng] congressional districts without the apportionment provided in the Constitution." The Court answered in the negative, thus:

The Constitution ordains:

"The House of Representatives shall be composed of not more than one hundred and twenty Members who shall be apportioned among the several provinces as nearly as may be according to the number of their respective inhabitants, but each province shall have at least one Member. The Congress shall by law make an apportionment within three years after the return of every enumeration, and not otherwise. Until such apportionment shall have been made, the House of Representatives shall have the same number of Members as that fixed by law for the National Assembly, who shall be elected by the qualified electors from the present Assembly districts. Each representative district shall comprise as far as practicable, contiguous and compact territory."

Pursuant to this Section, a representative district may come into existence: (a) indirectly, through the creation of a province — for "each province shall have at least one member" in the House of Representatives; or (b) by direct creation of several representative districts within a province. The requirements concerning the apportionment of representative districts and the territory thereof refer only to the second method of creation of

representative districts, and do not apply to those incidental to the creation of provinces, under the first method. This is deducible, not only from the general tenor of the provision above quoted, but, also, from the fact that the apportionment therein alluded to refers to that which is made by an Act of Congress. **Indeed, when a province is created by statute, the corresponding representative district, comes into existence neither by authority of that statute — which cannot provide otherwise — nor by apportionment, but by operation of the Constitution, without a reapportionment**.

There is no constitutional limitation as to the time when, territory of, or other conditions under which a province may be created, except, perhaps, if the consequence thereof were to exceed the maximum of 120 representative districts prescribed in the Constitution, which is not the effect of the legislation under consideration. As a matter of fact, provinces have been created or subdivided into other provinces, with the consequent creation of additional representative districts, without complying with the aforementioned requirements.[32] (Emphasis supplied)

Thus, the Court sustained the constitutionality of RA 4695 because (1) it validly created legislative districts "indirectly" **through a special law enacted by Congress creating a province** and (2) the creation of the legislative districts will not result in breaching the maximum number of legislative districts provided under the 1935 Constitution. *Felwa* does not apply to the present case because in *Felwa* the new provinces were created by a **national law enacted by Congress itself**. Here, the new province was created merely by a **regional law enacted by the ARMM Regional Assembly**.

What *Felwa* teaches is that the creation of a legislative district by Congress does not emanate alone from Congress' power to reapportion legislative districts, but also from Congress' power to create provinces which cannot be created without a legislative district. Thus, when a province is created, a legislative district is created **by operation of the Constitution because the Constitution provides that "each province shall have at least one representative**" in the House of Representatives. This does

[32] *Supra* note 13 at 1235-1236.

not detract from the constitutional principle that the power to create legislative districts belongs exclusively to Congress. It merely prevents any other legislative body, except Congress, from creating provinces because for a legislative body to create a province such legislative body must have the power to create legislative districts. In short, only an act of Congress can trigger the creation of a legislative district by operation of the Constitution. Thus, only Congress has the power to create, or trigger the creation of, a legislative district.

Moreover, if as Sema claims MMA Act 201 apportioned a legislative district to Shariff Kabunsuan upon its creation, this will leave Cotabato City as the lone component of the first legislative district of Maguindanao. However, Cotabato City cannot constitute a legislative district by itself because as of the census taken in 2000, it had a population of only 163,849. To constitute Cotabato City alone as the surviving first legislative district of Maguindanao will violate Section 5 (3), Article VI of the Constitution which requires that "[E]ach city with a population of at least two hundred fifty thousand x x x, shall have at least one representative."

Second. Sema's theory also undermines the composition and independence of the House of Representatives. Under Section 19,[33] Article VI of RA 9054, the ARMM Regional Assembly can create provinces and cities within the ARMM **with or without** regard to the criteria fixed in Section 461 of RA 7160, namely: minimum annual income of ₱20,000,000, and minimum contiguous territory of 2,000 square kilometers or minimum population of 250,000.[34] The following scenarios thus become distinct possibilities:

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[33] See note 3.

[34] Section 461 provides: "*Requisites for Creation.* — (a) A province may be created if it has an average annual income, as certified by the Department of Finance, of not less than Twenty million pesos (₱20,000,000.00) based on 1991 constant prices and either of the following requisites:

(i) a contiguous territory of at least two thousand (2,000) square kilometers, as certified by the Lands Management Bureau; or

(1) An inferior legislative body like the ARMM Regional Assembly can create 100 or more provinces and thus increase the membership of a superior legislative body, the House of Representatives, beyond the maximum limit of 250 fixed in the Constitution (unless a national law provides otherwise);

(2) The proportional representation in the House of Representatives based on one representative for at least every 250,000 residents will be negated because the ARMM Regional Assembly need not comply with the requirement in Section 461(a)(ii) of RA 7160 that every province created must have a population of at least 250,000; and

(3) Representatives from the ARMM provinces can become the majority in the House of Representatives through the ARMM Regional Assembly's continuous creation of provinces or cities within the ARMM.

The following exchange during the oral arguments of the petition in G.R. No. 177597 highlights the absurdity of Sema's position that the ARMM Regional Assembly can create provinces:

Justice Carpio:

> So, you mean to say [a] Local Government can create legislative district[s] and pack Congress with their own representatives [?]

Atty. Vistan II:[35]

> Yes, Your Honor, because the Constitution allows that.

(ii) a population of not less than two hundred fifty thousand (250,000) inhabitants as certified by the National Statistics Office: Provided, That, the creation thereof shall not reduce the land area, population, and income of the original unit or units at the time of said creation to less than the minimum requirements prescribed herein.

(b) The territory need not be contiguous if it comprise two (2) or more islands or is separated by a chartered city or cities which do not contribute to the income of the province.

(c) The average annual income shall include the income accruing to the general fund, exclusive of special funds, trust funds, transfers and non-recurring income."

[35] Atty. Edgardo Carlos B. Vistan II, counsel for petitioner in G.R. No. 177597.

Justice Carpio:

> So, [the] Regional Assembly of [the] ARMM can create and create x x x provinces x x x and, therefore, they can have thirty-five (35) new representatives in the House of Representatives without Congress agreeing to it, is that what you are saying? That can be done, under your theory[?]

Atty. Vistan II:

> Yes, Your Honor, under the correct factual circumstances.

Justice Carpio:

> Under your theory, the ARMM legislature can create thirty-five (35) new provinces, there may be x x x [only] one hundred thousand (100,000) [population], x x x, and they will each have one representative x x x to Congress without any national law, is that what you are saying?

Atty. Vistan II:

> Without law passed by Congress, yes, Your Honor, that is what we are saying.

x x x x x x x x x

Justice Carpio:

> **So, they can also create one thousand (1000) new provinces, sen[d] one thousand (1000) representatives to the House of Representatives without a national law[,] that is legally possible, correct?**

Atty. Vistan II:

> **Yes, Your Honor**.[36] (Emphasis supplied)

Neither the framers of the 1987 Constitution in adopting the provisions in Article X on regional autonomy,[37] nor Congress

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[36] TSN (27 November 2007), pp. 64-69.

[37] Unlike the 1935 and the 1973 Constitutions, the 1987 Constitution mandates, in Section 15, Article X, the creation of autonomous regions in the Cordilleras and Muslim Mindanao to foster political autonomy. See *Cordillera Broad Coalition v. Commission on Audit*, G.R. No. 79956, 29 January 1990, 181 SCRA 495.

in enacting RA 9054, envisioned or intended these disastrous consequences that certainly would wreck the tri-branch system of government under our Constitution. Clearly, the power to create or reapportion legislative districts cannot be delegated by Congress but must be exercised by Congress itself. Even the ARMM Regional Assembly recognizes this.

The Constitution empowered Congress to create or reapportion legislative districts, not the regional assemblies. Section 3 of the Ordinance to the Constitution which states, "[A]ny province that may hereafter be created x x x shall be entitled in the immediately following election to at least one Member," refers to a province created by Congress itself through a national law. The reason is that the creation of a province increases the actual membership of the House of Representatives, an increase that only Congress can decide. Incidentally, in the present 14th Congress, there are 219[38] district representatives out of the maximum 250 seats in the House of Representatives. Since party-list members shall constitute 20 percent of total membership of the House, there should at least be 50 party-list seats available in every election in case 50 party-list candidates are proclaimed winners. This leaves only 200 seats for district representatives, much less than the 219 incumbent district representatives. Thus, there is a need now for Congress to increase by law the allowable membership of the House, even before Congress can create new provinces.

It is axiomatic that organic acts of autonomous regions cannot prevail over the Constitution. Section 20, Article X of the Constitution expressly provides that the legislative powers of regional assemblies are limited **"[w]ithin its territorial jurisdiction and subject to the provisions of the Constitution and national laws,** x x x." The Preamble of the ARMM Organic Act (RA 9054) itself states that the ARMM Government is established "within the framework of the Constitution." This follows Section 15, Article X of the Constitution which mandates that the ARMM "**shall be created** x x x **within the framework of**

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[38] Website of House of Representatives as of 12 May 2008.

this Constitution and the national sovereignty as well as territorial integrity of the Republic of the Philippines."

The present case involves the creation of a local government unit that necessarily involves also the creation of a legislative district. The Court will not pass upon the constitutionality of the creation of municipalities and *barangays* that does not comply with the criteria established in Section 461 of RA 7160, as mandated in Section 10, Article X of the Constitution, because the creation of such municipalities and *barangays* does not involve the creation of legislative districts. We leave the resolution of this issue to an appropriate case.

In summary, we rule that Section 19, Article VI of RA 9054, insofar as it grants to the ARMM Regional Assembly the power to create provinces and cities, is void for being contrary to Section 5 of Article VI and Section 20 of Article X of the Constitution, as well as Section 3 of the Ordinance appended to the Constitution. Only Congress can create provinces and cities because the creation of provinces and cities necessarily includes the creation of legislative districts, a power only Congress can exercise under Section 5, Article VI of the Constitution and Section 3 of the Ordinance appended to the Constitution. The ARMM Regional Assembly cannot create a province without a legislative district because the Constitution mandates that every province shall have a legislative district. Moreover, the ARMM Regional Assembly cannot enact a law creating a national office like the office of a district representative of Congress because the legislative powers of the ARMM Regional Assembly operate only within its territorial jurisdiction as provided in Section 20, Article X of the Constitution. Thus, we rule that MMA Act 201, enacted by the ARMM Regional Assembly and creating the Province of Shariff Kabunsuan, is void.

Resolution No. 7902 Complies with the Constitution

Consequently, we hold that COMELEC Resolution No. 7902, preserving the geographic and legislative district of the First District of Maguindanao with Cotabato City, is valid as it merely complies with Section 5 of Article VI and Section 20 of Article X

of the Constitution, as well as Section 1 of the Ordinance appended to the Constitution.

WHEREFORE, we declare Section 19, Article VI of Republic Act No. 9054 *UNCONSTITUTIONAL* insofar as it grants to the Regional Assembly of the Autonomous Region in Muslim Mindanao the power to create provinces and cities. Thus, we declare *VOID* Muslim Mindanao Autonomy Act No. 201 creating the Province of Shariff Kabunsuan. Consequently, we rule that COMELEC Resolution No. 7902 is *VALID*.

Let a copy of this ruling be served on the President of the Senate and the Speaker of the House of Representatives.

SO ORDERED.

Puno, C.J., Quisumbing, Austria-Martinez, Corona, Carpio Morales, Nachura, and *Reyes, JJ.*, concur.

Ynares-Santiago, Azcuna, Chico-Nazario, Leonardo-de Castro, and *Brion, JJ.*, join the separate opinion of Justice Tinga.

Tinga, J., see dissenting and concurring opinion.

Velasco, Jr., J., no part — close relationship to a party.

SEPARATE OPINION

(Dissenting and Concurring)

TINGA, *J.*:

I agree that the petitions should be denied, but on a wholly different basis from that offered by the majority. I cannot accede to the majority's conclusion, burnished by reasoning most strained, that the Regional Assembly of the Autonomous Region of Muslim Mindanao (Regional Assembly) should be deprived of the power delegated to it by Congress to create provinces. With this ruling, the Court has dealt another severe blow to the cause of local autonomy.

Our Constitution, in reflection of the sovereign wisdom of the people, has prescribed local government rule as a tool for

national development and welfare. The majority is unfortunately unmindful of these considerations. The Regional Assembly and the government of the Autonomous Region of Muslim Mindanao exercised constituent functions in establishing the province of Shariff Kabunsuan and providing for its local government. The majority did not bother to hear their side in these petitions, which after all, never put in issue the constitutionality of the creation of the province. The people of Shariff Kabunsuan, by sovereign desire and constitutional design, ratified through a plebiscite the province named in honor of the revered figure who introduced Islam to Central Mindanao. The majority has annihilated the province with nary a word of comfort or concern for its citizens. Sadly, there will be no shelter for the Court from the impact of this decision, which unduly stretches the Constitution to deny the will of the duly elected members of the Regional Assembly, that of the constituents they represent, and most of all, that of the people of Shariff Kabunsuan.

I.

We are dealing with two consolidated petitions which essentially raise the same arguments, but were brought forth by two different parties laboring under different circumstances. The petitioner in G.R. No. 177597, Bai Sandra S.A. Sema, a congressional candidate in the 2007 legislative elections who posits that the newly-created province of Shariff Kabunsuan is entitled to its own exclusive legislative district. The petitioner in G.R. No. 178628, Perfecto F. Marquez, suing in his capacity as a taxpayer and a resident of Cotabato City,[1] argues that with the creation of Shariff Kabunsuan, his home city cannot be conjoined with Shariff Kabunsuan to create just one legislative district for both territories.

As narrated by the majority,[2] four (4) days prior to the 14 May 2007 elections, respondent Commission on Elections (COMELEC) promulgated Resolution No. 7902, whereby it

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[1] G.R. No.178628, *Rollo*, p. 5.

[2] See *ponencia*, *infra*.

resolved to maintain the composition of what had been the First District of Maguindanao, composed of Cotabato City, a chartered city, and several other municipalities, even though these municipalities formerly belonging to Maguindanao have since been constituted as part of the province of Shariff Kabunsuan, which was created by the Regional Assembly by virtue of Muslim Mindanao Autonomy Act No. 201 in August of 2006.

Both petitioners challenge the notion of fusing Cotabato City, which is not a part of ARMM, with the ARMM municipalities which now constitute the new province of Shariff Kabunsuan, into one legislative district. To resolve that question on the merits, it is inevitable that the Court examine the validity of the creation of Shariff Kabunsuan in the first place, and the majority has fully adopted that approach. However, there are significant impediments that weigh down both petitioners, and supply the cogent reason for the more prudent approach which is to dismiss the petitions outright.

It is clear that both petitioners rely on constitutional issues in support of their petitions as they posit that under the Constitution Shariff Kabunsuan is entitled to its own separate legislative district. It is cardinal that the Court's power of judicial review may be exercised in constitutional cases only if all the following requisites are complied with, namely: (1) the existence of an actual and appropriate case or controversy; (2) a personal and substantial interest of the party raising the constitutional question; (3) the exercise of judicial review is pleaded at the earliest opportunity; and (4) the constitutional question is the *lis mota* of the case.[3]

With respect to Sema, it is plainly evident, as argued by private respondent Rep. Didagen P. Dilangalen, that she is estopped from bringing forth the present petition. On 29 March 2007, she filed her Certificate of Candidacy before the COMELEC, declaring her candidacy a Member of the House of Representatives representing "the Province of Shariff Kabunsuan w/ Cotabato

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[3] *Montesclaros, et al., v. Comelec, et al.*, 433 Phil. 620, 633 (2002), citing *Integrated Bar of the Philippines v. Zamora*, 338 SCRA 81 (2000).

City." [4] She recognized under oath that she was seeking election for a legislative district that encompassed both Shariff Kabunsuan and Cotabato City, and she should be consequently barred from disavowing the very district which she undertook to serve if elected. Sema appears to have campaigned for election in this conjoined district, and was accordingly defeated by Dilangalen, her votes from both Shariff Kabunsuan and Cotabato City included in the tally.

It would indeed be difficult to assess injury for purposes of *locus standi* on the part of Sema by reason of the assailed COMELEC Resolution, which after all, reaffirms the very legislative district whose seat in Congress she had sought to be elected to. Her standing to raise the present petition is materially affected by her express consent and active campaign for election from the legislative district which she now seeks to invalidate. A party challenging the constitutionality of a law, act or statute must show "not only that the law is invalid, but also that he or she has sustained or is in immediate, or imminent danger of sustaining some direct injury as a result of its enforcement," that party has been or is about to be, denied some right or privilege to which he or she is lawfully entitled.[5] Sema's prior avowal that she was running for the Shariff Kabunsuan with Cotabato City legislative district, and her campaign for election to that district, belie the existence of injury on her part caused by the COMELEC resolution that affirmed that very legislative district.

On the part of Marquez, he first raised his present claims through the petition in G.R. No. 179608, which was filed with this Court in July 2007, or more than two months after the May 2007 elections. As a result, could no longer ask that the holding of the said elections in the conjoined district be restrained, and instead seeks that new or special elections be conducted.

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[4] *Rollo*, p. 23.

[5] See *e.g.*, *Integrated Bar of the Philippines v. Zamora*, *supra* note 3 at 478.

As earlier noted, among the requisites for the Court to be able to exercise judicial review in constitutional cases is that the exercise of judicial review is pleaded at the earliest possible opportunity.[6] Clearly, his petition was not timely filed at the earliest possible opportunity, which would have been at a point prior to the May 2007 elections. Worse, he filed his petition after the voters in the affected districts had already elected a candidate of their choosing, a sovereign act which he seeks to annul. Considering the grave implications of the step he seeks, as well as the fact that such recourse usually smacks of opportunism and bad faith, it is but proper for the Court to decline review unless all the established requisites for judicial review for constitutional cases have indeed been met. Marquez does not meet this Court's exacting standards.

Moreover, Marquez does not have a valid cause of action before this Court. His prayer is to compel the COMELEC to provide for new congressional elections for Cotabato City.The relief sought does not lie simply because Rep. Dilangalen, by virtue of his electoral victory, lawfully represents the City in addition to the Province of Shariff Kabunsuan. From another perspective, the COMELEC does not have the requisite power to call elections, as the same is part of the plenary legislative power. Only Congress, which was not impleaded as a party to Marquez's petition, has the power to set congressional elections only for Cotabato City, if ever. Even assuming that Congress was impleaded, it would be improper for this Court to compel Congress by judicial fiat to pass a law or resolution for the holding of such elections.

In sum, Marquez's petition should be dismissed outright for having been filed out of time, for lack of cause of action, and for not impleading a real party-in-interest.

II.

One might argue that it is imperative for the Court to resolve the substantive issues, since the situation may emerge again.

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[6] See *Estarija v. Ranada*, G. R. No. 159314, 26 June 2006, 492 SCRA 652, 664 citing *Arceta v. Mangrobang*, G.R. No. 152895, June 15, 2004, 432 SCRA 136, 140.

However, the exception in exercising judicial review if the case is capable of repetition yet evading review applies only if the case is "moot and academic,"[7] and not when the petitioners lack the requisite standing, have no cause of action, and have failed to join a proper party, which is the case here. In addition, it is entirely possible that between now and the next elections, either Congress or the Regional Assembly would pass new legislation concerning the composition or status of Shariff Kabunsuan, thereby changing the legal complexion and factual milieu of the situation. If that occurs, the questions that will be facing the Court then should a challenge be mounted may very well be different from those currently befacing us.

However, it is apparent that the *ponente* wishes to settle these cases on the merits. In doing so, he frames two issues– whether Congress can delegate to the Regional Assembly the power to create provinces; and whether the Regional Assembly has the power to create legislative districts. However, with due respect, the majority's discussion makes quite an easy leap when it abruptly fuses these two issues. Worse, the majority fails to take into account certain fundamental constitutional principles which have immense bearing in these cases. The resulting analysis is incomplete and uninformed of the full constitutional milieu under which these petitions should be resolved.

My own framework firstly considers two important principles which underlie the issues presented before us–the rule on delegation of powers, and the constitutionally-ordained paradigms of local government and local autonomy. Without the influence of these principles, any resulting analysis of the two issues cast by the majority will be atomistic in nature.

III.

The laws we are presently impelled to interpret involve multiple instances of Congress delegating power to the Regional Assembly.

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[7] See *Albaña v. Commission on Elections*, 478 Phil. 941, 949 (2004); *Acop v. Guingona, Jr.*, 433 Phil. 62, 67 (2002); *Sanlakas v. Executive Secretary*, 466 Phil. 482, 505-506.

Explicity, Rep. Act No. 9054 delegates to the Regional Assembly the power to create provinces and other local government units, though subject to certain specified limitations. The majority likewise asserts that through that mechanism, Congress has also delegated to the Regional Assembly the power to create legislative districts.

The fundamental principles on delegation of powers bear review.

The Constitution expressly vests legislative power in the Congress of the Philippines, consisting of a Senate and a House of Representatives.[8] Traditionally, the delegation of Congress of its legislative powers had been frowned upon. "A logical corollary to the doctrine of separation of powers is the principle of non-delegation of powers, as expressed in the Latin maxim *potestas delegata non delegare potest* (what has been delegated cannot be delegated). This is based on the ethical principle that such delegated power constitutes not only a right but a duty to be performed by the delegate through the instrumentality of his own judgment and not through the intervening mind of another."[9]

However, the strict application of the non-delegation doctrine has, in recent times, been relaxed, if not minimized altogether, particularly in the context of regulatory jurisdiction of administrative agencies. In every industrialized nation, administrative agencies, which are generally part of the executive branch, have been granted considerable lawmaking power.[10] "Given the volume and variety of interactions in today's society, it is doubtful if the legislature can promulgate laws that will deal adequately with and respond promptly to the minutiae of everyday life. Hence, the need to delegate to administrative bodies—the principal agencies tasked to execute laws in their specialized fields—the authority to promulgate rules and

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[8] Const., Art. VI, Sec. 1.

[9] *Gerochi v. DOE*, G.R. No. 159796, 17 July 2007, 527 SCRA 696, 719.

[10] G. Stone, L. Seidman, C. Sunstein and M. Tushnet, *CONSTITUTIONAL LAW* (4th ed.), at 365.

regulations to implement a given statute and effectuate its policies."[11]

In the context of delegation of legislative powers to local governments, a noted authority on the subject has this to say:

> The state legislative power – that is, the exercise of the policy-making judgment and discretion on state matters that state constitutions vest and recognize in the legislature – cannot be delegated to some other person or body but must rest with the legislature itself. Thus, the legislature cannot delegate to a commission the power to determine the form of government, powers and functions of proposed municipalities since these matters require legislative judgment. **But the details of organization of its own government can be left to a municipality, limited only by general state law; and such basic state powers as the police power, taxing power, and power of eminent domain can be, and almost always are, delegated to local governments for their use for local purposes. The rule against delegation of state legislative authority is no barrier to the delegation of powers of local self government to local units.** x x x[12]

Notwithstanding the exceptions that have been carved to the rule of non-delegation, it bears notice that while our Constitution broadly endows legislative powers to Congress it also specifically conditions the emergence of certain rights, duties and obligations upon the enactment of a law oriented towards such constitutional predicate. These include the prohibition of political dynasties as may be defined by law,[13] the reasonable conditions prescribed by law relating to full public disclosure of all the State's transactions involving public interest;[14] the manner by which Philippine citizenship may be lost or reacquired;[15] the date of

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[11] *Gerochi v. DOE*, *supra* note 9 at 720.

[12] O. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* (2nd ed., 2001), at 184-185. Emphasis supplied, citations omitted.

[13] CONST., Art. II, Sec. 26.

[14] CONST., Art. II, Sec. 28.

[15] CONST., Art. IV, Sec. 23.

regular elections for members of Congress;[16] the manner of conduct of special elections to fill in congressional vacancies;[17] the authorization of the President to exercise emergency powers;[18] the system for initiative and referendum;[19] the salaries of the President and Vice-President;[20] the creation and allocation of jurisdiction of lower courts;[21] and on many other matters of grave import.

May these specified functions be delegated by Congress to another body? These specific functions are non-delegable, for they are textually committed by the Constitution to Congress. Perhaps it is possible to segregate these particular functions to those which would, even absent constitutional definition, anyway fall within the plenary legislative power, and those which are not plenary in nature but were especially designated to Congress by the Constitution. Still, in either case, only Congress, and no other body, can carry out that function. As to those powers which would normally fall within the plenary legislative power, the Constitution has decided to doubly emphasize that it is the Congress which is so empowered to perform such tasks. With respect to the non-plenary functions assigned to Congress, it is clear that the assignment implies the delegation by the Constitution to Congress of specific, wholly original functions.

There shall be further discussion on this point in relation to the questions currently presented. Before we get there, I wish to emphasize a second constitutional principle, local governance and autonomy, that should likewise bear on our deliberations.

IV.

The 1987 Constitution ushered in a new era in local government rule for all citizens, and local autonomy rule for Muslim Mindanao

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[16] CONST., Art. VI, Sec. 8.

[17] CONST., Art. VI, Sec. 29.

[18] CONST., Art. VI, Sec. 23.

[19] CONST., Art. VI, Sec. 32.

[20] CONST., Art. VII, Sec. 6.

[21] CONST., Art. VIII, Secs. 1 & 2.

and the Cordillera region. This new paradigm is crystallized under Article X of the Constitution.

Section 2, Article X guarantees that the territorial and political subdivisions in the Philippines shall enjoy local autonomy. The guarantee of local autonomy is actualized through a local government code that delineates the structure and powers of local governments, and through constitutional measures that entitle local government units to generate their own revenue stream and assure the same to their fair share in the national internal revenue.[22] Local government rule, in constitutional contemplation, is a live being that exists to counterbalance the rule of the national government, and is not a mere palliative established in the Constitution to soothe the people with the illusion of having a more direct say in their governance.

By constitutional design, local government rule for the people of Muslim Mindanao and the Cordilleras is even more enhanced, as they are assured of their own autonomous regions. Section 15, Article X of the Constitution mandated that "[t]he (sic) shall be created autonomous regions in Muslim Mindanao and in the Cordilleras consisting of provinces, cities, municipalities, and geographical areas sharing common and distinctive historical and cultural heritage, economic and social structures, and other relevant characteristics…" Following the Constitution, Congress in 1989 passed Republic Act No. 6734, "An Act Providing for An Organic Act for the Autonomous Region in Muslim Mindanao," leading to the creation of the ARMM. In 2001, Congress further strengthened the Organic Act with the passage of Rep. Act No. 9054, which among others, empowered the Assembly to create provinces. The Organic Acts possess a special status within Philippine laws. While they are classified as statutes, the Organic Acts are more than ordinary statutes because they enjoy affirmation by a plebiscite, and thus could not be amended by ordinary statutes without any plebiscite.[23]

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[22] See Art. X, Secs. 5, 6 and 7.

[23] *Disomangcop v. Datumanong*, G.R. No. 149848, 25 November 2004, 444 SCRA 203.

In *Disomangcop v. Datumanong*,[24] the Court explained at length the vital constitutional purposes of local autonomy:

> xxx According to Commissioner Jose Nolledo, Chairman of the Committee which drafted the provisions, it "is an indictment against the status quo of a unitary system that, to my mind, has ineluctably tied the hands of progress in our country . . . our varying regional characteristics are factors to capitalize on to attain national strength through decentralization."
>
> The idea behind the Constitutional provisions for autonomous regions is to allow the separate development of peoples with distinctive cultures and traditions. These cultures, as a matter of right, must be allowed to flourish.
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> x x x x x x x x x
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> Several commissioners echoed the pervasive sentiment in the plenary sessions in their own inimitable way. Thus, Commissioner Blas Ople referred to the recognition that the Muslim Mindanao and the Cordilleras "do not belong to the dominant national community" as the justification for conferring on them a "measure of legal self-sufficiency, meaning self-government, so that they will flourish politically, economically and culturally," with the hope that after achieving parity with the rest of the country they would "give up their own autonomous region in favor of joining the national mainstream." For his part, the Muslim delegate, Commissioner Ahmad Alonto, spoke of the diversity of cultures as the framework for nation-building. Finally, excerpts of the poignant plea of Commissioner Ponciano Bennagen deserve to be quoted verbatim:
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> > . . . They see regional autonomy as the answer to their centuries of struggle against oppression and exploitation. For so long, their names and identities have been debased. Their ancestral lands have been ransacked for their treasures, for their wealth. Their cultures have been defiled, their very lives threatened, and worse, extinguished, all in the name of national development; all in the name of public interest; all in the name of common good; all in the name of the right to property; all in the name of Regalian Doctrine; all in the name of national security. These phrases have meant nothing to our indigenous communities, except for the violation of their human rights.

[24] *Supra* note 23.

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> Honorable Commissioners, we wish to impress upon you the gravity of the decision to be made by every single one of us in this Commission. We have the overwhelming support of the Bangsa Moro and the Cordillera Constitution. By this we mean meaningful and authentic regional autonomy. We propose that we have a separate Article on the autonomous regions for the Bangsa Moro and Cordillera people clearly spelled out in this Constitution, instead of prolonging the agony of their vigil and their struggle. This, too is a plea for national peace. Let us not pass the buck to the Congress to decide on this. Let us not wash our hands of our responsibility to attain national unity and peace and to settle this problem and rectify past injustices, once and for all.

The need for regional autonomy is more pressing in the case of the Filipino Muslims and the Cordillera people who have been fighting for it. Their political struggle highlights their unique cultures and the unresponsiveness of the unitary system to their aspirations. The Moros' struggle for self-determination dates as far back as the Spanish conquest in the Philippines. Even at present, the struggle goes on.

Perforce, regional autonomy is also a means towards solving existing serious peace and order problems and secessionist movements. Parenthetically, autonomy, decentralization and regionalization, in international law, have become politically acceptable answers to intractable problems of nationalism, separatism, ethnic conflict and threat of secession.[25]

Petitioner Sema points out that among the terms in the Final Peace Agreement between the Philippine Government and the Moro National Liberation Front was that amendments be introduced to the original Organic Act, including one which authorized the Assembly to "create, divide, merge, abolish or substantially alter boundaries of local government units in the area of autonomy in accordance with the criteria laid down by law subject to approval by a majority of the votes cast in a plebiscite called for the purpose in the political units affected."[26]

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[25] *Id*. at 227-229.

[26] G.R. No. 177597, *Rollo*, pp. 217-218.

Indeed, it could hardly be argued that the challenged power of the Assembly was animated by nakedly selfish political purposes. It was, in fact, among the terms negotiated with care by the Philippine Government with the leading armed insurgency group in Muslim Mindanao towards the higher purpose of providing a permanent peace agreement in the strife-torn region. It does come with a measure of surprise and disappointment that the Solicitor General has reached a position that rejects the Final Peace Agreement negotiated by the Government and the MNLF.

Disomangcop further crystallizes the interplay between regional autonomy and national sovereignty, to the extent that the former is accommodated under the latter.

> Regional autonomy is the degree of self-determination exercised by the local government unit *vis-à-vis* the central government.
>
> In international law, the right to self-determination need not be understood as a right to political separation, but rather as a complex net of legal-political relations between a certain people and the state authorities. It ensures the right of peoples to the necessary level of autonomy that would guarantee the support of their own cultural identity, the establishment of priorities by the community's internal decision-making processes and the management of collective matters by themselves.
>
> If self-determination is viewed as an end in itself reflecting a preference for homogeneous, independent nation-states, it is incapable of universal application without massive disruption. However, if self-determination is viewed as a means to an end — that end being a democratic, participatory political and economic system in which the rights of individuals and the identity of minority communities are protected — its continuing validity is more easily perceived.
>
> Regional autonomy refers to the granting of basic internal government powers to the people of a particular area or region with least control and supervision from the central government.
>
> The objective of the autonomy system is to permit determined groups, with a common tradition and shared social-cultural characteristics, to develop freely their ways of life and heritage, exercise their rights, and be in charge of their own business. This is achieved through the establishment of a special governance regime

for certain member communities who choose their own authorities from within the community and exercise the jurisdictional authority legally accorded to them to decide internal community affairs.

In the Philippine setting, regional autonomy implies the cultivation of more positive means for national integration. It would remove the wariness among the Muslims, increase their trust in the government and pave the way for the unhampered implementation of the development programs in the region. Again, even a glimpse of the deliberations of the Constitutional Commission could lend a sense of the urgency and the inexorable appeal of true decentralization:

> MR. OPLE. . . We are writing a Constitution, of course, for generations to come, not only for the present but for our posterity. There is no harm in recognizing certain vital pragmatic needs for national peace and solidarity, and the writing of this Constitution just happens at a time when it is possible for this Commission to help the cause of peace and reconciliation in Mindanao and the Cordilleras, by taking advantage of a heaven-sent opportunity. . .
>
> x x x x x x x x x x x x
>
> MR. ABUBAKAR. . . So in order to foreclose and convince the rest of the of the Philippines that Mindanao autonomy will be granted to them as soon as possible, more or less, to dissuade these armed men from going outside while Mindanao will be under the control of the national government, let us establish an autonomous Mindanao within our effort and capacity to do so within the shortest possible time. This will be an answer to the Misuari clamor, not only for autonomy but for independence.
>
> x x x x x x x x x x x x
>
> MR. OPLE. . . The reason for this abbreviation of the period for the consideration of the Congress of the organic acts and their passage is that we live in abnormal times. In the case of Muslim Mindanao and the Cordilleras, we know that we deal with questions of war and peace. These are momentous issues in which the territorial integrity and the solidarity of this country are being put at stake, in a manner of speaking.
>
> We are writing a peace Constitution. We hope that the Article on Social Justice can contribute to a climate of peace so that any civil strife in the countryside can be more quickly and

> more justly resolved. We are providing for autonomous regions so that we give constitutional permanence to the just demands and grievances of our own fellow countrymen in the Cordilleras and in Mindanao. One hundred thousand lives were lost in that struggle in Mindanao, and to this day, the Cordilleras is being shaken by an armed struggle as well as a peaceful and militant struggle.
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> x x x x x x x x x
>
> Rather than give opportunity to foreign bodies, no matter how sympathetic to the Philippines, to contribute to the settlement of this issue, I think the Constitutional Commission ought not to forego the opportunity to put the stamp of this Commission through definitive action on the settlement of the problems that have nagged us and our forefathers for so long.[27]

A necessary prerequisite of autonomy is decentralization, which typically involves delegated power wherein a larger government chooses to delegate certain authority to more local governments.[28] Decentralization of power involves an abdication of political power in the favor of local government units declared to be autonomous, which are free to chart their own destiny and shape their future with minimum intervention from central authorities.[29] What the Constitution contemplated with respect to the ARMM was political autonomy. As explained by Justice Cortes for the Court:

> It must be clarified that the constitutional guarantee of local autonomy in the Constitution [Art. X, Sec. 2] refers to the administrative autonomy of local government units or, cast in more technical language, the decentralization of government authority [*Villegas v. Subido*, G.R. No. L-31004, January 8, 1971, 37 SCRA 1]. Local autonomy is not unique to the 1987 Constitution, it being guaranteed also under the 1973 Constitution [Art. II, Sec. 10]. And while there was no express guarantee under the 1935 Constitution,

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[27] *Id*. at 230-232.

[28] *Disomangcop v. Datumanong*, *supra* note 23 at 233.

[29] *Limbona v. Mangelin*, G.R. No. 80391, 28 February 1989, 170 SCRA 786, 794–795.

the Congress enacted the Local Autonomy Act (R.A. No. 2264) and the Decentralization Act (R.A. No. 5185), which ushered the irreversible march towards further enlargement of local autonomy in the country [*Villegas v. Subido, supra*.]

On the other hand, the creation of autonomous regions in Muslim Mindanao and the Cordilleras, which is peculiar to the 1987 Constitution, contemplates the grant of political autonomy and not just administrative autonomy to these regions. Thus, the provision in the Constitution for an autonomous regional government with a basic structure consisting of an executive department and a legislative assembly and special courts with personal, family and property law jurisdiction in each of the autonomous regions [Art. X, Sec. 18].[30]

Disomangcop further elaborates on the import of political autonomy as it relates to the ARMM:

[B]y regional autonomy, the framers intended it to mean "meaningful and authentic regional autonomy." As articulated by a Muslim author, substantial and meaningful autonomy is "the kind of local self-government which allows the people of the region or area the power to determine what is best for their growth and development without undue interference or dictation from the central government."

To this end, Section 16, Article X limits the power of the President over autonomous regions. In essence, the provision also curtails the power of Congress over autonomous regions. Consequently, Congress will have to re-examine national laws and make sure that they reflect the Constitution's adherence to local autonomy. And in case of conflicts, the underlying spirit which should guide its resolution is the Constitution's desire for genuine local autonomy.

The diminution of Congress' powers over autonomous regions was confirmed in *Ganzon v. Court of Appeals*[31],wherein this Court held that "the omission (of "as may be provided by law") signifies nothing more than to underscore local governments' autonomy from Congress and to break Congress' 'control' over local government affairs."[32]

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[30] *Cordillera Broad Coalition v. Commission on Audit*, G.R. Nos. 79956 and 82217, 29 January 1990, 181 SCRA 495, 506.

[31] G.R. Nos. 93252, 93746, 95245, 5 August 1991, 200 SCRA 271, 281.

[32] *Disomangcop v. Datumanong*, *supra* note 23, at 235-236.

Unfortunately, the majority gives short shrift to the considerations of local autonomy, even as such paradigm partakes of a constitutional mandate. If anything, these provisions should dissuade against a reflexive dismissal of the provisions of the Organic Acts. It should be emphasized that local autonomy cannot be in denigration of the Constitution. It is repeatedly emphasized within Article X that the grant of local autonomy and the subsequent exercise of powers by the autonomous government must remain within the confines of the Constitution. At the same time, if there is no constitutional bar against the exercise of the powers of government by the autonomous government in Muslim Mindanao, particularly by the Regional Assembly, then there is no basis to thwart the constitutional design by denying such powers to that body.

Having laid down the essential constitutional predicates, I shall proceed to dwell on the core issues raised. May Congress delegate to the Regional Assembly the power to create provinces? Assuming that such delegation is not barred by the Constitution, may the exercise of such power by the Regional Assembly give rise to separate legislative districts for such provinces thus created?

V.

There should be little debate on the origins of the power to create provinces, which had existed as a political unit in the Philippines since the Spanish colonial period, and which all our Constitutions have recognized as a basic level of local governments. Ever since the emergence of our tripartite system of democratic government, the power to create provinces have always been legislative in character. They are created by the people through their representatives in Congress, subject to direct affirmation by the very people who stand to become the constituents of the new putative province.

May such power be delegated by Congress to a local legislative body such as the Regional Assembly? Certainly, nothing in the Constitution bars Congress from doing so. In fact, considering the constitutional mandate of local autonomy for Muslim Mindanao, it can be said that such delegation is in furtherance of the constitutional design.

The only constitutional provision that concerns with the creation of provinces is Section 10, Article X, which reads:

> Section 10. No province, city, municipality or *barangay* may be created, divided, merged, abolished, or its boundary substantially altered, except in accordance with the criteria established in the local government code and subject to approval by a majority of the votes cast in a plebiscite in the political units directly affected.

Nothing in this provision specifically limits the power to create provinces, cities, municipalities or *barangays* to Congress alone. The provision does embody a significant limitation – that the creation of these political subdivisions must be in accordance with the criteria established in the local government code, a law which is enacted by Congress. It would thus be proper to say that the Constitution limits the ability to set forth the standards for the creation of a province exclusively to Congress. But to say that the Constitution confines to Congress alone the power to establish the criteria for creating provinces is vastly different from saying that the Constitution confines to Congress alone the power to create provinces. There is nothing in the Constitution that supports the latter proposition.

Section 10, Article X does not specifically designate Congress as the body with the power to create provinces. As earlier stated, the power to create these political subdivisions is part of the plenary legislative power, hence such power can be exercised by Congress even without need of specific constitutional assignation. At the same time, the absence of constitutional language committing Congress with the function of creating political subdivisions ultimately denotes that such legislative function may be delegated by Congress.

In fact, the majority actually concedes that Congress, under its plenary legislative powers, "can delegate to local legislative bodies the power to create local government units, subject to reasonable standards and provided no conflict arises with any provision of the Constitution."[33] As pointed out, such delegation

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[33] *Id.* at 17.

is operationalized by the LGC itself, which confers to provincial boards and city and municipal councils, the general power to create *barangays* within their respective jurisdictions. The Constitution does not confine the exercise of such powers only to the national legislature, and indeed if that were the case, the power to create *barangays* as granted by the LGC to local legislative bodies would be unconstitutional.

Traditionally, it has been the national legislature which has exercised the power to create provinces. However, the 1987 Constitution ushered in a new era in devolved local government rule, and particularly, a regime of local autonomy for Muslim Mindanao and the Cordilleras. We recognized in *Disomangcop v. Datumanong,* thus:

> Autonomy, as a national policy, recognizes the wholeness of the Philippine society in its ethnolinguistic, cultural, and even religious diversities. It strives to free Philippine society of the strain and wastage caused by the assimilationist approach. Policies emanating from the legislature are invariably assimilationist in character despite channels being open for minority representation. As a result, democracy becomes an irony to the minority group.[34]

It bears reemphasizing that the Constitution also actualizes a preference for local government rule, and thusly provides:

> The Congress shall enact a local government code which shall provide for **a more responsive and accountable local government structure instituted through a system of decentralization** with effective mechanisms of recall, initiative, and referendum, **allocate among the different local government units their powers, responsibilities, and resources, and provide for the qualifications, election, appointment and removal, term, salaries, powers and functions and duties of local officials, and all other matters relating to the organization and operation of the local units**.[35]

Attuned with enhanced local government rule, Congress had, through Rep. Act No. 9054, taken the bold step of delegating

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[34] *Supra* note 23, at 227.

[35] Const., Art. X, Sec. 3.

to a local legislative assembly the power to create provinces, albeit prudently withholding any ability to create legislative districts as well. Section 19 of Rep. Act No. 9054 reads:

> Section 19. *Creation, Division or Abolition of Provinces, Cities, Municipalities or Barangay*. The Regional Assembly may create, divide, merge, abolish, or substantially alter boundaries of provinces, cities, municipalities, or *barangays* in accordance with the criteria laid down by the Republic Act No. 7160, the Local Government Code of 1991, subject to the approval by the majority of the votes cast in the plebiscite in the political units directly affected. The Regional Assembly may prescribe standards lower than those mandated by Republic Act No. 7160, the Local Government Code of 1991, in the creation, division, merger, abolition, or alteration of the boundaries of provinces, cities, municipalities, or *barangay*. Provinces, cities, municipalities, or *barangays* created, divided, merged, or whose boundaries are altered without observing the standards prescribed by Republic Act No. 7160, the Local Government Code of 1991, shall not be entitled to any share of the taxes that are allotted to the local governments units under the provisions of the code.
>
> The financial requirements of the provinces, cities and municipalities, or *barangays* so created, divided, merged shall be provided by the Regional Assembly out of the general funds of the Regional Government.
>
> The holding of a plebiscite to determine the will of the majority of the voters of the areas affected by the creation, division, merger, or whose boundaries are being altered as required by Republic Act No. 7160, the Local Government Code of 1991, shall, however, be observed.

Because this empowerment scheme is in line with a policy preferred by the Constitution, it becomes utterly necessary to pinpoint a specific constitutional prohibition that bars Congress from authorizing the Regional Assembly to create provinces. **No such constitutional limitation exists, and it is not the province, duty or sensible recourse of this Court to nullify an act of Government in furtherance of a constitutional mandate and directly ratified by the affected people if nothing in the Constitution proscribes such act.**

The constitutionality of the delegated power of the Regional Assembly to create provinces is further affirmed by the provisions in the Constitution concerning the mandatory creation of autonomous regions in Muslim Mindanao, as found in Sections 15 to 21, Article X. The organic act enacted by Congress for the autonomous region is to define the basic structure of government.[36] Section 20 specifically allows the organic act of autonomous regions to provide for legislative powers over, among others, administrative organization; creation of sources of revenues; economic, social and tourism development; and such other matters as may be authorized by law for the promotion of the general welfare of the people of the region. The creation of provinces within the autonomous region precisely assists these constitutional aims under Section 20, enhancing as it does the basic administration of government, the delivery of government services, and the promotion of the local economy.

In addition, Section 17, Article X states that "[a]ll powers, functions, and responsibilities not granted by this Constitution or by law to the autonomous regions shall be vested in the National Government." The original Organic Act for Muslim Mindanao did not grant to the regional government the power to create provinces, thus at that point, such power was properly exercised by the National Government. But the subsequent passage of Rep. Act No. 9054 granted to the Regional Assembly the power, function and responsibility to create provinces and other local government units which had been exercised by the National Government.

The majority does not point to any specific constitutional prohibition barring Congress from delegating to the Regional Assembly the power to create provinces. It does cite though that Article 460 of the LGC provides that only by an Act of Congress may a province be created, divided, merged, abolished or its boundary substantially altered. However, Republic Act No. 9054, which was passed ten (10) years after the LGC, unequivocally granted to the ARMM Regional Assembly the

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[36] CONST., Art. X, Sec. 18.

power to create provinces, cities, municipalities and *barangays* within the ARMM.

Any argument that the LGC confines to Congress the creation of provinces is muted by the fact that ten years after the LGC was enacted by Congress, the same legislative body conferred on the Assembly that same power within its territorial jurisdiction, thus amending the LGC to the extent of accommodating these newly-granted powers to the Assembly.

There actually is an obvious unconstitutional dimension to Section 19, albeit one which is not in point in this case. The provision states in part "[t]hat Regional Assembly may prescribe standards lower than those mandated by Republic Act No. 7160, the Local Government Code of 1991, in the creation, division, merger, abolition, or alteration of the boundaries of provinces, cities, municipalities, or *barangays*." That proviso is squarely inconsistent with Section 10, Article X, which accords to the LGC the sole criteria for the creation, division, merger, abolition or alteration of boundaries of local government units. Said proviso thus cannot receive recognition from this Court.

It bears noting that there is no contention presented thus far that the creation of Shariff Kabunsuan was not in accordance with the criteria established in the LGC, thus this aspect of unconstitutionality of Rep. Act No. 9054 may not be material to the petitions at bar.

VI.

The majority unfortunately asserts that Congress may not delegate to the Regional Assembly the power to create provinces, despite the absence of any constitutional bar in that respect. The reasons offered for such conclusion are actually the same reasons it submits why the Regional Assembly could not create legislative districts, as if the power to create provinces and the power to create legislative districts were one and the same. In contrast, I propose to pinpoint a specific constitutional provision that prohibits the Regional Assembly from creating, directly or indirectly, any legislative district without affecting that body's delegated authority to create provinces.

Let us review this issue as presented before us. Notably, Republic Act No. 9054 does not empower the Regional Assembly to create legislative districts, and MMA Act No. 201, which created Shariff Kabunsuan, specifically disavows the creation of a new district for that province and maintains the old legislative district shared with Cotabato City. It is the thesis though of the petitioners that following *Felwa v. Salas*,[37] the creation of the new province *ipso facto* established as well an exclusive legislative district for Shariff Kabunsuan, "by operation of the Constitution."

How exactly does a legislative district come into being? In theory, Congress does not have any express or plenary legislative power to create legislative districts, except by reapportionment. Under the Constitution, such reapportionment occurs within three years following the return of the census,[38] but this Court has likewise recognized that reapportionment can also be made through a special law, such as in the charter of a new city.[39] Still, even in exercising this limited power through the constitutionally mandated reapportionment, Congress cannot substitute its own discretion for the standards set forth in Section 5, Article VI. And should general reapportionment made by Congress violate the parameters set forth by the Constitution, such act may be invalidated by the Court, as it did in *Macias v. COMELEC*.[40]

There is another constitutional provision which is of critical importance in considering limitations in the creation of legislative districts. Section 5(1), Article VI states that "**[t]he House of Representatives shall be composed of not more than two hundred fifty members, unless otherwise fixed by law**.**"** The provision textually commits that only through a law may the numerical composition of Congress may be increased or reduced.

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[37] 124 Phil. 1226 (1966).

[38] See CONST., Art. VI, Sec. 5(1).

[39] See *Mariano v. COMELEC*, G.R. Nos. 118577 & 118627, 7 March 1995, 242 SCRA 211, 217.

[40] 113 Phil. 1 (1961).

The Court has previously recognized that such law increasing the membership of the House of Representatives need not be one specifically devoted for that purpose alone, but it may be one that creates a province or charters a city with a population of more than 250,000. In *Tobias v. Abalos*,[41] the Court pronounced that the law converting Mandaluyong into a city could likewise serve the purpose of increasing the composition of the House of Representatives:

> As to the contention that the assailed law violates the present limit on the number of representatives as set forth in the Constitution, a reading of the applicable provision, Article VI, Section 5 (1), as aforequoted, shows that the present limit of 250 members is not absolute. The Constitution clearly provides that the House of Representatives shall be composed of not more than 250 members, "unless otherwise provided by law." The inescapable import of the latter clause is that the present composition of Congress may be increased, if Congress itself so mandates through a legislative enactment. Therefore, the increase in congressional representation mandated by R.A. No. 7675 is not unconstitutional.[42]

This point was reemphasized by the Court in *Mariano v. COMELEC*:[43]

> These issues have been laid to rest in the recent case of *Tobias v. Abalos*. In said case, we ruled that reapportionment of legislative districts may be made through a special law, such as in the charter of a new city. The Constitution clearly provides that Congress shall be composed of not more than two hundred fifty (250) members, unless otherwise fixed by law. As thus worded, the Constitution did not preclude Congress from increasing its membership by passing a law, other than a general reapportionment law. This is exactly what was done by Congress in enacting R.A. No. 7854 and providing for an increase in Makati's legislative district.[44]

From these cases, it is evident that a law creating the province of Shariff Kabunsuan may likewise serve the purpose of increasing

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[41] G.R. No. 114783, 8 December 1994, 239 SCRA 106.

[42] *Id.*, at 112.

[43] G.R. Nos. 118577 and 118627, 7 March 1995, 242 SCRA 211.

[44] *Id.* at 217.

the composition of the House of Representatives. In addition, Congress generally has the power to delegate the power of creating local government units to the appropriate local legislative assemblies. The critical question now is thus whether Congress may delegate to local legislative assemblies the power to increase the composition of the House of Representatives? The answer is no.

I have already pointed out that when the Constitution specifically designates a particular function to Congress, only Congress may exercise such function, as the same is non-delegable. The power to increase the composition of the House of Representatives is restricted by the Constitution to a law passed by Congress, which may not delegate such law-making power to the Regional Assembly. If we were to rule that Congress may delegate the power to increase the composition of the House of Representatives, there would be no impediment for us to similarly rule that those other specific functions tasked by the Constitution to Congress may be delegated as well. To repeat, these include gravely important functions as the enactment of a law defining political dynasties; the enactment of reasonable conditions relating to full public disclosure of all the State's transactions involving public interest; the manner by which Philippine citizenship may be lost or reacquired; the date of regular elections for members of Congress; the provision for the manner of conduct of special elections to fill in congressional vacancies; the authorization of the President to exercise emergency powers; the prescription of a system for initiative and referendum; the salaries of the President and Vice-President; and the creation and allocation of jurisdiction of lower courts.

Considering that all these matters, including the composition of the House of Representatives, are of national interest, it is but constitutionally proper that only a national legislature has the competence to exercise these powers. And the Constitution does textually commit to Congress alone the power to increase the membership of the House of Representatives.

Accordingly, the petitioners' position cannot be sustained, as Shariff Kabunsuan cannot acquire its own legislative district

unless Congress itself accedes to the passage of a law that establishes the same. The contrary position is in denigration of the Constitution, which limits to Congress alone the non-delegable power to fix or increase the composition of the House of Representatives. For that, I concur with the result of the majority.

Felwa cannot apply to these petitions. Its pronouncement that the creation of a province automatically leads to the creation of a legislative district "by operation of the Constitution" can only apply when the province is created by Congress itself, since there is no other constitutional impediment to the emergence of the legislative district. However, in cases where it is a body other than Congress which has created, although validly, the legislative district, the Constitution itself bars the emergence of an accompanying legislative district, as this will result in an increase in the composition of the House of Representatives which can only be accomplished through a law passed by Congress.

VII.

Even as Section 19 of Rep. Act No. 9054 constitutionally authorizes the Regional Assembly to create provinces, there are legal limitations that constrict the discretion of that body to exercise such power. I had earlier identified as unconstitutional the discretion of the Regional Assembly to create local government units based on a lower standard than that prescribed under the LGC. Another clear limitation is that the creation of provinces cannot be authorized without the ratification through a plebiscite by the people affected by such act, a requirement imposed by the Organic Act itself and by Section 10, Article X of the Constitution.

The majority itself had raised an alarmist tone that allowing the Assembly to create provinces would not lead to the unholy spectacle of whimsical provinces intended as personal fiefdoms and created irrespective of size, shape and sense. In fact, allowing the Regional Assembly to create provinces will not lead to hundreds or thousands, or even tens or dozens of new provinces. Any new province will have to meet the same criteria set forth by the LGC for the creation of provinces.

To stress how implausible the scenario of dozens-hundreds-thousands of ARMM provinces actually is, it bears reviewing what exactly is the criteria set forth under the LGC for the creation of provinces. An Assembly-created province, just as with any other putative province, following Section 461 of the LGC, must possess the following requisites: (a) an average annual income, as certified by the Department of Finance, of not less than Php20,000,000.00, such income including the income accruing to the general fund, exclusive of special funds, trust funds, transfers, and non-recurring income; (b) a contiguous territory of at least two thousand (2,000) square kilometers, as certified by the Lands Management Bureau (excepting when comprised of two (2) or more islands or when separated by a chartered city or cities which do not contribute to the income of the province), or a population of not less than 250,000 inhabitants as certified by the National Statistics Office; (c) that the creation of the province shall not reduce the land area, population, and income of the original unit or units at the time of said creation to less than the minimum requirements prescribed under the Code. These standards, which should bear upon the Assembly, would preclude the emergence of dozens, hundreds or thousands of provinces within the relatively confined spaces of the present Autonomous Region of Muslim Mindanao.

IX.

The concerns raised by the majority on how allowing the Assembly to create provinces would affect the composition of the national Congress are valid issues, yet the approach it adopts is to treat autonomy as invisible and inconsequential, instead of the countervailing constitutional principle that it actually is. It is an approach that will exacerbate political and regional tensions within Mindanao, especially since it shuns the terms of the negotiated peace. This decision today, sad to say, is a decisive step backwards from the previous rulings of this Court that have been supportive of the aims of regional autonomy.

Except for the result, which I join, I respectfully dissent.

INDEX

INDEX

— Failure to invoke the privileged character of the Japan-Philippines Economic Partnership Agreement (JPEPA) documents during the House Committee hearings may not be construed as a waiver thereof by the executive branch. *(Id.)*

EXPROPRIATION

Just compensation — Reckoning date for the computation thereof. (Tiongson *vs*. NHA, G.R. No. 140377, July 14, 2008) p. 51

FORUM SHOPPING

Existence of — Cited. (Talidano *vs*. Falcon Maritime & Allied Services, Inc., G.R. No. 172031, July 14, 2008) p. 256

GUARANTY

Guarantor — Circumstances binding a party as a guarantor. (De Los Santos *vs*. Dr. Vibar, G.R. No. 150931, July 16, 2008) p. 393

HEARSAY RULE, EXCEPTIONS TO

Part of the res gestae — Fax messages cannot be deemed part of the res gestae. (Talidano *vs*. Falcon Maritime & Allied Services, Inc., G.R. No. 172031, July 14, 2008) p. 256

HUMAN RELATIONS

Concept of a mechanic's lien — Provides that he who executed a work upon a movable has the right to retain it by way of pledge until he is paid. (Optimum Motor Center Corp. *vs*. Tan, G.R. No. 170202, July 14, 2008) p. 244

JUDGES

Duties — A judge should decide a case within the reglementary period but an extension of time to decide the said case may be requested. (Lagamon *vs*. Judge Paderanga, A.M. No. RTJ-08-2123, July 14, 2008) p. 46

Gross inefficiency — Delay in deciding a case without requesting for an extension of time to decide the said case constitutes gross inefficiency warranting the imposition of administrative sanctions. (Lagamon *vs*. Judge Paderanga, A.M. No. RTJ-08-2123, July 14, 2008) p. 46

. Re

— Elucidated. *(Id.)*

RIGHTS OF THE ACCUSED

Right against double jeopardy — Verdicts of acquittal are to be regarded as absolutely final and irreviewable. (People *vs*. Terrado, G.R. No. 148226, July 14, 2008) p. 79

RULES OF PROCEDURE

Application of — Applied in the interest of substantial justice. (Honda Cars Makati, Inc. *vs*. CA, G.R. No. 165359, July 14, 2008) p. 190

SALES

Simulated sale — To be considered a valid donation, positive proof is required. (Ting Ho, Jr. *vs*. Teng Gui, G.R. No. 130115, July 16, 2008) p. 378

SEPARATION PAY

Award of — Discussed. (Central Phils. Bandag Retreaders, Inc. *vs*. Diasnes, G.R. No. 163607, July 14, 2008) p. 177

SHERIFFS

Duties — The duty to execute the judgment and make a return on the writ of execution within the period provided by the Rules is mandatory. (Atty. Lacambra, Jr. *vs*. Perez, A.M. No. P-08-2430, July 14, 2008) p. 33

Neglect of duty — Imposable penalty. (Atty. Lacambra, Jr. *vs*. Perez, A.M. No. P-08-2430, July 14, 2008) p. 33

TEMPERATE DAMAGES

Award of — Proper upon finding that pecuniary loss has been suffered but the amount cannot be proven with certainty. (Optimum Motor Center Corp. *vs*. Tan, G.R. No. 170202, July 14, 2008) p 244

CITATION

Page

I. LOCAL CASES

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

II. FOREIGN CASES

Page

Page

Page

REFERENCES

I. LOCAL AUTHORITIES

A. CONSTITUTION

Page

B. STATUTES

Page

Page

Page

Page

Page

C. OTHERS

D. BOOKS
(Local)

Page

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II. FOREIGN AUTHORITIES

A. STATUTES

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Art. II, Sec. 2 494
Sec. 2, cl. 2 526
Compare Trade Act of 1974 535
Omnibus Trade and Competitiveness Act of 1988 535
Reciprocal Trade Agreement Act of 1934 529
Smoot-Hawley Tariff Act 528
Trade Act of 1974 ..... 529, 531, 567
Trade Agreements Act of 1934 565

B. BOOKS

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Page