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PHILIPPINES

FROM

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MANILA
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REPORT OF CASES

DETERMINED IN THE

SUPREME COURT OF THE PHILIPPINES

THIRD DIVISION

[A.C. No. 5955. September 8, 2009]

JOHN CHRISTEN S. HEGNA, *complainant, vs.* **ATTY. GOERING G.C. PADERANGA,** *respondent.*

SYLLABUS

1. LEGAL ETHICS; ATTORNEYS; GROUNDS FOR DISBARMENT OR SUSPENSION. — Under Section 27 of Rule 138 of the Rules of Court, a member of the Bar may be disbarred or suspended on any of the following grounds: (1) deceit; (2) malpractice or other gross misconduct in office; (3) grossly immoral conduct; (4) conviction of a crime involving moral turpitude; (5) violation of the lawyer's oath; (6) willful disobedience of any lawful order of a superior court; and (7) willfully appearing as an attorney for a party without authority. In the present case, the Court finds respondent administratively liable for engaging in dishonest and deceitful conduct.

2. ID.; ID.; ID.; RESPONDENT VIOLATED RULE 1.01 OF THE CODE OF PROFESSIONAL RESPONSIBILITY WHICH PROVIDES THAT A LAWYER SHALL NOT ENGAGE IN UNLAWFUL, DISHONEST, IMMORAL OR DECEITFUL CONDUCT. — The Court is more inclined to believe that when complainant and defendants-spouses failed to reach an agreement, respondent came forward as a third-party claimant to prevent the levy and execution of said properties. He, therefore, violated Rule 1.01 of the Code of Professional Responsibility, which provides that a lawyer shall not engage

in unlawful, dishonest, immoral or deceitful conduct. Under this rule, conduct has been construed not to pertain exclusively to the performance of a lawyer's professional duties. In previous cases, the Court has held that a lawyer may be disbarred or suspended for misconduct, whether in his professional or private capacity, which shows him to be wanting in moral character, honesty, probity and good demeanor; or unworthy to continue as an officer of the court.

3. ID.; ID.; ID.; RESPONDENT'S NON-REGISTRATION OF THE SALE TRANSACTION SHOWS AN INTENT TO DEFRAUD THE GOVERNMENT, WHICH HAD THE RIGHT TO COLLECT REVENUE FROM HIM, AS WELL AS FROM OTHER PERSONS WHO MAY HAVE AN INTEREST IN SAID PROPERTIES. — In the falsification case earlier filed, complainant was able to cite several irregularities in the documents evidencing the deeds of sale in question: the non-registration by respondent of the sale transactions; a Community Tax Certificate number appearing on said deeds which was different from that issued to defendant Ma. Teresa Panaguinip; and the erasures of the entries pertaining to said deeds from the Notarial Register. Of these irregularities, only one can directly be attributable to respondent — his non-registration of the sale transaction. He argues that the sales were valid despite non-registration, and maintained that it was perfectly normal and regular for a lawyer like him to choose not to register and cause the transfer of title of the land and the FUSO jeepney after the execution of the Deeds of Sale, so the transactions would not appear in the records of the Bureau of Internal Revenue, the City Assessor or the Register of Deeds, on the Land Registration Office. He added that he had also bought four lots, which had not yet been transferred to his name, for estate planning or speculation purposes. He claimed that he found it legally wise not to immediately register after buying so that he would not pay for the expenses of the sale and transfer twice, once he decided to sell; or place them in his children's name, and avoid paying estate and inheritance taxes upon his death. While the act of registration of a document is not necessary in order to give it legal effect as between the parties, requirements for the recording of the instruments are designed to prevent frauds and to permit and require the public to act with the presumption that a recorded instrument exists and is genuine. However, while the RTC was correct in holding that

said omission on respondent's part may not be considered falsification, he had shown an intent to defraud the government, which had the right to collect revenue from him, as well as from other persons who may have an interest in said properties.

4. ID.; ID.; ID.; RESPONDENT'S ACT OF NON-REGISTRATION OF THE DEEDS OF SALE TO AVOID PAYING TAX MAY NOT BE ILLEGAL, *PER SE*, BUT, AS SERVANT OF THE LAW, A LAWYER SHOULD MAKE HIMSELF AN EXEMPLAR FOR OTHERS TO EMULATE; A LAWYER MUST REFRAIN FROM COMMITTING ACTS WHICH GIVE EVEN THE SEMBLANCE OF IMPROPRIETY TO THE PROFESSION. — Respondent violated the Lawyer's Oath, which mandates that he should support the Constitution, obey the laws as well as the legal orders of the duly constituted authorities therein, and do no falsehood or not consent to the doing of any in court. Further, he has also failed to live up to the standard set by law that he should refrain from counseling or abetting activities aimed at defiance of the law or at lessening confidence in the legal system. Respondent's act of non-registration of the deeds of sale to avoid paying tax may not be illegal *per se*; but, as a servant of the law, a lawyer should make himself an exemplar for others to emulate. The responsibilities of a lawyer are greater than those of a private citizen. He is looked up to in the community. Respondent must have forgotten that a lawyer must refrain from committing acts which give even a semblance of impropriety to the profession.

5. ID.; ID.; ID.; PENALTY OF ONE (1) YEAR SUSPENSION FROM THE PRACTICE OF LAW IS COMMENSURATE TO RESPONDENT'S DECEITFUL AND DISHONEST CONDUCT. — In cases wherein lawyers have similarly engaged in deceitful and dishonest conduct, the Court has imposed the penalty of suspension from the practice of law ranging from six (6) months to one (1) year. In *Spouses Donato v. Asuncion, Sr.*, where therein respondent lawyer filed a complaint for reformation of instrument to obtain financial gain, and prepared a contract which did not express the true intention of the parties, he was found guilty of gross misconduct and suspended from the practice of law for six (6) months. In *Yap-Paras v. Paras*, where therein respondent lawyer applied for free patents over lands owned by another person and not in the former's physical possession, he was found guilty of committing a falsehood in

violation of the Lawyer's Oath and the Code of Professional Responsibility and suspended from the practice of law for one (1) year, with a warning that the commission of the same or similar offense in the future would result in the imposition of a more severe penalty. In the present case, the Investigating Commissioner and the IBP Board of Governors recommended a penalty of suspension to be imposed upon respondent for five (5) years and one (1) year, respectively. The Court, however, believes that a penalty of one (1) year is more commensurate to respondent's deceitful and dishonest conduct.

APPEARANCES OF COUNSEL

Gerik C.A. Paderanga and *Ian Anthony P. Sapayan* for respondent.

D E C I S I O N

PERALTA, *J.*:

Before this Court is a letter-complaint[1] dated June 3, 2002, filed by complainant John Christen S. Hegna with the Office of the Bar Confidant (OBC) against respondent Atty. Goering G.C. Paderanga for deliberately falsifying documents, which caused delay in the execution of the decision rendered by the Municipal Trial Courts in Cities (MTCC), Branch 8, Cebu City, in Civil Case No. R-45146, entitled *John Hegna v. Mr. & Mrs. Eliseo Panaguinip.*

Herein complainant was the lessee of a portion of Lot No. 5529, situated at Barangay Quiot Pardo, Cebu City, which was owned by the heirs of Sabina Baclayon. The heirs of Baclayon, through their representative Gema Sabandija, entered into a contract of lease with complainant for a period of ten (10) years, commencing from June 26, 1994, with a rental of ₱3,000.00 per year, or ₱250.00 per month.

On September 26, 2001, complainant filed a complaint for forcible entry against therein defendants docketed as Civil Case

[1] *Rollo*, Vol. I, pp. 3-5.

No. R-45146, entitled *John Hegna v. Mr. & Mrs. Eliseo Panaguinip*, with the Municipal Trial Court in Cities (MTCC), Branch 8 of Cebu City. In said complaint, he alleged that in about the second week of March 1996, therein defendants entered the vacant portion of the leased premises by means of force, intimidation, threat, strategy or stealth; destroyed the barbed wire enclosing the leased premises of complainant, then built a shop on the said premises without complainant's consent. He averred that despite his demands upon therein defendants to vacate the premises and demolish the structure built thereon, the latter failed and refused to comply.[2]

When therein defendants failed to file their Answer, complainant filed a motion that judgment be rendered in default.

On December 21, 2001, the MTCC rendered a Decision in favor of complainant, ordering therein defendants to vacate the leased premises and to pay complainant compensatory damages for illegal occupation and use of the subject property, as well as attorney's fees and costs of suit. The dispositive portion of the decision reads as follows:

> WHEREFORE, this Court directs judgment against Defendants MR. & MRS. ELISEO PANAGUINIP and directs them to vacate Lot No. 5529 over the portion in an area of 1,596 square meters thereof, as leased to herein Plaintiff, situated at Barangay Quiot Pardo, Cebu City, and to pay Plaintiff the sum of PESOS: ONE THOUSAND (₱1,000) per month from the second week of March 1996 until the present date by way of compensatory damages for the illegal occupation and use of the contested property, subject to 12% annual legal interest until fully paid, and thereafter pay the same amount per month until they vacate the subject property hereof, and to further pay Plaintiff the sum of ₱5,000.00 by way of Attorney's Fees, and the costs of this suit.
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> SO ORDERED.[3]

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[2] Cited in the Amended Complaint dated April 24, 2002, filed by defendants and herein respondent in Case No. CEB-27614, entitled *Mr. Eliseo Panaguinip, Mrs. Ma. Teresa Panaguinip and Goering G.C. Paderanga v. John Hegna, Mila Hegna, Judge Edgemelo C. Rosales and Edilberto R. Suarin*, *id.* at 107-137.

[3] *Id.* at 6-7.

On February 8, 2002, the MTCC granted the Motion for Execution of Judgment filed by complainant, and issued a Writ of Execution on February 18, 2002.

On February 21, 2002, Sheriff Edilberto Suarin of the MTCC, Branch 8 of Cebu City levied on certain personal properties of therein defendants.[4]

On March 1, 2002, therein defendants requested the complainant to move for the dismissal of the complaint against them so as to prevent the issuance of the writ of execution thereon. While therein defendants wanted to amicably settle the case, however, they failed to mention the proposed settlement amount stated in the decision dated December 21, 2001.

Subsequently, respondent Atty. Goering G.C. Paderanga filed an Affidavit of Third-Party Claim[5] dated March 5, 2002 before Sheriff Suarin, the sheriff executing the judgment in the said civil case. In the said affidavit, respondent claimed that he was the owner of Lot No. 3653-D-1 and a FUSO (Canter series) vehicle, which he bought from therein defendants on November 27, 2001,[6] and December 12, 2001,[7] respectively, both of which could be erroneously levied by a writ of execution issued in the civil case.

On April 3, 2002, Sheriff Suarin tried to levy therein defendants' parcel of land and motor vehicle, but failed to do so because of the third- party claim filed by respondent.[8] Subsequently, on April 24, 2002, respondent filed a Complaint[9] for Annulment of Judgment with prayer for the issuance of an injunction and temporary restraining order (TRO) with damages

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[4] *Id.* at 389.

[5] *Id.* at 10-11.

[6] Deed of Absolute Sale dated November 27, 2001, *rollo*, Vol. I, p. 12.

[7] Deed of Absolute Sale dated December 12, 2001, *id.* at 14.

[8] Decision of the RTC dated June 29, 2006 in Civil Case No. CEB-27614, entitled *Spouses Panaguinip and Paderanga v. Hegna, et al.*; *rollo*, Vol. II, pp. 78-82.

[9] *Rollo*, Vol. I, pp. 107-137.

against complainant before the Regional Trial Court (RTC), Branch 13 of Cebu City, docketed as Case No. CEB-27614, entitled *Mr. Eliseo Panaguinip, Mrs. Ma. Teresa Panaguinip and Goering G.C. Paderanga v. John Hegna, Mila Hegna, Judge Edgemelo C. Rosales and Edilberto R. Suarin*.

In an Order[10] dated May 13, 2002, the RTC issued a writ of preliminary injunction enjoining the MTCC to desist from further proceeding with the civil case, and the Sheriff to desist from conducting a public auction of the levied properties of therein defendants. The RTC subsequently dismissed respondent's complaint for annulment of judgment in its Decision[11] dated June 29, 2006.

In a letter dated June 3, 2002, filed with the OBC, complainant alleged that he was filing a complaint against respondent for "deliberately falsifying documents, causing delay and a possible denial of justice to be served in Civil Case No. R-45146." He alleged that after the decision in the said civil case was rendered, therein defendants called him on the telephone, requesting the stay of the execution of judgment, as the latter would be settling their accounts within ten days, but they failed to comply.

On March 14, 2003, complainant filed a criminal complaint[12] for falsification of public documents against respondent; false testimony and perjury against therein defendants; and falsification under paragraph 6, Article 171 of the Revised Penal Code against Atty. Elena Marie Madarang, notary public, before the Office of the City Prosecutor of Cebu City. Anent the complaint against respondent, complainant averred that the third-party claim was full of irregularities, to wit: (a) the Deed of Absolute Sale involving Lot No. 3653-D-1, covered by TCT No. T-11127, dated November 27, 2001, had no record of transfer in the Register of Deeds of Cebu City; (b) the registration of the motor vehicle allegedly owned by respondent by virtue of the Deed of Absolute

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[10] *Id.* at 334-338.

[11] *Rollo*, Vol. II, pp. 78-82.

[12] *Id.* at 339-342.

Sale dated December 21, 2001 did not reflect any change of ownership from May 4, 2001; (c) the two Deeds of Absolute Sale dated November 27, 2001 and December 21, 2001 showed that both were notarized under Series of 2000 of the notary public; (d) Notarial Register No. 177 on page 37, Book II showed erasures and tampering done by substituting the intended entry of Joint Affidavit of Two Disinterested Person to a Deed of Absolute Sale under the names of the spouses Eliseo and Ma. Teresa Panaguinip, therein defendants, representing the sale of Lot No. 3653-D-1 under TCT No. 11127; and Notarial Register No. 188 on Page 39, Book II of Atty. Madarang also had tampering and erasures, as the entry of Affidavit of Loss was substituted with a Deed of Absolute Sale under the name of Ma. Teresa Panaguinip representing the sale of the FUSO (Canter series); and (e) the Community Tax Certificate number appearing in both Deeds of Absolute Sale was actually issued to another person, not to therein defendant Ma. Teresa Panaguinip.

On April 28, 2003, the Office of the City Prosecutor of Cebu City dismissed the criminal complaint for falsification of public documents against respondent for lack of *prima facie* evidence of guilt, as the allegations therein were similar to the instant administrative complaint.[13]

In his Comment[14] dated April 29, 2003 on the administrative complaint filed against him, respondent argued that he did not falsify any document and maintained that he had already satisfactorily explained the irregularities before the Office of the City Prosecutor. He added that the genuineness and due execution of the deeds of sale had not been affected by the fact that he failed to register the same. Also, he alleged that the MTCC Decision dated December 21, 2001 was unjust and void due to lack of jurisdiction, and for being based on spurious claims.

In a Resolution[15] dated July 9, 2003, the Court referred the administrative complaint to the Integrated Bar of the Philippines

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[13] *Id.* at 343-352.

[14] *Id.* at 76-96.

[15] *Id.* at 144.

(IBP) for investigation, report and recommendation/decision within ninety (90) days from receipt of the record.

On November 21, 2003, the parties appeared in a mandatory preliminary conference and, upon termination thereof, were ordered to submit their respective verified position papers within ten (10) days, after which the case would be deemed submitted for resolution.[16] Complainant and respondent submitted their position papers on December 11, 2003,[17] and December 2, 2003,[18] respectively.

On June 1, 2005, the Investigating Commissioner of the IBP submitted his Report and Recommendation, which contained the following observations:

III. FINDINGS:

Based on the resolution of the City Prosecutor's office in Cebu City, the complaint against the Panaguinip spouses and Attys. Paderanga and Madarang (the notary public) was dismissed for lack of *prima facie* of guilt. Such resolution is accorded great weight but certainly not conclusive considering the administrative nature of this instant complaint. In criminal prosecutions, a *prima facie* evidence is necessary but in this instant case, substantial evidence is all that [is] necessary to support a guilty verdict.

According to the Respondent, it was perfectly normal for him to obtain properties without registering the same under his own name. In his Position Paper, he even cited several other transactions where he merely possessed Deeds of Sale but not Certification of Registration or Transfer Certificates of Title. He alleged that for ESTATE PLANNING purposes, he intentionally left these properties in the name of the previous owner. The alleged discrepancies in the notarization were fully explained as well. The notary public explained that the erasures in her Notarial Register were made to correct mistakes so that entries will speak the truth. These corrections include the entries under entry number 177 to indicate the correct entry which was the Deed of Sale executed [by] the spouses Panaguinip. The

[16] *Id.* at 152.

[17] *Id.* at 214-216.

[18] *Id.* at 153-176.

original entry, Affidavit of Two Disinterested Persons, was actually notarized but was later cancelled at the request of the same affiants. The full explanation of these affiants, very doubtful and highly suspect, was nevertheless taken into consideration by the Prosecutor for reasons known only to him. The Respondents also managed to convince the Cebu Prosecutor that the discrepancy in the Residence Certificates was due to human error!

Not necessarily disagreeing with the findings of the City Prosecutor of Cebu City, the Resolution dismissing the case for falsification is not entirely convincing. There were certainly evidentiary matters which could have been better addressed by a judge, namely, the affidavit of the secretary of the notary public, the explanation in the incorrect entries in notarial register, the affidavit of the two (2) witnesses who sought the cancellation of their original affidavit, and the explanation of Paderanga himself regarding the difference in the dates.

Complainant is a layman who filed his own Position Paper unaided by counsel while Respondent is a lawyer. Nevertheless, Complainant managed to present one (1) piece of evidence not squarely addressed by Respondent Paderanga: the letter handwritten by Respondent's clients, written in Cebuano, asking the Complainant for mercy and forgiveness in relation to the forcible entry case. Such letter was no longer necessary if indeed there was a GENUINE transfer of ownership of properties owned by the Panaguinip spouses to their lawyer, Respondent Paderanga. This letter, attached to the Complaint, was never refuted in any way by Respondent Paderanga who may have skirted the issue by inadvertence or by design. The letter dated March 1, 2002 indicates that the Panaguinip spouses still believe and assert ownership over these properties despite the existence of a Deed of Sale allegedly dated March 5, 2002. Complainant also went further by attaching an Affidavit by a Third Person who stated that the Panaguinip spouses still assert ownership over the parcel of land and vehicle.

Moreover, Complainant alleged that Respondent invited him consecutive times after the issuance of the writ of execution in the lower court; the first was at the Majestic Restaurant, the second was at Club Cebu at Waterfront Hotel. There was an offer to settle the judgment award of ₱100,000. During the first meeting, the offer was ₱3,000, on the second meeting, this time with the Panaguinip spouses, the offer was ₱10,000. When Complainant refused to settle

with Respondent, he received a copy of the Affidavit of Third-Party Claim a few days later.

The parties did not stipulate this particular issue; however, this Commissioner feels that for the final disposition of this case, it is worthy to mention Article 1491 of the Civil Code. It specifically states that:

> Art. 1491. The following persons cannot acquire by purchase, even at public or judicial auction, either in person or through the mediation of another:
>
> x x x x x x x x x
>
> (5) Justices, judges, prosecuting attorneys, clerks of superior and inferior courts, and other officers and employees connected with the administration of justice, the property and rights in litigations or levied upon execution before the court within whose jurisdiction or territory they exercise their respective functions; this prohibition includes the act of acquiring by assignment and shall apply to lawyers, with respect to the property and rights which may be the object of any litigation in which they may take part by virtue of their profession.
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> x x x x x x x x x

This is a classic case where a lawyer acquired the interests of his client in certain properties subject for execution. Regardless of the court's apparent lack of jurisdiction, Respondent Paderanga acquired the two (2) matters subject for execution in the forcible entry case in violation of [the] Canon of Legal Ethics. A thing is said to be in litigation not only if there is some contest or litigation over it in court, but also the moment that becomes subject to the judicial action of the judge. x x x

In all likelihood, although Complainant failed to get a favorable resolution from the City Prosecutor's office in Cebu City, the Affidavit of Third Party Claim was simulated to defeat the rights of Complainant herein. It is immaterial that the decision of the lower court granting a judgment award was subsequently reversed or nullified. It is immaterial that the City Prosecutor did not find a *prima facie* case of falsification. The fact remains that there was a MULTITUDE of irregularities surrounding the execution of the Affidavit and, coupled with the letter sent by the Panaguinip spouses left unrebutted by Respondent Paderanga, there is substantial evidence that the Affidavit

of Third Party Claim was purposely filed to thwart the enforcement of the decision in the forcible entry case.

It is worthy to note that the proceedings before the prosecutor's office did not take into consideration the handwritten letter from the Panaguinip spouses. For whatever reason, Complainant did not present such letter, which if he did, the prosecutor may come up with a different resolution.

IV. RECOMMENDATION

While Complainant cannot fully prove the existence of falsity in the execution of the Affidavit of Third Party Claim, this Commissioner is convinced that there was indeed an anomaly which constitutes a violation of the Canons of Professional Responsibility.

A lawyer ought to have known that he cannot acquire the property of his client which is in litigation. x x x Respondent necessitates a heavy penalty since the circumstances surrounding the transfer of ownership of properties tend to indicate an anomalous transfer aimed to subvert the proper administration of justice. The numerous discrepancies in the transfer document, some dismissed as clerical errors and other explained by incredulous stories by way of affidavits, compounded by the letter left uncontested by Respondent Paderanga, inevitably lead a rational person to conclude that Paderanga may not have acquired the properties prior to the judicial action of execution. Even if the City Prosecutor found no *prima facie* case of falsification, this Commissioner finds substantial evidence to support a conclusion that Respondent Paderanga committed an ethical violation and should be meted the penalty of suspension of five (5) years from the practice of law.[19]

In a Resolution dated December 17, 2005, the IBP Board of Governors adopted and approved, with modification, the Report and Recommendation of the Investigating Commissioner, *viz*:

x x x finding the recommendation fully supported by the evidence on record and the applicable laws and rules, and considering that a lawyer ought to know that he cannot acquire the property of his client which is in litigation, Atty. Goering Paderanga is hereby **SUSPENDED** from the practice of law for one (1) year.[20]

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[19] *Rollo*, Vol. I, pp. 247-252. (Citations omitted.)

[20] *Id.* at 243.

On March 23, 2006, respondent filed with the Court a Motion for Reconsideration of the Resolution of the IBP Board of Governors and, on August 18, 2006, a Supplemental Motion for Reconsideration.

In a Resolution dated August 23, 2006, the Court referred the motion for reconsideration to the IBP.

On December 11, 2008, the IBP issued a Resolution denying the motion for reconsideration, and affirmed its Resolution dated December 17, 2005.

Under Section 27 of Rule 138[21] of the Rules of Court, a member of the Bar may be disbarred or suspended on any of the following grounds: (1) deceit; (2) malpractice or other gross misconduct in office; (3) grossly immoral conduct; (4) conviction of a crime involving moral turpitude; (5) violation of the lawyer's oath; (6) willful disobedience of any lawful order of a superior court; and (7) willfully appearing as an attorney for a party without authority. In the present case, the Court finds respondent administratively liable for engaging in dishonest and deceitful conduct.

Although respondent denied having acted as counsel for therein defendants, the Spouses Panaguinip, in the forcible entry case filed by complainant, his involvement in the said case was still highly suspect. After the writ of execution had been issued on February 18, 2002, he went with defendants-spouses to amicably settle with complainant on two separate occasions, ostensibly to protect his own interests. Complainant claimed that during those two meetings, respondent did not disclose his ownership over the properties in question, leading the former to believe that respondent was, in fact, the counsel for defendants-spouses. He averred that respondent and defendant spouses initially offered a settlement of ₱3,000.00, which he refused as he had already spent ₱10,000.00 on court expenses. On their second meeting, the offer had been raised to ₱25,000.00, which again complainant declined, as the latter had, at that time, spent ₱25,000.00.

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[21] As amended by SC Resolutions dated May 20, 1968 and February 13, 1992.

Complainant maintained that it was only after said meetings had transpired that he received the affidavit of a third-party claim executed by respondent, stating that the latter was the owner of the property and motor vehicle. On the other hand, respondent claimed that the meetings took place in April 2002, after he had filed a third-party claim.

Had respondent been the rightful owner of a parcel of land and motor vehicle that were still registered in the name of defendants-spouses, he should have immediately disclosed such fact immediately and filed a third-party claim, as time was of the essence. Moreover, in their letter dated March 1, 2002, defendants-spouses did not mention any transfer of ownership of the said properties to respondent, as the former still believed that they owned the same. The continued possession and ownership by defendants-spouses was also attested to by a certain Brigida Lines, who executed an Affidavit[22] in favor of complainant.

Based on the foregoing, the Court is more inclined to believe that when complainant and defendants-spouses failed to reach an agreement, respondent came forward as a third-party claimant to prevent the levy and execution of said properties. He, therefore, violated Rule 1.01 of the Code of Professional Responsibility,[23] which provides that a lawyer shall not engage in unlawful, dishonest, immoral or deceitful conduct. Under this rule, conduct has been construed not to pertain exclusively to the performance of a lawyer's professional duties.[24] In previous cases,[25] the Court has held that a lawyer may be disbarred or suspended for misconduct, whether in his professional or private capacity, which shows him to be wanting in moral character, honesty,

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[22] *Rollo*, p. 217.

[23] Promulgated by the Supreme Court on June 21, 1988.

[24] *Ronquillo, et al. v. Cezar*, A.C. No. 6288, June 16, 2006, 491 SCRA 1.

[25] *Id.; Lao v. Medel*, A.C. No. 5916, July 1, 2003, 405 SCRA 227, 232; *Ong v. Unto*, A.C. No. 2417, February 5, 2002, 376 SCRA 152, 160; *Calub v. Suller*, A.C. No. 1474, January 28, 2000, 323 SCRA 556; *Narag v. Narag*, A.C. No. 3405, June 29, 1998, 291 SCRA 451; *Nakpil v. Valdes*, A.C. No. 2040, March 4, 1998, 286 SCRA 758.

probity and good demeanor; or unworthy to continue as an officer of the court.

Notably, in the falsification case earlier filed, complainant was able to cite several irregularities in the documents evidencing the deeds of sale in question: the non-registration by respondent of the sale transactions; a Community Tax Certificate number appearing on said deeds which was different from that issued to defendant Ma. Teresa Panaguinip; and the erasures of the entries pertaining to said deeds from the Notarial Register.

Of these irregularities, only one can directly be attributable to respondent — his non-registration of the sale transaction. He argues that the sales were valid despite non-registration, and maintained that it was perfectly normal and regular for a lawyer like him to choose not to register and cause the transfer of title of the land and the FUSO jeepney after the execution of the Deeds of Sale, so the transactions would not appear in the records of the Bureau of Internal Revenue, the City Assessor or the Register of Deeds, on the Land Registration Office. He added that he had also bought four lots, which had not yet been transferred to his name, for estate planning or speculation purposes. He claimed that he found it legally wise not to immediately register after buying so that he would not pay for the expenses of the sale and transfer twice, once he decided to sell; or place them in his children's name, and avoid paying estate and inheritance taxes upon his death.[26]

While the act of registration of a document is not necessary in order to give it legal effect as between the parties, requirements for the recording of the instruments are designed to prevent frauds and to permit and require the public to act with the presumption that a recorded instrument exists and is genuine.[27] However, while the RTC was correct in holding that said omission on respondent's part may not be considered falsification, he had shown an intent to defraud the government, which had the

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[26] Counter-Affidavit dated April 11, 2003, *rollo*, pp. 97-99.

[27] *Maglucot-aw, et al. v. Maglucot, et al.,* G. R. No. 132518, March 28, 2000, 329 SCRA 78.

right to collect revenue from him, as well as from other persons who may have an interest in said properties.

Respondent violated the Lawyer's Oath, which mandates that he should support the Constitution, obey the laws as well as the legal orders of the duly constituted authorities therein, and do no falsehood or not consent to the doing of any in court. Further, he has also failed to live up to the standard set by law that he should refrain from counseling or abetting activities aimed at defiance of the law or at lessening confidence in the legal system.[28] Respondent's act of non-registration of the deeds of sale to avoid paying tax may not be illegal *per se*; but, as a servant of the law, a lawyer should make himself an exemplar for others to emulate. The responsibilities of a lawyer are greater than those of a private citizen. He is looked up to in the community.[29] Respondent must have forgotten that a lawyer must refrain from committing acts which give even a semblance of impropriety to the profession.

In cases wherein lawyers have similarly engaged in deceitful and dishonest conduct, the Court has imposed the penalty of suspension from the practice of law ranging from six (6) months to one (1) year.

In *Spouses Donato v. Asuncion, Sr.*,[30] where therein respondent lawyer filed a complaint for reformation of instrument to obtain financial gain, and prepared a contract which did not express the true intention of the parties, he was found guilty of gross misconduct and suspended from the practice of law for six (6) months.

In *Yap-Paras v. Paras*,[31] where therein respondent lawyer applied for free patents over lands owned by another person and not in the former's physical possession, he was found guilty

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[28] Code of Professional Responsibility, Canon 1. Rule 1.02.

[29] *Irene Santos-Tan v. Atty. Romeo R. Robiso*, A.C. No. 6383, March 31, 2009.

[30] A.C. No. 4914, March 3, 2004, 424 SCRA 199.

[31] A.C. No. 4947, February 14, 2005, 451 SCRA 194.

of committing a falsehood in violation of the Lawyer's Oath and the Code of Professional Responsibility and suspended from the practice of law for one (1) year, with a warning that the commission of the same or similar offense in the future would result in the imposition of a more severe penalty.

In the present case, the Investigating Commissioner and the IBP Board of Governors recommended a penalty of suspension to be imposed upon respondent for five (5) years and one (1) year, respectively. The Court, however, believes that a penalty of one (1) year is more commensurate to respondent's deceitful and dishonest conduct.

WHEREFORE, respondent Atty. Goering G.C. Paderanga is found guilty of engaging in dishonest and deceitful conduct, and is *SUSPENDED* from the practice of law for one (1) year, with a stern warning that a repetition of the same or similar offense in the future would result in the imposition of a more severe penalty.

Let a copy of this Decision be entered into respondent's record as a member of the Bar, and 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.

This Decision shall be immediately executory.

SO ORDERED.

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

EN BANC

[A.M. No. RTJ-07-2089. September 8, 2009]
(Formerly OCA I.P.I. No. 07-2659-RTJ)

LAND BANK OF THE PHILIPPINES, *complainant, vs.* **JUDGE ERNESTO P. PAGAYATAN,** *respondent.*

[A.M. No. RTJ-0921-99. September 8, 2009]
(Formerly OCA I.P.I. No. 07-2698-RTJ)

LETICIA LOURDES CAMARA, *complainant, vs.* **JUDGE ERNESTO P. PAGAYATAN,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS; JUDGES; GROSS IGNORANCE OF THE LAW; COMMITTED BY RESPONDENT JUDGE WHEN HE TOOK COGNIZANCE OF THE PETITION FOR INDIRECT CONTEMPT DESPITE NON-PAYMENT OF DOCKET FEES; IF A RULE OR LAW IS SO ELEMENTARY, NOT TO BE AWARE OF IT CONSTITUTE GROSS IGNORANCE OF THE LAW. — With respect to the other charges, however, the Court finds that, as did the OCA, respondent is guilty of Gross Ignorance of the Law or Procedure for taking cognizance of the petition for indirect contempt, despite the non-payment of docket fees. Rule 71, Section 4 of the Rules of Court provides that an indirect contempt proceeding, which is not initiated *motu proprio* by the court, shall be commenced by a verified petition that fully complies with the requirements for filing initiatory pleadings for civil actions, including the payment of docket fees. That Rule being so elementary, not to be aware of it constitutes Gross Ignorance of the Law or Procedure.

2. ID.; ID.; ID.; THE COURT WAS NOT CONVINCED BY RESPONDENT JUDGE'S ASSERTION THAT THE CLERK OF COURT DID NOT REQUIRE THE PAYMENT OF DOCKET FEES UNDER AN HONEST BELIEF THAT IT WAS NOT NECESSARY; A JUDGE CANNOT TAKE REFUGE BEHIND THE INEFFICIENCY OF COURT

PERSONNEL SINCE THEY ARE NOT RESPONSIBLE FOR HIS JUDICIAL FUNCTIONS. — The payment or non-payment of docket fees is reflected in the records of a case. Respondent's claim that he only learned of the non-payment of the docket fees during the proceedings for *habeas corpus* before this Court does not thus impress. Neither does respondent's assertion that the Clerk of Court did not require the payment of the docket fees under an honest belief that it was not necessary. A judge cannot take refuge behind the inefficiency of court personnel since they are not responsible for his judicial functions.

3. ID.; ID.; ID.; RESPONDENT JUDGE'S OBSTINATE REFUSAL TO RELEASE PRIVATE COMPLAINANT DESPITE COMPLIANCE BY THE BANK WITH THE MARCH 4, 2005 ORDER CONSTITUTES GRAVE MISCONDUCT; A JUDGE SHOULD ADMINISTER JUSTICE IMPARTIALLY WITHOUT DELAY. — As for respondent's obstinate refusal to release Leticia despite compliance by LBP with the March 4, 2005 Order, the Court finds that the same constitutes Gross Misconduct *vis a vis* Rule 1.02, Canon 1 of the Code of Judicial Conduct which states that "A judge should administer justice impartially and without delay." The partiality of respondent was highlighted when, out of his selective invocation of judicial courtesy, he refused to resolve Leticia and Teresita's February 14, 2007 Urgent Manifestation of Compliance and Motion and other pending incidents in view of the pendency before the appellate court of the LBP's Omnibus Motion praying for, among other things, the quashal of the warrant of arrest, *whereas* he had earlier found Leticia and Teresita guilty of contempt despite the pendency before the appellate court of LBP's motion for reconsideration of the dismissal of the petition in CA-G.R. SP No. 93206.

APPEARANCES OF COUNSEL

Legal Services Group (LBP) for Land Bank of the Philippines.

D E C I S I O N

CARPIO MORALES, *J.*:

By Decision of March 31, 2003, the Provincial Agrarian Reform Adjudicator (PARAD) of Occidental Mindoro ordered complainant Land Bank of the Philippines (LBP) to pay Josefina S. Lubrica (Josefina) ₱71,634,027.30 as just compensation for the 431.1407-hectare portion of a rice and corn land in Sta. Lucia, Occidental Mindoro.

On the allegation that the PARAD disregarded the formula in Presidential Decree No. 27 and Executive Order No. 228, series of 1997, LBP filed on March 5, 2004 a petition for fixing of just compensation[1] before the Regional Trial Court (RTC) of San Jose, Occidental Mindoro.

Judge Ernesto P. Pagayatan (respondent), Presiding Judge of Branch 46 of the RTC, by Order of March 4, 2005, directed LBP to deposit the preliminary compensation in the amount of ₱71,634,027.30.[2] LBP questioned this Order via petition for *certiorari*[3] before the Court of Appeals, docketed as CA G.R. No. 93206, which it dismissed by Resolution of August 17, 2006 for lack of merit.

On September 26, 2006, Josefina filed before the RTC a petition[4] to cite for contempt Teresita V. Tengco (Teresita), Acting Chief of the Land Compensation Department of LBP, and Leticia Lourdes A. Camara (Leticia), Chief of the Land Compensation Department of LBP, alleging that they disobeyed respondent's Order of March 4, 2005.

Teresita and Leticia opposed Josefina's petition for contempt, citing the pendency of a motion for reconsideration of the appellate

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[1] *Rollo* (RTJ-07-2089), pp. 29-36.

[2] *Id.* at 37-38.

[3] *Id.* at 63-93.

[4] *Id.* at 94-101.

court's dismissal of LBP's petition for *certiorari* in CA G.R. No. 93206.

Finding merit in the petition for contempt, respondent, by Order of February 9, 2007, issued a warrant for the arrest of Leticia and Teresita.[5] Leticia was arrested on February 12, 2007 and was detained at the provincial jail in San Jose, Occidental Mindoro. Teresita had evaded arrest.

In an attempt to secure Leticia's liberty, LBP deposited ₱71,634,027.30 in cash and in bond at its head office in Manila in the name of "The Clerk of Court, RTC Branch 46, San Jose, Occidental Mindoro, in the Matter of Agrarian Case No. 1390."

Leticia and Teresita, through LBP's counsel, thereupon filed with the trial court an Urgent Manifestation of Compliance and Motion[6] dated February 14, 2007, attaching thereto the Certificate of Deposit, and moving that the warrant of arrest against them be quashed and recalled. They also manifested that Leticia's health did not permit a prolonged confinement in the provincial jail.

Respondent refused to consider the deposit as substantial compliance with his March 4, 2005 Order.[7] Thus, Leticia and Teresita filed an *Ex-Parte* Motion for Issuance of Clarificatory Order, asking in whose name should the check and bond be issued.[8] They also filed an *Ex-Parte* Very Urgent Motion for the Immediate Release of [therein] Respondent Leticia Camara,[9] alleging that her continued detention was no longer necessary; and that in light of her medical history of colon cancer, she should stay in a comfortable place.

During the hearing of Leticia and Teresita's Urgent Manifestation of Compliance and Motion, respondent directed

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[5] *Id.* at 110-112.

[6] *Id.* at 261.

[7] *Vide id.* at 274.

[8] *Id.* at 275.

[9] *Id.* at 277-279.

"LBP [to] change the account and payee's name of the cash and bond deposit to *Office of Clerk of Court, Regional Trial Court, San Jose, Occidental Mindoro,* ***for the account of Josefina S. Lubrica****, as assignee of Federico Suntay, in the matter of Agrarian Case No. 1390.*"[10] Leticia and Teresita heeded and complied with the directive and thereafter filed an Urgent Manifestation reiterating their request that Leticia be immediately released.[11]

By Order of February 9, 2007, respondent held in abeyance the resolution of Leticia and Teresita's Urgent Manifestation of Compliance and Motion as well as the other pending incidents, explaining thus:

x x x x x x x x x

The record shows that the Land Bank of the Philippines filed with the Court of Appeals a "Very Urgent Omnibus Motion (A) for the Quashal of the Warrant of Arrest dated 09 February 2007; (B) Issuance of an Order status quo *ante*; and Posting/fixing of cash bond" dated February 12, 2007.

In the said Omnibus Motion, the Land Bank of the Philippines prayed the Court of Appeals:

"To QUASH the warrant of Arrest dated 9 February 2007 issued against LBP Officials Leticia Camara and Teresita Tengco for alleged indirect contempt. TO ISSUE an Order Status Quo *Ante* or an Order prior to the issuance of the said Warrant of Arrest, or FIX THE AMOUNT OF CASH BOND and allow the POSTING THEREOF for the provisional release of Mrs. Camara who is in custody of the arresting officer."

In deference to the Court of Appeals and out of Judicial courtesy, this Court deems it best to **await the resolution by the Court of Appeals** of the Land Bank of the Philippines' Omnibus Motion dated February 12, 2007 **before acting on the pending incidents**.

SO ORDERED.[12] (Emphasis and underscoring supplied)

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[10] *Id.* at 13, italics in the original, emphasis and underscoring supplied.

[11] *Id.* at 280-281.

[12] *Id.* at 284.

By Very Urgent Manifestation dated February 20, 2007,[13] Leticia and Teresita informed the trial court that the Court of Appeals had denied LBP's Omnibus Motion, and thus reiterated the request for Leticia's immediate release.

By Order[14] of February 21, 2007, respondent found Leticia and Teresita's compliance with its directive relative to the change of "the account and payee's name of the cash bond and deposit" unsatisfactory, the change not having been made, so respondent stated, in such form that Josefina could immediately withdraw the deposit without difficulty. Thus respondent, this time, ordered:

> x x x that the cash and bond payments be placed ***in the name of Josefina S. Lubrica as payee***, in a form that is readily withdrawable. Upon compliance, Respondent [Leticia] Camara shall forthwith be ordered released from custody, and the warrant of arrest of Respondent Tengco shall be ordered recalled.[15] (Emphasis, italics and underscoring supplied)

On February 22, 2007, Teresita and Leticia filed before the trial court an Urgent *Ex-Parte* Omnibus Motion for (A) Immediate Resolution of the February 14, 2007 Urgent Manifestation of Compliance, (B) Immediate Release of AVP [Leticia] Camara and/or Quashal of Warrant of Arrest dated February 9, 2007, and (C) Fixing/Posting of Cash Bond.[16] Respondent did not act on this Omnibus Motion, drawing LBP, Teresita, and Leticia to file on February 23, 2007 a Petition for *Certiorari* and *Mandamus*[17] before the Court of Appeals, docketed as CA-G.R. SP No. 98032, for the annulment of respondent's February 9, 2007 and February 21, 2007 Orders; and for an order commanding respondent to consider the deposit of ₱71,634,027.30 as faithful compliance with his March 4, 2005 order and to issue an order directing the release of Leticia from detention.

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[13] *Id.* at 285-287.

[14] *Id.* at 288-290.

[15] *Id.* at 290.

[16] *Id.* at 291-295.

[17] *Id.* at 296-334.

They also prayed for a preliminary mandatory injunction to secure Leticia's release pending resolution of the petition.

In a related move, Leticia's son filed, on her behalf, on February 27, 2007 a petition for *habeas corpus* before this Court for her release,[18] docketed as G.R. No. 176563, "*In the Matter of the application for issuance of Writ of Habeas Corpus in behalf of Leticia Lourdes A. Camara, Asst. Vice President of Land Bank of the Philippines, represented by her son, Mark Darwin Camara, petitioner v. Hon. Ernesto P. Pagayatan, in his capacity as Presiding Judge, RTC San Jose, Occidental Mindoro, Branch 46, and all other persons acting on his behalf, respondents*."

On April 2, 2007, this Court, acting on Leticia's son's petition for *habeas corpus*, found Leticia's continued detention unlawful, and ordered respondent to desist from detaining Leticia.[19] It turned out that on March 1, 2007, the Court of Appeals, in CA-G.R. SP. No. 98032 (for *Certiorari* and *Mandamus*, for the annulment of respondent's February 9, 2007 and February 21, 2007 Orders) had granted a writ of preliminary mandatory injunction ordering the immediate release of Leticia, following which or on the following day, March 2, 2007, respondent ordered Leticia's release.[20]

On August 24, 2007, LBP filed before this Court the first above-captioned administrative complaint against respondent,[21] charging him with

a. Violation of Article III, Section 1 of the 1987 Constitution which provides that "No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws;"

b. Violation of the Anti-Graft and Corrupt Practices Act (R.A. No. 3019), Section 3(e), in relation to Rule 140, Section 8(2) of the Revised Rules of Court;

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[18] *Id.* at 366-376.

[19] *Camara v. Pagayatan*, G.R. No. 176563, April 2, 2007, 520 SCRA 182, 191.

[20] *Rollo* (RTJ-07-2089), pp. 377-378.

[21] *Id.* at 1-28.

c. Gross Ignorance of the Law or Procedure under Rule 140, Section 8(9) of the Revised Rules of Court;

d. Knowingly Rendering an Unjust Judgment (Article 204, Revised Penal Code), in relation to Rule 140, Section 8(4) of the Revised Rules of Court;

e. Knowingly Rendering an Unjust Interlocutory Order (Article 206, Revised Penal Code), in relation to Rule 140, Section 8(4) of the Revised Rules of Court;

f. Malicious Delay in the Administration of Justice (Article 207, the Revised Penal Code), in relation to Rule 140, Section 9(1) of the Revised Rules of Court (Undue Delay in Rendering a Decision or Order);

g. Arbitrary detention (Article 267, Revised Penal Code);

h. Code of Judicial Conduct (Canon 1, Rules 1.01 to 1.03, and Canon 2, Rule 2.01) in relation to Rule 140, Section 8(3) of the Revised Rules of Court, to wit:

"Canon 1

A judge should uphold the integrity and independence of the judiciary

Rule 1.01 — A judge should be the embodiment of competence, integrity, and independence.

Rule 1.02. — A judge should administer justice impartially and without delay.

Rule 1.03. — A judge should be vigilant against any attempt to subvert the independence of the judiciary and resist any pressure from whatever source.

Canon 2

A judge should avoid impropriety and the appearance of impropriety in all activities.

Rule 2.01. — A judge should so behave at all times as to promote public confidence in the integrity and impartiality of the judiciary."

i. Code of Judicial Ethics (Par. 3), which states that:

"3. Avoidance of appearance of impropriety

> A judge's official conduct should be free from the appearance of impropriety, and his personal behavior, not only upon the bench and in the performance of judicial duties, but also in his every day life, should be beyond reproach."[22]

for having

I. X X X ISSUED THE ORDER DATED 4 MARCH 2005 DIRECTING LBP TO DEPOSIT ₱71,634,027.30 WITH THE LAND BANK OF THE PHILIPPINES AS PRELIMINARY COMPENSATION FOR JOSEFINA S. LUBRICA WHEN THERE IS NO LEGAL BASIS THEREFOR.

II. X X X [TAKEN] COGNIZANCE OF THE PETITION FOR INDIRECT CONTEMPT FILED BY LUBRICA AGAINST MS. LETICIA LOURDES A. CAMARA, ASSISTANT VICE-PRESIDENT, LBP LAND COMPENSATION DEPARTMENT, AND MS. TERESITA V. TENGCO, MANAGER, LBP BOND SERVICING DEPARTMENT, DESPITE THE NON-PAYMENT OF THE REQUIRED DOCKET FEES.

III. X X X ISSUED THE ORDER DATED 9 FEBRUARY 2007 FINDING MS. CAMARA AND MS. TENGCO GUILTY OF INDIRECT CONTEMPT AND DIRECTING THEIR ARREST, WITHOUT ANY HEARING.

IV. X X X ISSUED THE CONTEMPT AND ARREST ORDER OF 9 FEBRUARY 2007 IN SPITE OF THE PENDING MOTION FOR RECONSIDERATION FILED BY LBP IN CA G.R. NO. 93206 (PETITION FOR *CERTIORARI*), IN VIOLATION OF JUDICIAL COURTESY.

V. X X X ISSUED THE ORDER DATED 21 FEBRUARY 2007 FINDING LBP'S EARLIER DEPOSIT AND COMPLIANCE WITH HIS 4 MARCH 2005 ORDER AS INSUFFICIENT, AND ARBITARILY COMMANDING LBP TO DEPOSIT THE CARP PROCEEDS "IN THE NAME OF JOSEFINA S. LUBRICA AS PAYEE, IN A FORM THAT IS READILY WITHDRAWABLE," DESPITE THE LACK OF LEGAL BASIS THEREFOR.

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[22] *Id.* at 2-5.

> **VI. X X X DELIBERATELY AND MALICIOUSLY REFUSED AND DELAYED TO RESOLVE LBP'S NUMEROUS MOTIONS AND PLEADINGS OF EXTREMELY URGENT CHARACTER, RESULTING IN THE ILLEGAL, UNJUSTIFIED AND CONTINUED DETENTION OF MS. CAMARA FOR NINETEEN (19) DAYS.**[23] (Emphasis in the original; underscoring supplied)

On October 30, 2007, Leticia herself filed an administrative complaint against respondent, the second above-captioned administrative complaint, for gross ignorance of the law, grave abuse of authority, misconduct, and conduct prejudicial to the proper administration of justice.[24]

In his Comment on LBP's complaint,[25] respondent contended as follows: There was ample legal basis for his March 4, 2005 Order requiring LBP to deposit the ₱71,634,027.30. Respecting the non-payment of docket fee for the indirect contempt petition against Leticia and Teresita, the Office of the Clerk of Court did not require the payment thereof in the honest belief that it was not necessary since the petition was filed in connection with a principal action already being heard in his sala. He in fact only learned of the non-payment of the docket fee during the *habeas corpus* proceedings before this Court and, in any event, complainants are estopped from questioning the court's jurisdiction over the indirect contempt petition.

Regarding the charge that he violated judicial courtesy, respondent cited the amendment introduced by A.M. No. 07-7-12-SC to Section 7 of Rule 65 of the Rules of Court requiring a public respondent to proceed with the principal case within ten days from the filing of a petition for *certiorari* with a higher court or tribunal in the absence of a temporary restraining order or a preliminary injunction, or upon its expiration.

Finally, respondent maintained that the detention of Leticia was not unlawful.

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[23] *Id.* at 5-6.

[24] *Rollo* (RTJ-0921-99), pp. 1-19.

[25] *Rollo* (RTJ-07-2089), pp. 423-445.

In his Comment[26] on Leticia's complaint, respondent, raising substantially the same arguments as those he raised in his Comment on LBP's complaint, added that the raffle of the petition for indirect contempt was not necessary considering that there are only three *salas* in the Occidental Mindoro RTC of which only Branch 46 over which he presides was designated as a Special Agrarian Court.

Respondent posited that Leticia is engaged in forum shopping given the pendency before this Court of G.R. No. 180488, "*Land Bank of the Philippines, Leticia Camara and Teresita Tengco v. Josefina Lubrica,*" which sought the resolution of the issue of whether respondent's Order citing Leticia for contempt is valid.[27]

Finally, respondent contended that with these twin administrative complaints, he is being placed in jeopardy of being punished twice for the same offense.

On the recommendation of the Office of the Court Administrator (OCA), Leticia's complaint was consolidated with that of the LBP.[28]

In a Memorandum dated October 4, 2008,[29] the OCA found that respondent validly issued the March 4, 2005 Order as it was based on this Court's ruling in *Lubrica v. Land Bank of the Philippines*[30] involving another property of Josefina, which reinstated an order directing LBP to deposit the just compensation provisionally determined by PARAD.[31]

With respect to the other charges, the OCA found respondent liable for Gross Ignorance of the Law **and** Gross Misconduct,[32]

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[26] *Rollo* (RTJ-0921-99), pp. 381-391.

[27] *Id.* at 387.

[28] *Id.* at 547.

[29] *Rollo* (RTJ-07-2089), pp. 626-646.

[30] G.R. No. 170220, November 20, 2006, 507 SCRA 415.

[31] *Id.* at 425.

[32] *Rollo* (RTJ-07-2089), p. 642.

albeit it, in its recommendation, faulted him only for Gross Ignorance of the Law and Procedure.[33]

Noting that respondent had, in the meantime, retired on December 31, 2007, the OCA recommended that he be fined ₱40,000, to be charged to his retirement benefits.[34]

It bears emphasis that a respondent's retirement during the pendency of the proceedings against him/her does not preclude the finding of any administrative liability and the imposition of a penalty therefor to which he/she may be answerable.[35]

The Court finds that, indeed, respondent's March 4, 2005 Order had ample legal basis. In *Lubrica v. Land Bank of the Philippines*,[36] this Court reinstated an order directing LBP to deposit the just compensation determined by the PARAD, pending computation of the final valuation of the subject properties based on the formula declared by this Court.[37]

With respect to the other charges, however, the Court finds that, as did the OCA, respondent is guilty of Gross Ignorance of the Law or Procedure for taking cognizance of the petition for indirect contempt, despite the non-payment of docket fees. Rule 71, Section 4 of the Rules of Court provides that an indirect contempt proceeding, which is not initiated *motu proprio* by the court, shall be commenced by a verified petition that fully complies with the requirements for filing initiatory pleadings for civil actions, including the payment of docket fees.[38] That Rule being so elementary, not to be aware of it constitutes Gross Ignorance of the Law or Procedure.[39]

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[33] *Id.* at 645.

[34] *Ibid.*

[35] *Lilia v. Fanuñal,* A.M. No. RTJ-99-1503, December 13, 2001, 372 SCRA 213, 219.

[36] *Supra* note 30.

[37] *Id.* at 425.

[38] *Vide Arriola v. Arriola,* G.R. No. 177703, January 28, 2008, 542 SCRA 666, 673.

[39] *Vide Cabico v. Dimaculangan-Querijero,* A.M. No. RTJ-02-1735, April 27, 2007, 522 SCRA 300, 314.

The payment or non-payment of docket fees is reflected in the records of a case. Respondent's claim that he only learned of the non-payment of the docket fees during the proceedings for *habeas corpus* before this Court does not thus impress. Neither does respondent's assertion that the Clerk of Court did not require the payment of the docket fees under an honest belief that it was not necessary. A judge cannot take refuge behind the inefficiency of court personnel since they are not responsible for his judicial functions.[40]

As for respondent's obstinate refusal to release Leticia despite compliance by LBP with the March 4, 2005 Order, the Court finds that the same constitutes Gross Misconduct *vis a vis* Rule 1.02, Canon 1 of the Code of Judicial Conduct which states that "A judge should administer justice impartially and without delay." The following pertinent portion of this Court's Resolution in the *habeas corpus* case relative to respondent's contempt powers bears reiterating:

> This is grave abuse of respondent judge's contempt powers, amounting to lack or excess of his jurisdiction.
>
> Nothing in the 4 March 2005 Order requires that the deposit be "placed in the name of Josefina S. Lubrica as payee, in a form that is readily withdrawable." What respondent judge ordered LBP to do, which LBP did, was to "deposit the preliminary compensation as determined by the PARAD in cash and bonds[,] in the total amount of Php71,634,027.30 with the Land Bank of the Philippines, Manila." That the cash deposit was made under its account in trust for, and the bond made payable to, respondent judge's clerk of court is not a contumacious disregard of the 4 March 2005 Order not only because that Order is silent in whose name the deposit should be made but also because the branch clerk of court is under respondent judge's control. If LBP's supposed transgression is in not placing the cash deposit under the account of, and the bond made payable to, Lubrica, respondent judge could have readily remedied the problem by directing LBP to turn over the manager's check and LBP bond to the branch clerk of court for disposal of the check's proceeds and the bond to Lubrica, subject to Lubrica's compliance with the regulations of the

[40] *Vide Office of the Court Administrator v. Javellana,* A.M. No. RTJ-02-1737, September 9, 2004, 438 SCRA 1, 15.

Department of Agrarian Reform (DAR) on the release of payment to claimants under Republic Act No. 6657.

Indeed, LBP went out of its way to further accommodate respondent judge when, following the latter's suggestion during the hearing of 19 February 2007, LBP changed the account name for the cash deposit and the payee's name for the bond deposit to "Office of Clerk of Court, RTC San Jose Occidental Mindoro, for the account of Josefina S. Lubrica, as assignee of Federico Suntay, in the matter of Agrarian Case No. 1390." Significantly, during the oral arguments, Lubrica's counsel admitted that even if the deposit was made under the name of Lubrica, the latter is still bound by, and willing to comply with, the DAR regulations on the release of payment.

The facts of this case highlight respondent judge's failure to appreciate, in full measure, the nature of his power to cite litigants in contempt of court. It is a drastic and extraordinary attribute of courts, to be exercised in the interest of justice and only when there is clear and contumacious refusal to obey orders. If a *bona fide* misunderstanding of the terms of an order does not justify the immediate institution of contempt proceedings, with more reason that it should not serve as basis to prolong a litigant's detention under a prior contempt citation when, as here, there has been an attempt to comply with the order.[41] (Emphasis and underscoring supplied)

The partiality of respondent was highlighted when, out of his selective invocation of judicial courtesy, he refused to resolve Leticia and Teresita's February 14, 2007 Urgent Manifestation of Compliance and Motion and other pending incidents in view of the pendency before the appellate court of the LBP's Omnibus Motion praying for, among other things, the quashal of the warrant of arrest, *whereas* he had earlier found Leticia and Teresita guilty of contempt despite the pendency before the appellate court of LBP's motion for reconsideration of the dismissal of the petition in CA-G.R. SP No. 93206.

IN FINE, respondent is not only guilty of Gross Ignorance of the Law or Procedure. He is also guilty of Gross Misconduct. Both are serious charges under Rule 140, Section 8 paragraphs

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[41] *Camara v. Pagayatan*, *supra* note 19 at 182, 189-190.

(3) and (9) of the Rules of Court,[42] each of which carries, under Section 11 of the same Rule, the following penalties:

1. Dismissal from the service, forfeiture of all or part of the benefits as the Court may determine, and disqualification from reinstatement or appointment to any public office, including government-owned or controlled corporations: *Provided, however,* that the forfeiture of benefits shall in no case include accrued leave credits;

2. Suspension from office without salary and other benefits for more than three (3) but not exceeding six (6) months; or

3. A fine of not more than ₱20,000.00 but not exceeding ₱40,000.00.

Respondent having already retired from the service, he may be fined more than ₱20,000 but not exceeding ₱40,000. As he had already been previously penalized for Gross Ignorance of the Law, with a stern warning that the commission of similar acts in the future shall be dealt with more severely,[43] this Court imposes the maximum fine of ₱40,000 for each offense.

WHEREFORE, respondent, Judge Ernesto Pagayatan, who has in the meantime retired, is found *GUILTY* of *GROSS IGNORANCE OF THE LAW OR PROCEDURE* and of *GROSS MISCONDUCT* for which he is each *FINED* Forty Thousand (₱40,000) Pesos, chargeable to his retirement benefits.

SO ORDERED.

Puno, C.J., Quisumbing, Carpio, Corona, Chico-Nazario, Velasco, Jr., Nachura, Leonardo-de Castro, Brion, Peralta, Bersamin, Del Castillo, and *Abad, JJ.,* concur.

Ynares-Santiago, J., on official leave.

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[42] Sec. 8. *Serious charges.* — Serious charges include:

x x x x x x x x x

3. Gross misconduct constituting violations of the Code of Judicial Conduct;

x x x x x x x x x

9. Gross ignorance of the law or procedure.

[43] *Domingo v. Pagayatan,* A.M. No. RTJ-03-1751, June 10, 2003, 403 SCRA 381, 389.

THIRD DIVISION

[G.R. No. 152101. September 8, 2009]

EMCOR INCORPORATED, *petitioner, vs.* **MA. LOURDES D. SIENES,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; INSTANT PETITION FOR REVIEW TREATED AS ONE FOR *CERTIORARI* IN ACCORDANCE WITH THE LIBERAL SPIRIT PERVADING THE RULES OF COURT AND IN THE INTEREST OF JUSTICE. — Petitioner's argument that a petition for *certiorari* is the proper remedy since the CA had no jurisdiction to entertain the petition for *certiorari* filed before it as the petition was filed beyond the 60-day period for filing the same deserves scant consideration. There is no reason why such issue could not have been raised on appeal. However, in accordance with the liberal spirit pervading the Rules of Court and in the interest of justice, we have the discretion to treat a petition for *certiorari* as having been filed under Rule 45, especially if filed within the reglementary period for filing a petition for review. Petitioner received the CA resolution denying its motion for reconsideration on January 24, 2002, and it filed the petition for *certiorari* on February 7, 2002; thus, the petition was filed within the 15-day reglementary period for filing a petition for review.

2. ID.; ID.; ID.; A.M. NO. 00-2-03-SC; THE 60-DAY PERIOD WITHIN WHICH TO FILE THE PETITION SHALL BE COUNTED FROM THE NOTICE OF DENIAL OF THE MOTION FOR RECONSIDERATION, IF ONE IS FILED; BEING A CURATIVE STATUTE, A.M. NO.00-2-03-SC WHICH AMENDED SECTION 4, RULE 65 OF THE RULES OF COURT, SHOULD BE APPLIED RETROACTIVELY. — Petitioner contends that the CA erred in giving due course to respondent's petition for *certiorari* for being filed out of time. We do not agree. Records show that respondent received the NLRC decision on December 2, 1998 and filed her motion for reconsideration on December 8, 1998. The NLRC denied

the motion for reconsideration, which respondent received on January 25, 1999. Thus, she had only 54 days, *i.e.*, until March 20, 1999, to file the petition for *certiorari* with the CA, in consonance with Circular No. 39-98, which contained the amendments to Section 4, Rule 65 of the 1997 Rules of Civil Procedure, which was in effect when the petition was filed. Respondent filed the petition on March 25, 1999, and not on March 29, 1999 as erroneously stated by the CA; thus, the petition was indeed filed out of time. However, on September 1, 2000, A.M. No. 00-2-03-SC took effect, amending Section 4, Rule 65 of the 1997 Rules of Civil Procedure, whereby the 60-day period within which to file the petition shall be counted from notice of the denial of the motion for reconsideration, if one is filed. We ruled that A.M. No. 00-2-03-SC, being a curative statute, should be applied retroactively.

3. ID.; ID.; ID.; ALTHOUGH THE APPELLATE COURT ERRONEOUSLY FOUND THE PETITION FILED OUT OF TIME, IT NONETHELESS GAVE DUE COURSE BASED ON THE MERITS OF THE CASE; APPLICATION OF TECHNICAL RULES OF PROCEDURE MAY BE RELAXED TO SERVE THE DEMANDS OF SUBSTANTIAL JUSTICE AND EQUITY AND THE SUBSTANTIAL MERITS OF THE CONTROVERSY. — The petition, which was filed on March 25, 1999, was timely filed as provided under A.M. No. 00-2-03-SC. Although the CA erroneously found that the petition was filed only on March 29, 1999 and thus the same was not timely filed even under A.M. No. 00-2-03-SC, it nonetheless gave due course to the petition based on the merit of the case. We have held that the application of technical rules of procedure may be relaxed to serve the demands of substantial justice, particularly in labor cases, because they must be decided according to justice and equity and the substantial merits of the controversy. However, as we have discussed above, the petition was timely filed under A.M. No. 00-2-03-SC.

4. ID.; ID.; ID.; PETITIONER IS ESTOPPED FROM QUESTIONING THE JURISDICTION OF THE COURT OF APPEALS DUE TO RESPONDENT'S FAILURE TO PAY THE FULL AMOUNT OF DOCKET FEES; SAID ISSUE WAS NEVER RAISED IN ANY OF THE PLEADINGS FILED BEFORE THE APPELLATE COURT, AND WAS RAISED ONLY FOR THE FIRST TIME IN THEIR REPLY

FILED WITH THE COURT. — Anent petitioner's claim regarding respondent's failure to pay the full amount of docket fees at the time of the filing of the petition with the CA, we find that it is estopped from questioning the jurisdiction of the CA on this ground, because such issue had never been raised in any of the pleadings filed before the CA. Notably, the CA issued a minute resolution dated June 7, 1999 requiring respondent to remit the amount of ₱510.00 to complete the docket and other fees. Respondent complied, but due to inadvertence, the amount remitted lacked the amount of ₱10.00, thus, the CA in a Resolution dated November 22, 1999, considered the appeal abandoned pursuant to Section 1(c), Rule 50 of the 1997 Rules of Court. Upon respondent's motion for reconsideration, the appeal was reinstated on February 22, 2000. Petitioner was copy-furnished all the resolutions issued by the CA, but petitioner never raised the issue of incomplete payment of docket fees. In fact, such issue was only raised for the first time in its Reply filed with us.

5. ID.; APPEALS; FACTUAL FINDINGS OF QUASI-JUDICIAL AND ADMINISTRATIVE BODIES ARE ACCORDED GREAT RESPECT AND EVEN FINALITY BY THE COURTS. — We agree with petitioner that factual findings of quasi-judicial and administrative bodies are accorded great respect and even finality by the courts. However, this rule is not absolute. When there is a showing that the factual findings of administrative bodies were arrived at arbitrarily or in disregard of the evidence on record, they may be examined by the courts. The CA can grant the petition for *certiorari* if it finds that the NLRC, in its assailed decision or resolution, made a factual finding not supported by substantial evidence. It is within the jurisdiction of the CA, whose jurisdiction over labor cases has been expanded to review the findings of the NLRC. In *R & E Transport, Inc. v. Latag*, we held: The power of the CA to review NLRC decisions via a Rule 65 petition is now a settled issue. As early as *St. Martin Funeral Homes v. NLRC*, we have definitively ruled that the proper remedy to ask for the review of a decision of the NLRC is a special civil action for *certiorari* under Rule 65 of the Rules of Court, and that such petition should be filed with the CA in strict observance of the doctrine on the hierarchy of courts. Moreover, it has already been explained that under Section 9 of Batas Pambansa (BP) 129, as amended by Republic Act 7902, the CA — pursuant to the

exercise of its original jurisdiction over petitions for *certiorari* – was specifically given the power to pass upon the evidence, if and when necessary, to resolve factual issues.

6. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; AUTHORIZED CAUSES; REDUCTION OF PERSONNEL OR RETRENCHMENT; EMPLOYER HAS THE BURDEN OF PROOF TO SHOW THAT IT HAD INCURRED LOSSES THAT WOULD JUSTIFY RETRENCHMENT TO PREVENT FURTHER LOSSES. — It is a settled rule that in the exercise of this Court's power of review, it does not inquire into the sufficiency of the evidence presented, consistent with the rule that this Court is not a trier of facts. *A fortiori*, this rule applies to labor cases. However, there are recognized exceptions to this rule such as when the findings of fact are conflicting, which is present in this case, thus, a review is in order. Article 283 of the Labor Code recognizes the right of the management to retrench or lay off workers to meet clear and continuing economic threats or during a period of economic recession to prevent losses. Petitioner claims that respondent was retrenched as part of its cost-cutting measures to prevent further losses as it had suffered financial losses in the amount of ₱6,321,953.00. The CA found that petitioner failed to present quantum of proof of losses to which we agree. The burden of proving the validity of retrenchment is on the petitioner. Evidence does not sufficiently establish that petitioner had incurred losses that would justify retrenchment to prevent further losses. The Comparative Income Statement for the year 1996 and for the months of February to June 1997 which petitioner submitted did not conclusively show that petitioner had suffered financial losses. In fact, records show that from January to July 1997, petitioner hired a total of 114 new employees assigned in the petitioner's stores located in the different places of the country.

7. ID.; ID.; ID.; ID.; NOTICE REQUIREMENT WAS COMPLIED WITH BY THE EMPLOYER. — We disagree with the CA finding that petitioner failed to comply with the notice requirement to be served on respondent and the Department of Labor and Employment at least one month prior to the intended date of retrenchment. Records show that petitioner had served a written notice dated July 30, 1997 to respondent

which was to be effective 30 days from receipt of the notice. Respondent received the notice on August 1, 1997 and she was no longer allowed to report for work the following day. Although respondent was asked not to report for work, still her termination was to be effective one month from receipt of notice and she would be paid whatever entitlements due her under the law. Thus, the notice requirement was indeed complied with by petitioner.

8. ID.; ID.; ID.; RESPONDENT'S DISMISSAL WAS ARBITRARY AND ILLEGAL DUE TO THE ABSENCE OF REASONABLE CRITERIA IN EFFECTING THE RETRENCHMENT IN CASE AT BAR; RESPONDENT WAS TERMINATED WITHOUT EVEN CONSIDERING HER SENIORITY NOR WAS SHE OFFERED TO BE TRANSFERRED TO OTHER POSITIONS. — We agree with the CA in finding that petitioner failed to show that it used reasonable criteria in effecting retrenchment, such as, but not limited to: (a) less preferred status (*e.g.*, temporary employee), (b) efficiency, and (c) seniority. Records do not show any criterion adopted or used by petitioner in dismissing respondent. Respondent was terminated without considering her seniority. Retrenchment scheme without taking seniority into account rendered the retrenchment invalid. While respondent was the third most senior employee among the 7 employees in petitioner's personnel department, she was retrenched while her other co-employees junior than her were either retained in the Personnel Department or were transferred to other positions in the company. There was no showing that respondent was offered to be transferred to other positions. We, therefore, find that the CA did not err, much less abuse, its discretion in finding that respondent's dismissal was arbitrary and illegal.

APPEARANCES OF COUNSEL

Dominguez Paderna & Tan Law Offices Co. for petitioner.
Public Attorney's Office for respondent.

D E C I S I O N

PERALTA, *J.*:

Before us is a special civil action for *certiorari* under Rule 65 of the Rules of Court filed by petitioner Emcor Incorporated seeking to set aside the Decision[1] dated May 24, 2001 and the Resolution[2] dated January 14, 2002 of the Court of Appeals (CA) in CA-G.R. SP No. 52810.

Petitioner is engaged in the business of selling, promoting and servicing National appliances and Kawasaki motorcycles and parts throughout Visayas and Mindanao. Respondent Ma. Lourdes D. Sienes was hired by petitioner on March 29, 1992 as one of its clerks assigned in its Personnel Department.

On June 6, 1996, respondent got married to a Credit Officer of petitioner who had to resign in view of petitioner's policy against husband and wife both working in the company.

On August 1, 1997, respondent was terminated from employment due to petitioner's retrenchment program.

On October 15, 1997, respondent filed a case for illegal dismissal and damages against petitioner alleging that her retrenchment was discriminatory and without basis; that when she was told on August 1, 1997 that she was being retrenched and was asked to sign a waiver and quitclaim which she refused to sign, thus, she was not allowed to report for work since then; that petitioner's alleged suffering from business reverses was belied by its continuous hiring of new employees from January to July 1997; that she was the third most senior of the seven clerks assigned to the Personnel Department and yet she was chosen to be retrenched when there was no evaluation of her performance before her termination; that petitioner committed bad faith in forcing her husband to resign in the guise of the

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[1] Penned by Justice Conchita Carpio Morales (now a member of this Court), with Associate Justices Candido V. Rivera and Rebecca de Guia-Salvador, concurring; *rollo*, pp. 93-99.

[2] *Id.* at 102-103.

alleged prohibition on spouses working in the same company. Respondent prayed for moral and exemplary damages.

In its position paper, petitioner argued that respondent was retrenched as part of its cost-cutting measures in order to prevent further losses; that she was served a one-month advance notice, receipt of which she refused to acknowledge; that it suffered financial losses in the amount of ₱6,321,953.00 for the year 1997 as shown by its Comparative Income Statement for the year 1996 and from February to June 1997; that it was constrained to resort to downsizing its manpower complement because of the continuous slump in the market demands for its products by reducing or abolishing some job positions in each department and transferring the work activities of the abolished positions to the remaining job positions; that there were 5 other employees retrenched who had received their separation pay; and that respondent's termination was a valid exercise of management prerogative.

Respondent filed her Reply and petitioner filed its Rejoinder.

On May 27, 1998, the Labor Arbiter issued a Decision[3] dismissing the case.

The Labor Arbiter found that petitioner's retrenchment program was to prevent further losses, thus, a valid exercise of management prerogative; that petitioner had served the affected employees one-month advance notice, a copy furnished the DOLE Regional Office, and they were properly paid their monetary benefits; that proof of actual losses incurred by the company was not a condition *sine qua non* for retrenchment as it could be resorted to by an employer primarily to avoid or minimize business losses as provided under Article 283 of the Labor Code; and that respondent's position was not indispensable to the operation of petitioner's business. The Labor Arbiter also found that the hiring of new employees was necessary for the different stores located throughout the country; that respondent failed to show that someone was hired to take her place, and she failed to controvert petitioner's Comparative Income Statement; and

[3] Penned by Labor Arbiter Antonio M. Villanueva; *rollo,* pp. 58-64.

that there appeared no evidence that respondent's husband was forced to resign, as he voluntarily left the company.

Aggrieved, respondent filed an appeal with the National Labor Relations Commission (NLRC). In a Decision[4] dated November 16, 1998, the NLRC dismissed the appeal and affirmed the Labor Arbiter's decision. Respondent received the NLRC decision on December 2, 1998.[5]

On December 8, 1998, respondent filed a motion for reconsideration, which was denied in a Resolution[6] dated January 11, 1999. She received the Resolution on January 25, 1999;[7] thus, she had until March 20, 1999 to file a petition for *certiorari* with the CA.

On March 25, 1999, respondent filed a petition for *certiorari* with the CA. After the parties had filed their respective pleadings, the case was submitted for Decision.

On May 24, 2001, the CA rendered its assailed Decision, which reversed the decisions of the Labor Arbiter and the NLRC, the dispositive portion of which reads:

> WHEREFORE, the petition is hereby GRANTED. The assailed decision is SET ASIDE, and a new one rendered declaring Lourdes' retrenchment as illegal and ordering EMCOR to reinstate Lourdes to her former position with payment of full backwages.[8]

The CA found that the petition for *certiorari* was indeed filed out of time following SC Resolution dated July 21, 1998, which was applicable to respondent's case, as the petition was filed on March 29, 1999; that even applying SC A.M. No. 00-02-03 dated September 1, 2000, where a new period of 60

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[4] Penned by Commissioner Leon G. Gonzaga, Jr., with Presiding Commissioner Oscar N. Abella, concurring; *id.* at 66-68.

[5] CA *rollo*, p. 12.

[6] *Rollo*, pp. 71-72.

[7] CA *rollo*, p. 12.

[8] *Rollo*, p. 99.

days from receipt of the denial of the motion for reconsideration is provided for, the petition was still filed out of time; nonetheless, the CA gave due course to the petition based on the merit of the case, setting aside technical rules in the higher interest of justice.

In reversing the NLRC, the CA found that petitioner failed to present the quantum of proof of its losses to justify respondent's retrenchment; that the best proof of the profit and loss performance of a company was not petitioner's Comparative Income Statement but the Income Statement for the year 1996 bearing the accountant's signature or showing that it was audited by an independent auditor; that since respondent was terminated on August 1, 1997 when fiscal year 1997 had not yet ended, petitioner should have come up with its books of accounts and profit and loss statement signed by its accountant; that petitioner's Comparative Income Statement which covered only the year 1996 and two quarters of 1997, was not sufficient to show serious business losses, as it failed to show the income or losses for the years immediately preceding 1996; that it hired new employees when it could have offered respondent any of the clerical positions for newly-hired employees. The CA also held that the required one-month notice prior to her termination was not complied with since she was no longer allowed to work on August 2, 1997 despite the fact that the notice to terminate her was made only on August 1, 1997; and that there were no fair and reasonable criteria observed in terminating her. The CA, however, found no evidence to substantiate respondent's claim for damages.

Petitioner received a copy of the CA decision on June 8, 2001 and filed a motion for reconsideration on June 20, 2001. On January 14, 2002, the CA denied the motion for reconsideration, and petitioner received a copy of the resolution on January 24, 2002.

Undaunted, petitioner filed a petition for *certiorari* raising the following issues:

PUBLIC RESPONDENT COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OF OR LACK OF

JURISDICTION WHEN IT GAVE DUE COURSE TO THE APPEAL DESPITE THE FACT THAT IT WAS ADMITTEDLY FILED OUT OF TIME.

PUBLIC RESPONDENT COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OF OR LACK OF JURISDICTION WHEN IT FURTHER REVERSED AND SET ASIDE THE CONSISTENT RULING OF BOTH THE LABOR ARBITER AND THE NATIONAL LABOR RELATIONS COMMISSION.[9]

Petitioner alleges that the CA erred in giving due course to the petition for *certiorari*, as the same was filed out of time, and a liberal application of Section 4, Rule 65 of the 1997 Rules of Civil Procedure was uncalled for; that both the Labor Arbiter and the NLRC, being experts in their field and having a good grasp of the over-all conditions then prevailing, affirmed with definiteness the soundness of petitioner's retrenchment program; and that the CA gravely erred and abused its discretion when it reversed the findings of the Labor Arbiter and the NLRC, since the policy of the court is not to interfere with the exercise of the adjudicatory functions of the administrative bodies, unless there be a showing of arbitrary action or palpable and serious error.

In her Comment, respondent argues that the petition should be dismissed, as petitioner filed a petition for *certiorari* under Rule 65 which was a wrong remedy, since an appeal from a final disposition of the CA should be under Rule 45 of the Rules of Court; that *certiorari* cannot be used as a substitute for the lost or lapsed appeal. Respondent counters that the petition for *certiorari* filed before the CA was timely filed under A.M. No. 00-2-03- SC amending Section 4, Rule 65 of the Rules of Court; that the CA correctly reversed the decision of the administrative bodies, since petitioner presented an unsigned and unaudited Comparative Income Statement for the year 1996 and from January to June 1997; and that there were no criteria applied to the selection of the employees to be terminated.

In its Reply, petitioner argues that an appeal under Rule 45 presupposes that the inferior court had jurisdiction to entertain

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[9] *Id.* at 7.

the case; however, the CA had no jurisdiction to entertain the same because the petition was filed beyond the 60-day period required for filing the petition. Petitioner raised for the first time respondent's failure to pay the full amount of docket fees at the time of the filing of the petition. It claims that the CA committed grave abuse of discretion amounting to lack of jurisdiction when it reversed the findings of both the Labor Arbiter and the NLRC, thus, the appropriate remedy is a petition for *certiorari*. Petitioner contends that nevertheless, the instant petition is not a substitute for a lapsed appeal; since petitioner received a copy of the CA resolution denying its motion for reconsideration on January 24, 2002, and the instant petition was filed on February 7, 2002, *i.e.*, within the 15-day period to file the petition for review on *certiorari*.

Preliminarily, we must first resolve respondent's contention that the instant petition for *certiorari* filed under Rule 65 should be summarily dismissed for being the wrong mode of appeal.

The proper remedy of a party aggrieved by a decision of the Court of Appeals is a petition for review under Rule 45, which is not identical to a petition for *certiorari* under Rule 65. Rule 45 provides that decisions, final orders or resolutions of the Court of Appeals in any case, *i.e.*, regardless of the nature of the action or proceedings involved, may be appealed to us by filing a petition for review, which would be but a continuation of the appellate process over the original case.[10] Thus, petitioner should have filed a petition for review under Rule 45 instead of a special civil action for *certiorari* under Rule 65.

Petitioner's argument that a petition for *certiorari* is the proper remedy since the CA had no jurisdiction to entertain the petition for *certiorari* filed before it as the petition was filed beyond the 60-day period for filing the same deserves scant consideration. There is no reason why such issue could not have been raised on appeal.

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[10] *Mercado v. Court of Appeals,* G. R. No. 150241, November 4, 2004, 441 SCRA 463, 469.

However, in accordance with the liberal spirit pervading the Rules of Court and in the interest of justice, we have the discretion to treat a petition for *certiorari* as having been filed under Rule 45, especially if filed within the reglementary period for filing a petition for review.[11] Petitioner received the CA resolution denying its motion for reconsideration on January 24, 2002, and it filed the petition for *certiorari* on February 7, 2002; thus, the petition was filed within the 15-day reglementary period for filing a petition for review.

Now, on the issues raised by petitioner.

Petitioner contends that the CA erred in giving due course to respondent's petition for *certiorari* for being filed out of time.

We do not agree.

Records show that respondent received the NLRC decision on December 2, 1998 and filed her motion for reconsideration on December 8, 1998. The NLRC denied the motion for reconsideration, which respondent received on January 25, 1999. Thus, she had only 54 days, *i.e.*, until March 20, 1999, to file the petition for *certiorari* with the CA, in consonance with Circular No. 39-98, which contained the amendments to Section 4, Rule 65 of the 1997 Rules of Civil Procedure, which was in effect when the petition was filed, thus:

> SEC. 4. *Where and when petition to be filed.* — The petition may be filed not later than sixty (60) days from notice of the judgment, order or resolution sought to be assailed in the Supreme Court or, if it relates to the acts or omissions of a lower court or of a corporation, board, officer or person, in the Regional Trial Court exercising jurisdiction over the territorial area as defined by the Supreme Court. It may also be filed in the Court of Appeals whether or not the same is in aid of its appellate jurisdiction, or in the Sandiganbayan if it is in aid of its jurisdiction. If it involves the acts or omissions of a quasi-judicial agency, and unless otherwise provided by law or these Rules, the petition shall be filed in and cognizable only by the Court of Appeals.

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[11] *Delsan Transport Lines, Inc. v. Court of Appeals,* G.R. No. 112288, February 20, 1997, 268 SCRA 597, 605.

If the petitioner had filed a motion for new trial or reconsideration in due time after notice of said judgment, order or resolution, the period herein fixed shall be interrupted. If the motion is denied, the aggrieved party may file the petition within the remaining period, but which shall not be less than five (5) days in any event, reckoned from notice of such denial. No extension of time to file the petition shall be granted, except for the most compelling reason and in no case to exceed fifteen (15) days.

Respondent filed the petition on March 25, 1999,[12] and not on March 29, 1999 as erroneously stated by the CA; thus, the petition was indeed filed out of time. However, on September 1, 2000, A.M. No. 00-2-03-SC took effect, amending Section 4, Rule 65 of the 1997 Rules of Civil Procedure, whereby the 60-day period within which to file the petition shall be counted from notice of the denial of the motion for reconsideration, if one is filed. We ruled that A.M. No. 00-2-03-SC, being a curative statute, should be applied retroactively.[13]

In *Narzoles v. NLRC*,[14] the rationale for the retroactive application of A.M. No. 00-2-03-SC was stated in this wise, thus:

The Court has observed that Circular No. 39-98 has generated tremendous confusion resulting in the dismissal of numerous cases for late filing. This may have been because, historically, *i.e.*, even before the 1997 revision to the Rules of Civil Procedure, a party had a fresh period from receipt of the order denying the motion for reconsideration to file a petition for *certiorari*. Were it not for the amendments brought about by Circular No. 39-98, the cases so dismissed would have been resolved on the merits. Hence, the Court deemed it wise to revert to the old rule allowing a party a fresh 60-day period from notice of the denial of the motion for reconsideration to file a petition for *certiorari*. Earlier this year, the Court resolved, in A.M. No. 00-2-03-SC, to further amend Section 4, Rule 65 to read as follows:

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[12] It was the date stamped on the envelope containing respondent's petition for *certiorari* filed with the CA.

[13] *Romero v. Court of Appeals*, G.R. No. 142803, November 20, 2007, 537 SCRA 643, 648-649.

[14] G.R. No. 141959, September 29, 2000, 341 SCRA 533.

> Sec. 4. *When and where petition filed*. — The petition shall be filed not later than sixty (60) days from notice of the judgment, order or resolution. In case a motion for reconsideration or new trial is timely filed, whether such motion is required or not, the sixty (60) day period shall be counted from notice of the denial of said motion.
>
> The petition shall be filed in the Supreme Court or, if it relates to the acts or omissions of a lower court or of a corporation, board, officer or person, in the Regional Trial Court exercising jurisdiction over the territorial area as defined by the Supreme Court. It may also be filed in the Court of Appeals whether or not the same is in aid of its appellate jurisdiction or in the Sandiganbayan if it is in aid of its appellate jurisdiction. If it involves the acts or omissions of a quasi-judicial agency, unless otherwise provided by law or these rules, the petition shall be filed in and cognizable only by the Court of Appeals.
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> No extension of time to file the petition shall be granted except for compelling reason and in no case exceeding fifteen (15) days.

The latest amendments took effect on September 1, 2000, following its publication in the Manila Bulletin on August 4, 2000 and in the Philippine Daily Inquirer on August 7, 2000, two newspapers of general circulation.

In view of its purpose, the Resolution further amending Section 4, Rule 65 can only be described as curative in nature, and the principles governing curative statutes are applicable.

Curative statutes are enacted to cure defects in a prior law or to validate legal proceedings which would otherwise be void for want of conformity with certain legal requirements. They are intended to supply defects, abridge superfluities and curb certain evils. They are intended to enable persons to carry into effect that which they have designed or intended, but has failed of expected legal consequence by reason of some statutory disability or irregularity in their own action. They make valid that which, before the enactment of the statute was invalid. Their purpose is to give validity to acts done that would have been invalid under existing laws, as if existing laws have been complied with. Curative statutes, therefore, by their very essence, are retroactive.

Accordingly, while the Resolution states that the same "shall take effect on September 1, 2000, following its publication in two (2) newspapers of general circulation," its retroactive application cannot be denied. In short, the filing of the petition for *certiorari* in this Court on 17 December 1998 is deemed to be timely, the same having been made within the 60-day period provided under the curative Resolution. We reach this conclusion bearing in mind that the substantive aspects of this case involves the rights and benefits, even the livelihood, of petitioner employees.[15]

Thus, the petition, which was filed on March 25, 1999, was timely filed as provided under A.M. No. 00-2-03-SC. Although the CA erroneously found that the petition was filed only on March 29, 1999 and thus the same was not timely filed even under A.M. No. 00-2-03-SC, it nonetheless gave due course to the petition based on the merit of the case. We have held that the application of technical rules of procedure may be relaxed to serve the demands of substantial justice, particularly in labor cases, because they must be decided according to justice and equity and the substantial merits of the controversy.[16] However, as we have discussed above, the petition was timely filed under A.M. No. 00-2-03-SC.

Anent petitioner's claim regarding respondent's failure to pay the full amount of docket fees at the time of the filing of the petition with the CA, we find that it is estopped from questioning the jurisdiction of the CA on this ground, because such issue had never been raised in any of the pleadings filed before the CA. Notably, the CA issued a minute resolution[17] dated June 7, 1999 requiring respondent to remit the amount of ₱510.00 to complete the docket and other fees. Respondent complied, but due to inadvertence, the amount remitted lacked the amount of ₱10.00, thus, the CA in a Resolution[18] dated November 22, 1999, considered the appeal abandoned pursuant to Section

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[15] *Id.* at 537-538. (Citations omitted.)

[16] See *Garcia v. Philippine Airlines, Inc.*, G.R. No. 160798, June 8, 2005, 459 SCRA 768, 782.

[17] CA *rollo*, p. 90.

[18] *Id.* at 98.

1(c), Rule 50 of the 1997 Rules of Court. Upon respondent's motion for reconsideration, the appeal was reinstated on February 22, 2000.[19] Petitioner was copy-furnished all the resolutions issued by the CA, but petitioner never raised the issue of incomplete payment of docket fees. In fact, such issue was only raised for the first time in its Reply filed with us.

Petitioner's argument that the CA erred and abused its discretion in reversing the findings of the Labor Arbiter and the NLRC, as it is the court's policy of non-interference in the exercise of the adjudicatory functions of the administrative bodies, is devoid of merit. We agree with petitioner that factual findings of quasi-judicial and administrative bodies are accorded great respect and even finality by the courts. However, this rule is not absolute. When there is a showing that the factual findings of administrative bodies were arrived at arbitrarily or in disregard of the evidence on record, they may be examined by the courts. The CA can grant the petition for *certiorari* if it finds that the NLRC, in its assailed decision or resolution, made a factual finding not supported by substantial evidence. It is within the jurisdiction of the CA, whose jurisdiction over labor cases has been expanded to review the findings of the NLRC. In *R & E Transport, Inc. v. Latag*,[20] we held:

> The power of the CA to review NLRC decisions via a Rule 65 petition is now a settled issue. As early as *St. Martin Funeral Homes v. NLRC,* we have definitively ruled that the proper remedy to ask for the review of a decision of the NLRC is a special civil action for *certiorari* under Rule 65 of the Rules of Court, and that such petition should be filed with the CA in strict observance of the doctrine on the hierarchy of courts. Moreover, it has already been explained that under Section 9 of Batas Pambansa (BP) 129, as amended by Republic Act 7902, the CA — pursuant to the exercise of its original jurisdiction over petitions for *certiorari* — was specifically given the power to pass upon the evidence, if and when necessary, to resolve factual issues.[21]

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

[20] G.R. No. 155214, February 13, 2004, 422 SCRA 698.

[21] *Id.* at 703-704.

The next issue before us is whether the CA committed an error in reversing the NLRC decision finding respondent's dismissal valid due to retrenchment.

It is a settled rule that in the exercise of this Court's power of review, it does not inquire into the sufficiency of the evidence presented, consistent with the rule that this Court is not a trier of facts.[22] *A fortiori*, this rule applies to labor cases.[23] However, there are recognized exceptions[24] to this rule such as when the findings of fact are conflicting, which is present in this case, thus, a review is in order.

Article 283 of the Labor Code recognizes the right of the management to retrench or lay off workers to meet clear and continuing economic threats or during a period of economic recession to prevent losses, thus:

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

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[22] *The Insular Life Assurance Company, Ltd. v. Court of Appeals*, G.R. No. 126850, April 28, 2004, 428 SCRA 79, 85.

[23] *Chuayuco Steel Manufacturing Corporation and/or Edwin Chua v. Buklod Ng Manggagawa sa Chuayuco Steel Manufacturing Corporation*, G.R. No. 167347, January 31, 2007, 513 SCRA 621.

[24] *Id.* at 627-628.

(1) when the findings are grounded entirely on speculation, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of facts are conflicting; (6) when in making its findings the Court of Appeals went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; and (11) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.

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 workers 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 (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year.

In *Flight Attendants and Stewards Association of the Philippines v. Philippine Airlines, Inc.*,[25] we have stated the nature, justification and requisites of a valid retrenchment, to wit:

The law recognizes the right of every business entity to reduce its work force if the same is made necessary by compelling economic factors which would endanger its existence or stability. Where appropriate and where conditions are in accord with law and jurisprudence, the Court has authorized valid reductions in the work force to forestall business losses, the hemorrhaging of capital, or even to recognize an obvious reduction in the volume of business which has rendered certain employees redundant.

Nevertheless, while it is true that the exercise of this right is a prerogative of management, there must be faithful compliance with substantive and procedural requirements of the law and jurisprudence, for retrenchment strikes at the very heart of the worker's employment, the lifeblood upon which he and his family owe their survival. Retrenchment is only a measure of last resort, when other less drastic means have been tried and found to be inadequate.

The burden clearly falls upon the employer to prove economic or business losses with sufficient supporting evidence. Its failure to prove these reverses or losses necessarily means that the employee's dismissal was not justified. Any claim of actual or potential business losses must satisfy certain established standards, all of

[25] G.R. No. 178083, July 22, 2008, 559 SCRA 252.

which must concur, before any reduction of personnel becomes legal. These are:

> (1) That retrenchment is reasonably necessary and likely to prevent business losses which, if already incurred, are not merely *de minimis*, but substantial, serious, actual and real, or if only expected, are reasonably imminent as perceived objectively and in good faith by the employer;
>
> (2) That the employer served written notice both to the employees and to the Department of Labor and Employment at least one month prior to the intended date of retrenchment;
>
> (3) That the employer pays the retrenched employees separation pay equivalent to one (1) month pay or at least one-half (½) month pay for every year of service, whichever is higher;
>
> (4) That the employer exercises its prerogative to retrench employees in good faith for the advancement of its interest and not to defeat or circumvent the employees' right to security of tenure; and,
>
> (5) That the employer used fair and reasonable criteria in ascertaining who would be dismissed and who would be retained among the employees, such as status, efficiency, seniority, physical fitness, age, and financial hardship for certain workers.[26]

Petitioner claims that respondent was retrenched as part of its cost-cutting measures to prevent further losses as it had suffered financial losses in the amount of ₱6,321,953.00. The CA found that petitioner failed to present quantum of proof of losses to which we agree.

The burden of proving the validity of retrenchment is on the petitioner. Evidence does not sufficiently establish that petitioner had incurred losses that would justify retrenchment to prevent further losses. The Comparative Income Statement for the year 1996 and for the months of February to June 1997 which petitioner submitted did not conclusively show that petitioner had suffered financial losses. In fact, records show that from January to July 1997, petitioner hired a total of 114 new employees

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[26] *Id.* at 272-273.

assigned in the petitioner's stores located in the different places of the country.[27]

We, however, disagree with the CA finding that petitioner failed to comply with the notice requirement to be served on respondent and the Department of Labor and Employment at least one month prior to the intended date of retrenchment.

Records show that petitioner had served a written notice dated July 30, 1997 to respondent which was to be effective 30 days from receipt of the notice.[28] Respondent received the notice on August 1, 1997 and she was no longer allowed to report for work the following day. Although respondent was asked not to report for work, still her termination was to be effective one month from receipt of notice and she would be paid whatever entitlements due her under the law. Thus, the notice requirement was indeed complied with by petitioner.

Finally, we agree with the CA in finding that petitioner failed to show that it used reasonable criteria in effecting retrenchment, such as, but not limited to: (a) less preferred status (*e.g.*, temporary employee), (b) efficiency, and (c) seniority.

Records do not show any criterion adopted or used by petitioner in dismissing respondent. Respondent was terminated without considering her seniority. Retrenchment scheme without taking seniority into account rendered the retrenchment invalid.[29] While respondent was the third most senior employee among the 7 employees in petitioner's personnel department, she was retrenched while her other co-employees junior than her were either retained in the Personnel Department[30] or were transferred to other positions in the company.[31] There was no showing that respondent was offered to be transferred to other positions.

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[27] LA decision, *id.* at 62.

[28] *Rollo*, p. 50.

[29] *Philippine Tuberculosis Society Inc. v. NLRC*, 356 Phil. 63, 72 (1998).

[30] *Rollo*, pp. 55-56.

[31] *Id.* at 53-54.

We, therefore, find that the CA did not err, much less abuse, its discretion in finding that respondent's dismissal was arbitrary and illegal.

WHEREFORE, the petition is *DENIED*. The Decision dated May 24, 2001 and the Resolution dated January 14, 2002 of the Court of Appeals in CA-G.R. SP No. 52810 are *AFFIRMED*.

SO ORDERED.

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

FIRST DIVISION

[G.R. No. 157952. September 8, 2009]

JOWETT K. GOLANGCO, *petitioner, vs.* **JONE B. FUNG,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; FATAL PROCEDURAL OMISSIONS WERE COMMITTED BEFORE THE COURT OF APPEALS; PETITIONER FAILED TO IMPLEAD THE PEOPLE OF THE PHILIPPINES AS AN INDISPENSABLE PARTY AND THE CONSENT OF THE SOLICITOR GENERAL WAS NOT OBTAINED OR, AT THE VERY LEAST, FURNISHED THE LATTER A COPY OF THE PETITION BEFORE THE FILING THEREOF. — The petitioner did not join the People of the Philippines as a party in his action for *certiorari* in the Court of Appeals. He thereby ignored that the People of the Philippines were indispensable parties due to his objective being to set aside the trial court's order dated May 23, 2001 that concerned the public aspect of Criminal Case No. 95-145703.

The omission was fatal and already enough cause for the summary rejection of his petition for *certiorari*. The petitioner did not also obtain the consent of the Office of the Solicitor General (OSG) to his petition for *certiorari*. At the very least, he should have furnished a copy of the petition for *certiorari* to the OSG prior to the filing thereof, but even that he did not do. Thereby, he violated Section 35(l), Chapter 12, Title III of Book IV of Executive Order No. 292 (*The Administrative Code of* 1987), which mandates the OSG to represent "the Government in the Supreme Court and the Court of Appeals in all criminal proceedings; represent the Government and its officers in the Supreme Court, the Court of Appeals, and all other courts or tribunals in all civil actions and special proceedings in which the Government or any officer thereof in his official capacity is a party." Although the petition for *certiorari* bore the conformity of the public prosecutor (*i.e.*, Assistant City Prosecutor Danilo Formoso of Manila), that conformity alone did not suffice. The authority of the City Prosecutor or his assistant to appear for and represent the People of the Philippines was confined only to the proceedings in the trial court.

2. ID.; ID.; ID.; TRIAL JUDGE DID NOT ACT CAPRICIOUSLY, ARBITRARILY OR WHIMSICALLY IN ISSUING THE ASSAILED ORDER TERMINATING THE PROSECUTION'S PRESENTATION OF EVIDENCE. — The criminal case had been pending since 1995 and the petitioner as the complainant had presented only two witnesses as of the issuance of the assailed order. The trial court had not been wanting in giving warnings to the Prosecution on the dire consequences should the Prosecution continue to fail to complete its evidence. The Prosecution had retained the duty to ensure that its witnesses would be present during the trial, for its obligation in the administration of justice had been to prove its case *sans* vexatious and oppressive delays. Yet, the warnings of the trial court had gone unheeded. Instead, the Prosecution would deflect the responsibility for the delays to the failure of the trial court to issue the subpoena to its proposed witness and to cause the subpoena to be served. Such attitude of the Prosecution, which included the petitioner as the complainant, manifested a lack of the requisite diligence required of all litigants coming to the courts to seek redress. We find that the trial judge did not act capriciously, arbitrarily or whimsically in issuing the assailed order. Thus, the Court

of Appeals properly dismissed the petition for *certiorari*. The petitioner now needs to be reminded that *certiorari* is an extraordinary remedy to correct a grave abuse of discretion amounting to lack or excess of jurisdiction when an appeal, or any plain, speedy and adequate remedy in the ordinary course of law is not available. In this regard, grave abuse of discretion implies a capricious and whimsical exercise of judgment that is equivalent to lack of jurisdiction whenever the power is exercised in an arbitrary or despotic manner by reason of passion, prejudice or personal aversion amounting to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law.

3. ID.; ID.; ID.; TRIAL COURT'S ASSAILED ORDER TERMINATING THE PROSECUTION'S PRESENTATION OF EVIDENCE IS MERELY INTERLOCUTORY; *CERTIORARI* DOES NOT LIE TO REVIEW AN INTERLOCUTORY ORDER BUT ONLY A FINAL JUDGMENT OR ORDER THAT ENDS THE PROCEEDINGS. — It does not escape our notice that the trial court's assailed order terminating the Prosecution's presentation of evidence was merely interlocutory. This fact surely adds justification to the Court of Appeals' rejection of the petition for *certiorari*, because it is the settled rule that *certiorari* does not lie to review an interlocutory order, but only a final judgment or order that ends the proceedings. *Certiorari* will be refused where there has been no final judgment or order and the proceeding for which the writ is sought is still pending and undetermined in the lower court. Indeed, a writ of *certiorari* is not intended to correct every controversial interlocutory ruling unless the ruling is attended by grave abuse of discretion or tainted by whimsical exercise of judgment equivalent to lack of jurisdiction, for the function of *certiorari* is limited to keeping an inferior court within its jurisdiction and to relieving persons from its arbitrary acts — acts that courts or judges have no power or authority in law to perform. Instead, the proper remedy for the petitioner was to proceed in the action until judgment, which, once rendered, might then be reviewed on appeal, along with the assailed interlocutory order. As long as the trial court acted within its jurisdiction, its alleged error committed in the exercise of its jurisdiction amounted to nothing more than an error of judgment

that was reviewable by a timely appeal, not by a special civil action of *certiorari*.

APPEARANCES OF COUNSEL

Fernandez Panganiban Beloso Zaldivar & Associates law Office for petitioner.

Urbano Palamos & Perdigon for respondent.

D E C I S I O N

BERSAMIN, *J.*:

We have before us a petition for review on *certiorari* seeking the review of the decision dated September 12, 2002 (dismissing the petitioner's petition for *certiorari*)[1] and the resolution dated April 2, 2003 (denying the petitioner's motion for reconsideration),[2] both promulgated by the Court of Appeals in C.A.-G.R. SP No. 66616 entitled *Jowett K. Golangco v. The Presiding Judge of Branch 53, Regional Trial Court of Manila and Jone B. Fung.*

Antecedents

C.A.-G.R. SP No. 66616 was a special civil action for *certiorari* commenced by the petitioner to assail the order issued by the Regional Trial Court (RTC), Branch 53, in Manila in Criminal Case No. 95-145703 entitled *People v. Jone B. Fung*, whereby the RTC declared the Prosecution to have terminated the presentation of further evidence and required the Prosecution to file a written offer of evidence within 20 days, furnishing a copy of the offer to the accused who in turn had to comment on the offer within 15 days from receipt.

Criminal Case No. 95-145703, a prosecution for libel initiated by the petitioner as the complainant against the respondent, was commenced in 1995.[3] Allegedly, the respondent had issued

[1] *Rollo*, pp. 20-25.

[2] *Id.*, p. 30.

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

an office memorandum dated May 10, 1995 maliciously imputing against the petitioner the commission of bribery and had sent copies of the memorandum to the petitioner's superiors in the Philippine Overseas Employment Administration (POEA) and to other public officers and personalities not connected with the POEA, causing damage and prejudice to the petitioner.[4]

After almost 6 years, the Prosecution had presented only two witnesses in Criminal Case No. 95-145703. On February 16, 2001, the Prosecution requested that a subpoena *ad testificandum* be issued to and served on Atty. Oscar Ramos, Resident Ombudsman of the POEA, to compel him to testify in the criminal case on February 20, 2001. The hearing of February 20, 2001 was, however, reset to May 23, 2001 due to the unavailability of Atty. Ramos.

On May 23, 2001, the Prosecution still failed to present Atty. Ramos as its witness because no subpoena had been issued to and served on him for the purpose. Consequently, the RTC judge issued an order terminating the Prosecution's presentation of evidence,[5] as follows:

ORDER

When the case was called for hearing, the accused is in court with his lawyer Atty. Benigno Palamos. Private prosecutor Atty. Agripino Baybay is in court but he has no witnesses today. He manifested that he has to present Atty. Oscar Ramos, but since the last hearing on February 20, to this date he has not asked for any subpoena. Defense counsel moves to terminate the presentation of prosecution evidence in view of the failure of the prosecution to present witnesses despite numerous postponements. The private prosecutor asks for another continuance. The records show that on January 23, 2001 this Court gave a stern warning to the prosecutor that it is giving one final postponement for the production of witnesses. Yet the prosecution caused the service of the subpoena too late for the hearing on February 20. For the next three months, the prosecution simply did not apply for a subpoena. The Court finds that the intention

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

[5] *Id.*, pp. 17 & 21.

to delay the proceedings is evident. As prayed for, the prosecution is declared to have terminated further evidence.

The prosecution is given 20 days from today to make its formal offer with copy furnished the defense counsel who is given 15 days from receipt to make his comment and thereafter the offer will be deemed submitted for resolution.

SO ORDERED.

The petitioner, by his lonesome, assailed on *certiorari* in the Court of Appeals the order dated May 23, 2001, claiming that the RTC judge thereby committed grave abuse of discretion for not issuing the subpoena to require Atty. Ramos to appear and testify in the May 23, 2001 hearing. He contended that his prior request for the subpoena for the February 20, 2001 hearing should have been treated as a continuing request for the subpoena considering that the *Rules of Court* did not require a party to apply for a subpoena again should it not be served in the first time.[6]

In its decision dated September 12, 2002, the Court of Appeals rebuffed the petitioner and dismissed the petition for *certiorari*, holding:

Axiomatically, any request for a subpoena to a witness must indicate the date and time when the witness must appear in court to give his or her testimony. It is on the basis of that request that the court personnel prepares the subpoena indicating the title of the case, the date and time for the appearance of the intended witness. This is where petitioner fell into error. His urgent request for subpoena (Annex "A") failed to contain the date and time when the intended witness, Atty. Oscar Ramos, must appear in court to testify.

Even then, granting that the subpoena issued for February 20, 2001 hearing was properly served but which hearing was later on postponed, there is still a need to ask for a new subpoena to the same witness for the next scheduled hearing. The court cannot be tasked to guess whether or not petitioner still intends to present the witness at the next hearing. An intention to still present the witness necessarily requires another request for a subpoena.

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

Moreover, the case was last heard on January 23, 2001 prior to the February 20, 2001 hearing. *Apropos*, to ask for a subpoena to his next witness on February 16, 2001, for the hearing on February 20, 2001 was rather late. As the complainant in the case, petitioner should have exercised due diligence or proper zeal in the prosecution of his case which has long been pending for five (5) years, let alone that it was the last chance given by the court to the prosecution to the prosecution (sic) to produce its witness on February 20, 2001 on account of its previous failure to do so.

Then, again, as correctly observed by the *court a quo*, from February 20, 2001 to May 23, 2001, a good three (3) months period passed without the prosecution requesting for a subpoena for its intended witness. When the respondent court, as a consequence, deemed the prosecution evidence terminated and required it to formally offer its evidence, it was not committing any error nor abuse of discretion. Here, petitioner created its own predicament and should suffer from its adverse effect.[7]

Hence, this appeal.

Issue

The issue is whether the Court of Appeals correctly ruled on the petition for *certiorari* of the petitioner.

Ruling of the Court

We find no reversible error on the part of the Court of Appeals.

I

Before dealing with the petition for review, we point out the gross procedural misstep committed by the petitioner in the Court of Appeals.

The petitioner did not join the People of the Philippines as a party in his action for *certiorari* in the Court of Appeals. He thereby ignored that the People of the Philippines were indispensable parties due to his objective being to set aside the trial court's order dated May 23, 2001 that concerned the public aspect of Criminal Case No. 95-145703. The omission was

[7] *Id.*, pp. 23-24.

fatal and already enough cause for the summary rejection of his petition for *certiorari*.

The petitioner did not also obtain the consent of the Office of the Solicitor General (OSG) to his petition for *certiorari*. At the very least, he should have furnished a copy of the petition for *certiorari* to the OSG prior to the filing thereof,[8] but even that he did not do. Thereby, he violated Section 35(l), Chapter 12, Title III of Book IV of Executive Order No. 292 (*The Administrative Code of* 1987), which mandates the OSG to represent "the Government in the Supreme Court and the Court of Appeals in all criminal proceedings; represent the Government and its officers in the Supreme Court, the Court of Appeals, and all other courts or tribunals in all civil actions and special proceedings in which the Government or any officer thereof in his official capacity is a party."

Although the petition for *certiorari* bore the conformity of the public prosecutor (*i.e.*, Assistant City Prosecutor Danilo Formoso of Manila), that conformity alone did not suffice. The authority of the City Prosecutor or his assistant to appear for and represent the People of the Philippines was confined only to the proceedings in the trial court.

II

Even on the merits, the petition for review fails.

The criminal case had been pending since 1995 and the petitioner as the complainant had presented only two witnesses as of the issuance of the assailed order. The trial court had not been wanting in giving warnings to the Prosecution on the dire consequences should the Prosecution continue to fail to complete its evidence. The Prosecution had retained the duty to ensure that its witnesses would be present during the trial, for its obligation to the administration of justice had been to prove its case *sans* vexatious and oppressive delays. Yet, the warnings of the trial court had gone unheeded. Instead, the Prosecution would deflect

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[8] *Mangahas v. Court of Appeals,* G.R. No. 173375, September 25, 2008; *Salazar v. Romaquin,* G.R. No. 151068, May 21, 2004, 429 SCRA 41, 47-48.

the responsibility for the delays to the failure of the trial court to issue the subpoena to its proposed witness and to cause the subpoena to be served. Such attitude of the Prosecution, which included the petitioner as the complainant, manifested a lack of the requisite diligence required of all litigants coming to the courts to seek redress.

We find that the trial judge did not act capriciously, arbitrarily or whimsically in issuing the assailed order. Thus, the Court of Appeals properly dismissed the petition for *certiorari*. The petitioner now needs to be reminded that *certiorari* is an extraordinary remedy to correct a grave abuse of discretion amounting to lack or excess of jurisdiction when an appeal, or any plain, speedy and adequate remedy in the ordinary course of law is not available. In this regard, grave abuse of discretion implies a capricious and whimsical exercise of judgment that is equivalent to lack of jurisdiction whenever the power is exercised in an arbitrary or despotic manner by reason of passion, prejudice or personal aversion amounting to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined, or to act at all in contemplation of law.[9]

Also, it does not escape our notice that the trial court's assailed order terminating the Prosecution's presentation of evidence was merely interlocutory. This fact surely adds justification to the Court of Appeals' rejection of the petition for *certiorari*, because it is the settled rule that *certiorari* does not lie to review an interlocutory order, but only a final judgment or order that ends the proceedings. *Certiorari* will be refused where there has been no final judgment or order and the proceeding for which the writ is sought is still pending and undetermined in the lower court. Indeed, a writ of *certiorari* is not intended to correct every controversial interlocutory ruling unless the ruling is attended by grave abuse of discretion or tainted by whimsical exercise of judgment equivalent to lack of jurisdiction, for the function of *certiorari* is limited to keeping an inferior court within its jurisdiction and to relieving persons from its

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[9] *Urbanes, Jr. v. Court of Appeals*, G.R. No. 117964, March 28, 2001, 355 SCRA 537, 538-539.

arbitrary acts — acts that courts or judges have no power or authority in law to perform.

Instead, the proper remedy for the petitioner was to proceed in the action until judgment, which, once rendered, might then be reviewed on appeal, along with the assailed interlocutory order.[10] As long as the trial court acted within its jurisdiction, its alleged error committed in the exercise of its jurisdiction amounted to nothing more than an error of judgment that was reviewable by a timely appeal, not by a special civil action of *certiorari*.[11]

WHEREFORE, we affirm the decision dated September 12, 2002 rendered in CA-G.R. SP No. 66616.

Costs of suit to be paid by the petitioner.

SO ORDERED.

Puno, C.J. (Chairperson), Carpio, Leonardo-de Castro, and *Del Castillo,*[*] *JJ.,* concur.

THIRD DIVISION

[G.R. No. 180863. September 8, 2009]

ANGELITA VALDEZ, *petitioner, vs.* **REPUBLIC OF THE PHILIPPINES,** *respondent.*

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[10] *Denso (Phils.), Inc. v. Intermediate Appellate Court,* G.R. No. 75000, February 27, 1987, 148 SCRA 280; *Investments, Inc. v. Court of Appeals,* G.R. No. 60036, Jan. 27, 1987, 147 SCRA 334.

[11] *Refugia v. Alejo,* G.R. No. 138674, June 22, 2000, 334 SCRA 230.

[*] Additional member per raffle list of 24 August 2009.

SYLLABUS

1. CIVIL LAW; CIVIL CODE; PRESUMPTION OF DEATH UNDER THE CIVIL CODE IS ESTABLISHED BY LAW AND NO COURT ORDER IS NEEDED FOR THE PRESUMPTION TO ARISE SINCE DEATH IS PRESUMED TO HAVE TAKEN PLACE ON THE SEVENTH YEAR OF ABSENCE. — Under the Civil Code, the presumption of death is established by law and no court declaration is needed for the presumption to arise. Since death is presumed to have taken place by the seventh year of absence, Sofio is to be presumed dead starting October 1982. Consequently, at the time of petitioner's marriage to Virgilio, there existed no impediment to petitioner's capacity to marry, and the marriage is valid under paragraph 2 of Article 83 of the Civil Code. Further, considering that it is the Civil Code that applies, proof of "well-founded belief" is not required. Petitioner could not have been expected to comply with this requirement since the Family Code was not yet in effect at the time of her marriage to Virgilio. The enactment of the Family Code in 1988 does not change this conclusion. The Family Code itself states: Art. 256. This Code shall have retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code or other laws.

2. ID.; ID.; ID.; TO RETROACTIVELY APPLY THE PROVISIONS OF THE FAMILY CODE REQUIRING PETITIONER TO EXHIBIT "WELL FOUNDED BELIEF" WILL ULTIMATELY, RESULT IN THE INVALIDATION OF HER SECOND MARRIAGE, WHICH IS VALID AT THE TIME IT WAS CELEBRATED; SUCH A SITUATION IS UNTENABLE AND WOULD GO AGAINST THE OBJECTIVES THAT THE FAMILY CODE WISHES TO ACHIEVE. — To retroactively apply the provisions of the Family Code requiring petitioner to exhibit "well-founded belief" will, ultimately, result in the invalidation of her second marriage, which was valid at the time it was celebrated. Such a situation would be untenable and would go against the objectives that the Family Code wishes to achieve. In sum, we hold that the Petition must be dismissed since no decree on the presumption of Sofio's death can be granted under the Civil Code, the same presumption having arisen by operation of law.

However, we declare that petitioner was capacitated to marry Virgilio at the time their marriage was celebrated in 1985 and, therefore, the said marriage is legal and valid.

APPEARANCES OF COUNSEL

Dennis V. Niño for petitioner.
The Solicitor General for respondent.

D E C I S I O N

NACHURA, *J.*:

Before this Court is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court assailing the Decision of the Regional Trial Court (RTC) of Camiling, Tarlac dated November 12, 2007 dismissing petitioner Angelita Valdez's petition for the declaration of presumptive death of her husband, Sofio Polborosa (Sofio).

The facts of the case are as follows:

Petitioner married Sofio on January 11, 1971 in Pateros, Rizal. On December 13, 1971, petitioner gave birth to the spouses' only child, Nancy. According to petitioner, she and Sofio argued constantly because the latter was unemployed and did not bring home any money. In March 1972, Sofio left their conjugal dwelling. Petitioner and their child waited for him to return but, finally, in May 1972, petitioner decided to go back to her parents' home in Bancay 1st, Camiling, Tarlac. Three years passed without any word from Sofio. In October 1975, Sofio showed up at Bancay 1st. He and petitioner talked for several hours and they agreed to separate. They executed a document to that effect.[1] That was the last time petitioner saw him. After that, petitioner didn't hear any news of Sofio, his whereabouts or even if he was alive or not.[2]

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[1] *Rollo*, p. 33.

[2] *Id.* at 5-6.

Believing that Sofio was already dead, petitioner married Virgilio Reyes on June 20, 1985.[3] Subsequently, however, Virgilio's application for naturalization filed with the United States Department of Homeland Security was denied because petitioner's marriage to Sofio was subsisting.[4] Hence, on March 29, 2007, petitioner filed a Petition before the RTC of Camiling, Tarlac seeking the declaration of presumptive death of Sofio.

The RTC rendered its Decision[5] on November 12, 2007, dismissing the Petition for lack of merit. The RTC held that Angelita "was not able to prove the well-grounded belief that her husband Sofio Polborosa was already dead." It said that under Article 41 of the Family Code, the present spouse is burdened to prove that her spouse has been absent and that she has a well-founded belief that the absent spouse is already dead before the present spouse may contract a subsequent marriage. This belief, the RTC said, must be the result of proper and honest-to-goodness inquiries and efforts to ascertain the whereabouts of the absent spouse.

The RTC found that, by petitioner's own admission, she did not try to find her husband anymore in light of their mutual agreement to live separately. Likewise, petitioner's daughter testified that her mother prevented her from looking for her father. The RTC also said there is a strong possibility that Sofio is still alive, considering that he would have been only 61 years old by then, and people who have reached their 60s have not become increasingly low in health and spirits, and, even assuming as true petitioner's testimony that Sofio was a chain smoker and a drunkard, there is no evidence that he continues to drink and smoke until now.

Petitioner filed a motion for reconsideration.[6] She argued that it is the Civil Code that applies in this case and not the

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[3] *Id.* at 10.

[4] *Id.* at 11.

[5] Penned by Judge Jose S. Vallo, *id.* at 35-39.

[6] *Rollo*, pp. 40-55.

Family Code since petitioner's marriage to Sofio was celebrated on January 11, 1971, long before the Family Code took effect. Petitioner further argued that she had acquired a vested right under the provisions of the Civil Code and the stricter provisions of the Family Code should not be applied against her because Title XIV of the Civil Code, where Articles 384 and 390 on declaration of absence and presumption of death, respectively, can be found, was not expressly repealed by the Family Code. To apply the stricter provisions of the Family Code will impair the rights petitioner had acquired under the Civil Code.

The RTC denied the Motion for Reconsideration in a Resolution dated December 10, 2007.[7]

Petitioner now comes before this Court seeking the reversal of the RTC Decision and Motion for Reconsideration.

In its Manifestation and Motion,[8] the Office of the Solicitor General (OSG) recommended that the Court set aside the assailed RTC Decision and grant the Petition to declare Sofio presumptively dead. The OSG argues that the requirement of "well-founded belief" under Article 41 of the Family Code is not applicable to the instant case. It said that petitioner could not be expected to comply with this requirement because it was not yet in existence during her marriage to Virgilio Reyes in 1985. The OSG further argues that before the effectivity of the Family Code, petitioner already acquired a vested right as to the validity of her marriage to Virgilio Reyes based on the presumed death of Sofio under the Civil Code. This vested right and the presumption of Sofio's death, the OSG posits, could not be affected by the obligations created under the Family Code.[9]

Next, the OSG contends that Article 390 of the Civil Code was not repealed by Article 41 of the Family Code.[10] Title XIV of the Civil Code, the OSG said, was not one of those expressly

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[7] *Id.* at 56-61.

[8] *Id.* at 86-98.

[9] *Id.* at 92-93.

[10] *Id.* at 94.

repealed by the Family Code. Moreover, Article 256 of the Family Code provides that its provisions shall not be retroactively applied if they will prejudice or impair vested or acquired rights.[11]

The RTC Decision, insofar as it dismissed the Petition, is affirmed. However, we must state that we are denying the Petition on grounds different from those cited in the RTC Decision.

Initially, we discuss a procedural issue. Under the Rules of Court, a party may directly appeal to this Court from a decision of the trial court only on pure questions of law. A question of law lies, on one hand, when the doubt or difference arises as to what the law is on a certain set of facts; on the other hand, a question of fact exists when the doubt or difference arises as to the truth or falsehood of the alleged facts. Here, the facts are not disputed; the controversy merely relates to the correct application of the law or jurisprudence to the undisputed facts.[12]

The RTC erred in applying the provisions of the Family Code and holding that petitioner needed to prove a "well-founded belief" that Sofio was already dead. The RTC applied Article 41 of the Family Code, to wit:

> Art. 41. A marriage contracted by any person during subsistence of a previous marriage shall be null and void, unless before the celebration of the subsequent marriage, the prior spouse had been absent for four consecutive years and the spouse present has a well-founded belief that the absent spouse was already dead. In case of disappearance where there is danger under the circumstances set forth in the provisions of Article 391 of the Civil Code, an absence of only two years shall be sufficient.
>
> For the purpose of contracting a subsequent marriage under the preceding paragraph, the spouse present must institute a summary proceeding as provided in this Code for the declaration of presumptive death of the absentee, without prejudice to the effect of reappearance of the absent spouse.

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[11] *Id.* at 96.

[12] *Philippine Veterans Bank v. Monillas*, G.R. No. 167098, March 28, 2008, 550 SCRA 251. (Citations omitted.)

It is readily apparent, however, that the marriages of petitioner to Sofio and Virgilio on January 11, 1971 and June 20, 1985, respectively, were both celebrated under the auspices of the Civil Code.

The pertinent provision of the Civil Code is Article 83:

Art. 83. Any marriage subsequently contracted by any person during the lifetime of the first spouse of such person with any person other than such first spouse shall be illegal and void from its performance, unless:

(1) The first marriage was annulled or dissolved; or

(2) The first spouse had been absent for seven consecutive years at the time of the second marriage without the spouse present having news of the absentee being alive, or if the absentee, though he has been absent for less than seven years, is generally considered as dead and believed to be so by the spouse present at the time of contracting such subsequent marriage, or if the absentee is presumed dead according to Articles 390 and 391. The marriage so contracted shall be valid in any of the three cases until declared null and void by a competent court.

Article 390 of the Civil Code states:

Art. 390. After an absence of seven years, it being unknown whether or not the absentee still lives, he shall be presumed dead for all purposes, except for those of succession.

The absentee shall not be presumed dead for the purpose of opening his succession till after an absence of ten years. If he disappeared after the age of seventy-five years, an absence of five years shall be sufficient in order that his succession may be opened.

The Court, on several occasions, had interpreted the above-quoted provision in this wise:

For the purposes of the civil marriage law, it is not necessary to have the former spouse judicially declared an absentee. The declaration of absence made in accordance with the provisions of the Civil Code has for its sole purpose to enable the taking of the necessary precautions for the administration of the estate of the absentee. For the celebration of civil marriage, however, the law only requires that the former spouse has been absent for seven consecutive years

at the time of the second marriage, that the spouse present does not know his or her former spouse to be living, that such former spouse is generally reputed to be dead and the spouse present so believes at the time of the celebration of the marriage.[13]

Further, the Court explained that presumption of death cannot be the subject of court proceedings independent of the settlement of the absentee's estate.

In re Szatraw[14] is instructive. In that case, petitioner contracted marriage with a Polish national in 1937. They lived together as husband and wife for three years. Sometime in 1940, the husband, on the pretext of visiting some friends, left the conjugal abode with their child and never returned. After inquiring from friends, petitioner found that her husband went to Shanghai, China. However, friends who came from Shanghai told her that the husband was not seen there. In 1948, petitioner filed a petition for the declaration of presumptive death of her husband arguing that since the latter had been absent for more than seven years and she had not heard any news from him and about her child, she believes that he is dead. In deciding the case, the Court said:

> The petition is not for the settlement of the estate of Nicolai Szatraw, because it does not appear that he possessed property brought to the marriage and because he had acquired no property during his married life with the petitioner. The rule invoked by the latter is merely one of evidence which permits the court to presume that a person is dead after the fact that such person had been unheard from in seven years had been established. This presumption may arise and be invoked and made in a case, either in an action or in a special proceeding, which is tried or heard by, and submitted for decision to, a competent court. **Independently of such an action or special proceeding, the presumption of death cannot be invoked, nor can it be made the subject of an action or special proceeding**. In this case, there is no right to be enforced nor is there a remedy prayed for by the petitioner against her absent husband. Neither is there a prayer for the final determination of his right or status or for the ascertainment of a particular fact (*Hagans v. Wislizenus*,

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[13] *Jones v. Hortigüela*, 64 Phil. 179, 183 (1937).

[14] *In re Szatraw*, 81 Phil. 461 (1948).

42 Phil. 880), for the petition does not pray for a declaration that the petitioner's husband is dead, but merely asks for a declaration that he be presumed dead because he had been unheard from in seven years. If there is any pretense at securing a declaration that the petitioner's husband is dead, such a pretension cannot be granted because it is unauthorized. The petition is for a declaration that the petitioner's husband is presumptively dead. But this declaration, even if judicially made, would not improve the petitioner's situation, because such a presumption is already established by law. **A judicial pronouncement to that effect, even if final and executory, would still be a *prima facie* presumption only. It is still disputable. It is for that reason that it cannot be the subject of a judicial pronouncement or declaration, if it is the only question or matter involved in a case, or upon which a competent court has to pass**. The latter must decide finally the controversy between the parties, or determine finally the right or status of a party or establish finally a particular fact, out of which certain rights and obligations arise or may arise; and once such controversy is decided by a final judgment, or such right or status determined, or such particular fact established, by a final decree, then the judgment on the subject of the controversy, or the decree upon the right or status of a party or upon the existence of a particular fact, becomes *res judicata*, subject to no collateral attack, except in a few rare instances especially provided by law. It is, therefore, clear that **a judicial declaration that a person is presumptively dead, because he had been unheard from in seven years, being a presumption *juris tantum* only, subject to contrary proof, cannot reach the stage of finality or become final**. Proof of actual death of the person presumed dead because he had been unheard from in seven years, would have to be made in another proceeding to have such particular fact finally determined. If a judicial decree declaring a person presumptively dead, because he had not been heard from in seven years, cannot become final and executory even after the lapse of the reglementary period within which an appeal may be taken, for such presumption is still disputable and remains subject to contrary proof, then a petition for such a declaration is useless, unnecessary, superfluous and of no benefit to the petitioner.[15]

In *Lukban v. Republic*,[16] petitioner Lourdes G. Lukban contracted marriage with Francisco Chuidian on December 10,

[15] *Id.* at 462-463. (Emphasis supplied.)

[16] 98 Phil. 574 (1956).

1933. A few days later, on December 27, Francisco left Lourdes after a violent quarrel. She did not hear from him after that day. Her diligent search, inquiries from his parents and friends, and search in his last known address, proved futile. Believing her husband was already dead since he had been absent for more than twenty years, petitioner filed a petition in 1956 for a declaration that she is a widow of her husband who is presumed to be dead and has no legal impediment to contract a subsequent marriage. On the other hand, the antecedents in *Gue v. Republic*[17] are similar to *Szatraw*. On January 5, 1946, Angelina Gue's husband left Manila where they were residing and went to Shanghai, China. From that day on, he had not been heard of, had not written to her, nor in anyway communicated with her as to his whereabouts. Despite her efforts and diligence, she failed to locate him. After 11 years, she asked the court for a declaration of the presumption of death of Willian Gue, pursuant to the provisions of Article 390 of the Civil Code of the Philippines.

In both cases, the Court reiterated its ruling in *Szatraw*. It held that a petition for judicial declaration that petitioner's husband is presumed to be dead cannot be entertained because it is not authorized by law.[18]

From the foregoing, it can be gleaned that, under the Civil Code, the presumption of death is established by law[19] and no court declaration is needed for the presumption to arise. Since death is presumed to have taken place by the seventh year of absence,[20] Sofio is to be presumed dead starting October 1982.

Consequently, at the time of petitioner's marriage to Virgilio, there existed no impediment to petitioner's capacity to marry, and the marriage is valid under paragraph 2 of Article 83 of the Civil Code.

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[17] 107 Phil. 381 (1960).

[18] *Id.* at 386.

[19] *In re Szatraw*, *supra* note 14.

[20] Tolentino, *Civil Code of the Philippines*, Vol. 1, 5th ed., p. 738.

Further, considering that it is the Civil Code that applies, proof of "well-founded belief" is not required. Petitioner could not have been expected to comply with this requirement since the Family Code was not yet in effect at the time of her marriage to Virgilio. The enactment of the Family Code in 1988 does not change this conclusion. The Family Code itself states:

> Art. 256. This Code shall have retroactive effect insofar as it does not prejudice or impair vested or acquired rights in accordance with the Civil Code or other laws.

To retroactively apply the provisions of the Family Code requiring petitioner to exhibit "well-founded belief" will, ultimately, result in the invalidation of her second marriage, which was valid at the time it was celebrated. Such a situation would be untenable and would go against the objectives that the Family Code wishes to achieve.

In sum, we hold that the Petition must be dismissed since no decree on the presumption of Sofio's death can be granted under the Civil Code, the same presumption having arisen by operation of law. However, we declare that petitioner was capacitated to marry Virgilio at the time their marriage was celebrated in 1985 and, therefore, the said marriage is legal and valid.

WHEREFORE, the foregoing premises considered, the Petition is *DENIED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Velasco, Jr., and *Peralta, JJ.,* concur.

THIRD DIVISION

[G.R. No. 187156. September 8, 2009]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **MELODY GUTIERREZ *y* LAURIADA,** *accused-appellant.*

SYLLABUS

CRIMINAL LAW; COMPREHENSIVE DANGEROUS DRUGS ACT OF 2002; POSSESSION OF DANGEROUS DRUGS; ESTABLISHED IN CASE AT BAR; PENALTY IMPOSED, MODIFIED. — We find no reason to disturb the factual findings of the trial court, as affirmed by the CA. The CA exhaustively discussed the facts of the case, and we agree with its conclusion that the prosecution proved the accused's guilt beyond reasonable doubt. However, the CA, in affirming the trial court's decision *in toto*, overlooked the error in the penalty imposed by the latter in Criminal Case No. 07-287. The trial court sentenced accused to "imprisonment for an indeterminate term of fourteen (14) years, eight (8) months, and one (1) day, as minimum," without providing for the maximum penalty. Under the Indeterminate Sentence Law, accused shall be sentenced to an indeterminate sentence, the maximum term of which shall not exceed the maximum fixed by law punishing the offense, and the minimum shall not be less than the minimum term prescribed by the same. Hence, the maximum penalty should be in the range of 17 years, four (4) months, and one (1) day to 20 years, while the minimum should not be less than 12 years and one day to 14 years and eight (8) months. The minimum penalty set by the trial court is within the proper range; but as to the maximum penalty, considering that there are no aggravating circumstances, we find that the penalty of imprisonment for 17 years, four (4) months, and one (1) day is appropriate.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

R E S O L U T I O N

NACHURA, *J.*:

Before this Court is an appeal by accused Melody Gutierrez *y* Lauriada of the Court of Appeals (CA) Decision[1] in CA-G.R. CR-H.C. No. 02884 affirming her conviction by the Regional Trial Court (RTC) of Makati City[2] for violations of Republic Act No. 9165 (RA 9165), or the Comprehensive Dangerous Drugs Act of 2002.

On January 25, 2007, a confidential informant known as Amboy went to the Anti-Illegal Drugs Special Operations Task Force (SAID-SOTF) of the Makati Police Station, and reported that accused and another, known by his *alias* Toto, were selling illegal drugs on Adora Street, Barangay Tejeros, Makati City. Police Officer 1 (PO1) Jaime Orante, Jr., who interviewed the informant, checked the Makati Drug Abuse Council (MADAC) watch list, and found accused's name in it. A team composed of SAID-SOTF and MADAC operatives was quickly formed to conduct a buy-bust operation. PO1 Orante was designated as poseur-buyer and given three marked one-hundred peso bills.[3]

At 6:30 that evening, the team and informant Amboy proceeded to Adora Street. PO1 Orante and Amboy approached accused. Amboy greeted accused and said, "*Te, mayroon ba tayo dyan tatlo lang?*" PO1 Orante handed accused the marked money, and the latter placed the money in her pocket. Accused then took a plastic container and a plastic sachet containing a white crystalline substance and handed these to PO1 Orante. The latter then reversed the bull cap he was wearing as a signal that the transaction had been completed. The rest of the team came forward and helped PO1 Orante arrest accused. The plastic sachets confiscated from accused were brought to the Philippine

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[1] Penned by Justice Sixto C. Marella, Jr., with Justices Amelita G. Tolentino and Japar B. Dimaampao, concurring, *rollo*, pp. 2-14.

[2] RTC Decision, CA *rollo*, pp. 12-17.

[3] *Rollo*, p. 4.

National Police (PNP) Crime Laboratory for examination. It was found that the contents thereof were methylamphetamine hydrochloride, more commonly known as *shabu*, a prohibited drug.[4]

Accused Melody Gutierrez was charged for violation of Article II, Sections 5 and 11 of RA 9165 before the Makati City RTC for, first, selling ₱300.00 worth of methylamphetamine hydrochloride weighing 0.02 gram;[5] and second, for possession, custody and control of three plastic sachets of methylamphetamine hydrochloride weighing 0.02 gram each.[6]

At the trial, accused denied the charges against her. She claimed that on the day she was arrested, she was having a snack on Barona Street when a green-colored vehicle stopped near her. Two men alighted from the vehicle, introduced themselves as police officers, and asked her if she knew the whereabouts of a certain Toto. She said she did not know the person they were looking for, but the two men did not believe her. They forced her into the vehicle and brought her to SAID-SOTF.[7]

In a Decision[8] dated May 25, 2007, the trial court held that the prosecution was able to prove the elements of the illegal sale of *shabu*, on one hand, and the illegal possession of a dangerous drug on the other. Thus, it found the accused guilty of the offenses charged, to wit:

> WHEREFORE, it appearing that the guilt of accused MELODY GUTIERREZ *y* LAURIADA was proven beyond reasonable doubt, for the offenses of violation of Sections 5 and 11, Article II of RA 9165, as principal, with no mitigating or aggravating circumstances, she is hereby sentenced:
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> 1. In Criminal Case No. 07-286, to suffer life imprisonment and to pay a fine of ₱500,000.00;

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[4] *Id.* at 4-5.

[5] CA *rollo*, Criminal Case No. 07-286, p. 39.

[6] *Id.*, Criminal Case No. 07-287, p. 39.

[7] *Id.* at 14.

[8] Penned by Judge Francisco B. Ibay, CA *rollo*, pp. 12-17.

2. In Criminal Case No. 07-287, to suffer imprisonment for an indeterminate term of fourteen [14] years eight [8] months and one [1] day, as minimum, and to pay a fine of ₱300,000.00; and

3. To pay the costs.

Let the 0.02-gram, 0.02-gram, 0.02-gram, and 0.02 gram; (sic) of Methylamphetamine Hydrochloride be turned-over (sic) to the PDEA for proper disposition.

SO ORDERED.

Accused appealed her conviction to the Court of Appeals. She argued that her guilt was not proven, because nobody corroborated the testimony of PO1 Orante; and the other prosecution witness, MADAC Operative Joebert Dela Peña, admitted that his sole participation was in assisting in the arrest of the accused. Accused also questioned the failure of the prosecution to present the confidential informant as witness, and the forensic chemist to testify the veracity of the laboratory report. Accused claimed that the sole eyewitness testimony of PO1 Orante to the sale was insufficient to prove her guilt beyond reasonable doubt.[9]

The CA affirmed the RTC Decision *in toto* in a Decision dated September 30, 2008.[10] It held that what is material is proof that the transaction took place, coupled with the presentation in court of the *corpus delicti* as evidence, both of which were proven by the testimony of PO1 Orante. Contrary to accused's contention, the consummation of the sale was corroborated by MADAC Operative Dela Peña.[11]

As to the failure of the prosecution to present the forensic chemist who examined the content of the plastic sachets seized from accused, the CA said this does not diminish the integrity of the testimonies of the other prosecution witnesses. According to the CA, the witnesses were able to prove the chain of custody

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[9] CA *rollo*, p. 36.

[10] *Supra* note 1.

[11] *Rollo*, p. 8.

from the time PO1 Orante took possession of the illegal drugs from accused up to the time they were offered in evidence. Right after the arrest, PO1 Orante prepared Spot Report No. STN2-012507-281, listing as evidence seized "four pieces of small heat-sealed transparent plastic sachet containing suspected '*shabu*'; and presented as 'JCO' as subject of sale and 'JCO-1' TO 'JCO-3' as subject of possession." He also prepared an acknowledgment receipt listing all the items seized from accused. Thereafter, the sachets were delivered to the PNP Crime Laboratory by PO1 Orante himself, as shown in the stamp of receipt by the PNP Crime Laboratory Southern Police District. These circumstances, the CA said, sufficiently established the unbroken chain of custody of the seized illegal drugs.[12] Moreover, the defense admitted the execution and authenticity of the Physical Science Report during the pre-trial.[13]

Accused is now before this Court assailing the CA's Decision. In a Resolution[14] dated June 10, 2009, the Court accepted accused's appeal and notified the parties that they may submit their respective supplemental briefs, if they so desire. In separate Manifestations, accused, through the Public Attorney's Office, and the People of the Philippines, through the Office of the Solicitor General, both informed this Court that they will no longer file supplemental briefs, since their respective appeal briefs before the CA have thoroughly discussed their respective arguments.[15]

We affirm the Decision of the CA.

We find no reason to disturb the factual findings of the trial court, as affirmed by the CA. The CA exhaustively discussed the facts of the case, and we agree with its conclusion that the prosecution proved the accused's guilt beyond reasonable doubt.

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

[13] *Id.* at 10.

[14] *Id.* at 20-21.

[15] *Id.* at 22-24 and 26-27.

However, the CA, in affirming the trial court's decision *in toto*, overlooked the error in the penalty imposed by the latter in Criminal Case No. 07-287. The trial court sentenced accused to "imprisonment for an indeterminate term of fourteen (14) years, eight (8) months, and one (1) day, as minimum," without providing for the maximum penalty.

Under the Indeterminate Sentence Law, accused shall be sentenced to an indeterminate sentence, the maximum term of which shall not exceed the maximum fixed by law punishing the offense, and the minimum shall not be less than the minimum term prescribed by the same.

Article II, Section 11 of RA 9165 provides:

SEC. 11. *Possession of Dangerous Drugs*. — The penalty of life imprisonment to death and a fine ranging from Five hundred thousand pesos (₱500,000.00) to Ten million pesos (₱10,000,000.00) shall be imposed upon any person, who, unless authorized by law, shall possess any dangerous drug in the following quantities, regardless of the degree of purity thereof:

x x x x x x x x x

(5) 50 grams or more of methamphetamine hydrochloride or "*shabu*;"

x x x x x x x x x

Otherwise, if the quantity involved is less than the foregoing quantities, the penalties shall be graduated as follows:

x x x x x x x x x

(3) Imprisonment of twelve (12) years and one (1) day to twenty (20) years and a fine ranging from Three hundred thousand pesos (₱300,000.00) to Four hundred thousand pesos (₱400,000.00), if the quantities of dangerous drugs are less than five (5) grams of opium, morphine, heroin, cocaine or cocaine hydrochloride, marijuana resin or marijuana resin oil, methamphetamine hydrochloride or "*shabu*," or other dangerous drugs such as, but not limited to, MDMA or "ecstacy," PMA, TMA, LSD, GHB, and those similarly designed or newly introduced drugs and their derivatives, without having any therapeutic value or if the quantity possessed is far beyond therapeutic requirements; or less than three hundred (300) grams of marijuana.

Hence, the maximum penalty should be in the range of 17 years, four (4) months, and one (1) day to 20 years, while the minimum should not be less than 12 years and one day to 14 years and eight (8) months.

The minimum penalty set by the trial court is within the proper range; but as to the maximum penalty, considering that there are no aggravating circumstances, we find that the penalty of imprisonment for 17 years, four (4) months, and one (1) day is appropriate.

WHEREFORE, foregoing premises considered, the assailed Decision of the Court of Appeals is *AFFIRMED WITH MODIFICATION*. Accused is hereby sentenced, in Criminal Case No. 07-287, to an indeterminate sentence of 12 years, and one (1) day, as minimum, to 14 years, as maximum. In all other respects, the Decision of the Regional Trial Court of Makati City in Criminal Case Nos. 07-286-287 is *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Velasco, Jr., and *Peralta, JJ.,* concur.

EN BANC

[A.C. No. 7435. September 10, 2009]

REY C. SARMIENTO, ANGELITO C. SARMIENTO, WILLY C. SARMIENTO and RAQUEL C. SARMIENTO-CO, *complainants, vs.* **ATTY. EDELSON G. OLIVA,** *respondent.*

SYLLABUS

1. LEGAL ETHICS; ATTORNEYS; DISBARMENT; NOT BEING A MEMBER OF THE BAR, HAVING BEEN PREVIOUSLY

DISBARRED, RESPONDENT CANNOT BE SUSPENDED FROM THE PRACTICE OF LAW. — In a resolution dated October 7, 1994, respondent was disbarred in *Libit v. Attys. Edelson G. Oliva and Umali* for grave misconduct. Hence, not being a member of the bar, he cannot be suspended from the practice of law. *Libit* was never mentioned in the records of this case. Complainants obviously had no knowledge of respondent's disbarment in 1994. Respondent must have represented himself to complainants as a *bona fide* member of the bar. Furthermore, he never informed the IBP of his prior disbarment. As a former lawyer, he knew that the jurisdiction of the IBP is limited to members of the bar.

2. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; CONTEMPT; INDIRECT CONTEMPT; A DISBARRED LAWYER WHO CONTINUES TO REPRESENT HIMSELF AS A LAWYER WITH AUTHORITY TO PRACTICE LAW IS ESTOPPED FROM QUESTIONING JURISDICTION OF IBP RECOMMENDATION OF THE INTEGRATED BAR OF THE PHILIPPINES THAT RESPONDENT BE REQUIRED TO INDEMNIFY THE COMPLAINANTS FOUND TO BE PROPER UNDER PRINCIPLE OF UNDUE ENRICHMENT. — Since respondent himself made a positive misrepresentation to complainants that he was still a lawyer and even submitted himself to the jurisdiction of the IBP, he is estopped from questioning the jurisdiction of the IBP over him. For this reason we find as proper the recommendation of the IBP that respondent be required to indemnify the complainants the amount of ₱11 million. Respondent does not dispute that complainants were the owners of the property before he had the title to the said property transferred in his name. He cannot unduly enrich himself and enjoy ownership of the property without compensating complainants.

3. ID.; ID.; ID.; ID.; A LAWYER WHO COMMITS A CONTUMACIOUS ACT IS LIABLE FOR INDIRECT CONTEMPT. — The Court has held that a disbarred lawyer, who continues to represent himself as a lawyer with the authority to practice law commits a contumacious act and is liable for indirect contempt.

RESOLUTION

CORONA, *J.*:

This is a complaint for disbarment[1] filed by complainants Rey, Angelito, Willy and Raquel[2] Sarmiento against respondent Atty. Edelson G. Oliva.

Complainants alleged that they received, as payment for the purchase[3] of a ₱13 million Makati City property,[4] five postdated checks from respondent.[5] When presented to the drawee bank, two checks were dishonored due to "closed account."[6] Consequently, complainants sent demand letters to respondent on June 21, 2003 and October 7, 2003.

On May 20, 2004, respondent requested complainants to reduce his obligation to ₱11 million. Complainants agreed. He gave a partial down payment of ₱200,000[7] and issued four postdated Premier Bank checks.[8] Upon presentment, the first check was

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[1] Letter-complaint dated December 10, 2004. *Rollo*, pp. 1-2.

[2] Surnamed Sarmiento-Co in some parts of the records.

[3] Under Memorandum of Agreement, Deeds of Absolute Sale and Transfer Certificate of Title No. 218601, "Annex K" of answer. *Rollo*, pp. 6-8, 9-11 and 46.

[4] Lot is covered by TCT No. 66772.

[5] *Rollo*, pp. 15-17.

Serial No.	Amount	Date
0005470026	₱ 475,000	December 10, 2002
0005470027	3,000,000	March 10, 2003
0005470028	3,000,000	June 10, 2003
0005470029	3,000,000	September 10, 2003
0005470029	2,000,000	December 10, 2003
	₱ 11,475,000	

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

[7] Receipt, *id.*, p. 21.

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

Serial No.	Amount	Date
009117	₱ 2,625,000	August 30, 2004
009118	2,625,000	November 30, 2004

dishonored again due to "closed account."[9] On October 7, 2004, complainants again demanded payment from respondent but the demand was ignored.[10] Hence, this complaint, which was originally filed with the Integrated Bar of the Philippines (IBP).

Respondent, in his answer, claimed that this complaint was instituted to harass him inasmuch as he had no outstanding financial obligation to the complainants. He maintained that complainants had a buyer for the property on installment. He issued the checks on the condition that these would only be presented on approval and release of proceeds of the loan as the buyer would issue his own checks to cover payment in respondent's name. Because the complainants deposited the checks for clearing without informing him, they actually violated their agreement.[11]

The complaint was set for mandatory conference/hearing[12] but respondent repeatedly failed to appear at the scheduled hearings despite due notice.[13] He was thus deemed to have waived his right to participate in further proceedings.[14]

In its January 23, 2006 report and recommendation,[15] the Commission on Bar Discipline (CBD) of the IBP found that respondent transferred the property to his name despite giving complainants only ₱200,000. He took advantage of complainants who trusted him and relied on his good faith. Furthermore, he never appeared in any of the scheduled hearings. The CBD

009119	2,625,000	February 25, 2005
009120	2,625,000	May 30, 2005
	₱10,500,000	

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

[10] *Id.*, p. 23.

[11] *Id.*, pp. 33-35.

[12] Order dated April 13, 2005. *Id.*, p. 48.

[13] May 18, 2005, June 22, 2005, July 6, 2005. *Id.*, pp. 51, 69, 71.

[14] Order dated September 21, 2005. *Id.*, p. 77.

[15] Penned by Commissioner Rebecca Villanueva-Maala. *Id.*, pp. 80-86.

thus recommended that respondent be suspended from the practice of law for two years.

The IBP Board of Governors approved and adopted the report and recommendation of the CBD *in toto* and ordered respondent to restitute the amount of ₱11 million to complainants.[16]

We modify the recommendation of the IBP.

In a resolution dated October 7, 1994, respondent was disbarred in *Libit v. Attys. Edelson G. Oliva and Umali*[17] for grave misconduct.[18] Hence, not being a member of the bar, he cannot be suspended from the practice of law.

Libit was never mentioned in the records of this case. Complainants obviously had no knowledge of respondent's disbarment in 1994. Respondent must have represented himself to complainants as a *bona fide* member of the bar. Furthermore, he never informed the IBP of his prior disbarment. As a former lawyer, he knew that the jurisdiction of the IBP is limited to members of the bar.

Since respondent himself made a positive misrepresentation to complainants that he was still a lawyer and even submitted himself to the jurisdiction of the IBP, he is estopped from questioning the jurisdiction of the IBP over him. For this reason we find as proper the recommendation of the IBP that respondent be required to indemnify the complainants the amount of ₱11 million.[19] Respondent does not dispute that complainants were the owners of the property before he had the title to the said property transferred in his name. He cannot unduly enrich himself

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[16] Resolution dated November 18, 2006. *Id.*, p. 79.

[17] A.C. No. 2837, 7 October 1994, 237 SCRA 375.

[18] Respondent was found to have falsified the Sheriff's Return on Summons in Civil Case No. 84-24144.

[19] This is, of course, subject to the presumption that complainants have not sought to enforce their right to collect on the amount of the checks either by a criminal action for violation of BP 22 or estafa or by civil action for a sum of money.

and enjoy ownership of the property without compensating complainants.

Moreover, the Court has held that a disbarred lawyer, who continues to represent himself as a lawyer with the authority to practice law commits a contumacious act[20] and is liable for indirect contempt.[21]

WHEREFORE, respondent Edelson G. Oliva is hereby *ORDERED* to *SHOW CAUSE* within ten days from receipt of this resolution why he should not be cited for indirect contempt for misrepresenting himself to be an attorney, without prejudice to complainants' right to seek other legal remedies.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Chico-Nazario, Velasco, Jr., Nachura, Leonardo-de Castro, Peralta, Bersamin, Del Castillo, and *Abad, JJ.,* concur.

Carpio Morales and *Brion, JJ.,* concur in the result.

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[20] *Tan v. Balon, Jr.,* A.C. No. 6483, 31 August 2007, 531 SCRA 645.

[21] RULES OF COURT, Rule 71, Section 3(e) provides:

Indirect contempt to be punished after charge and hearing. — After charge in writing has been filed, and an opportunity given to the respondent to comment thereon within such period as may be fixed by the court and to be heard by himself or counsel, a person guilty of any of the following acts may be punished for indirect contempt:

x x x x x x x x x

(e) Assuming to be an attorney or an officer of a court, and acting as such without authority;

x x x x x x x x x

But nothing in this section shall be so construed as to prevent the court from issuing process to bring the respondent into court, or from holding him in custody pending such proceedings.

EN BANC

[A.M. No. 06-3-07-SC. September 10, 2009]

RE: REQUEST FOR APPROVAL OF THE REVISED QUALIFICATION STANDARD FOR THE CHIEF OF MISO.

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; PUBLIC OFFICERS; QUALIFICATION STANDARDS; THE TECHNICAL OR SPECIALIZED SKILLS NEEDED FOR THE POSITIONS OF CHIEF OF MANAGEMENT INFORMATION SYSTEMS OFFICE (MISO) AND JUDICIAL REFORM PROGRAM ADMINISTRATOR OF THE PROGRAM MANAGEMENT OFFICE (PMO) SHOULD BE THE FOREMOST CONSIDERATION IN SETTING THEIR RESPECTIVE QUALIFICATION STANDARDS; WHILE A LAW DEGREE AND MEMBERSHIP IN THE BAR IS PREFERRED, POST-GRADUATE STUDIES IN COMPUTER SCIENCE (FOR MISO) AND IN PUBLIC ADMINISTRATION, FINANCE, ECONOMICS, OR RELATED FIELD (FOR JRPA OF THE PMO) WOULD BE ADEQUATE SUBSTITUTES. — The Court acknowledges that there is some merit in the OAS recommendation. Indeed, while the MISO and the PMO are not directly involved in the adjudicative functions of the Court, both offices operate to support the Court in its main function of deciding cases. As such, it is important that the persons who head these offices have adequate working knowledge of the Court's functions and the legal implications of their actions. However, we must also recognize the technical nature of the positions of Chief, MISO and JRPA, PMO. The OAS itself admitted the technical character of the functions of the MISO and PMO when it said that the duties and responsibilities of Assistant Chief, MISO and Deputy JRPA, PMO, involve special technical skills in computer/information technology and project management and donor coordination, respectively. The same specialized skills should likewise be required for the Chief of MISO and the JRPA of the PMO. As heads of these offices,

the Chief of MISO and JRPA of the PMO must possess the requisite knowledge and expertise to lead their respective offices in the performance of their main tasks. Accordingly, even as the Court sees the importance of maintaining uniformity of the QS for positions in the same level, the nature of the functions of each office must play a dominant role in determining who should head these offices. The technical or specialized skills needed for the positions of Chief of MISO and JRPA of the PMO should, therefore, be the foremost consideration in setting their respective QS. Thus, while a law degree and membership in the Bar is preferred, post-graduate studies in Computer Science (for MISO) and in public administration, finance, economics, or related fields (for JRPA of the PMO) would be adequate substitutes.

2. ID.; ID.; ID.; ID.; THE COURT RE-AFFIRMED THE COURT'S RESOLUTION DATED JUNE 6, 2006 WITH REGARD TO THE JUDICIAL RANKING OF THE TWO POSITIONS. — As regards the judicial ranking of the two positions, the Court reaffirms the Court's Resolution dated June 6, 2006, and applies the same to the PMO. Thus: 1. If the appointee for Chief, MISO/JRPA is a lawyer, he/she will be given the *collatilla* "Deputy Clerk of Court" and entitled to judicial rank. He/She will be given the rank, salary and privileges of [an RTC] judge; 2. If the appointee for the Chief, MISO/JRPA is not a lawyer, he/she will only be considered as a Chief of Office. He/She will not be given the *collatilla* "Deputy Clerk of Court" and will not be entitled to judicial rank. Relative to the QS for the Assistant Chief of Office of the MISO and Deputy JRPA of the PMO, the Court agrees with the OAS recommendation, subject to the modification of the educational requirement. Considering the higher education standard required of the Chief of MISO and JRPA of the PMO, which is a Master's degree, in the case of the Assistant Chief, this may be substituted with post-graduate units in computer science or ICT, and post-graduate units in Public Administration, Business Administration, Finance, Economics, Social Sciences or any related field, respectively.

R E S O L U T I O N

NACHURA, *J.*:

For this Court's resolution is the request for revision of the Qualification Standards (QS) for the chiefs of the Management Information Systems Office (MISO) and the Program Management Office (PMO).

The following QS for the position of Chief, MISO, were approved by then Chief Justice Hilario G. Davide, Jr. on October 14, 1999:

Education:	Bachelor of Laws
Experience:	Ten (10) years or more of relevant supervisory work experience acquired under career service position in the Supreme Court, three (3) years of which [were] rendered under a position requiring the qualifications of a lawyer
Training:	32 hours of relevant training in management and supervision
Eligibility:	RA 1080 [Bar][1]

On March 14, 2006, the Court resolved to revise the said QS.[2] It was further amended on June 20, 2006, to wit:

Education:	Bachelor's Degree in Computer Science or any equally comparable degree, with post-graduate level (at least 18 units) in Computer Science or Information Technology
Experience:	Seven (7) years of relevant experience on Information and Communication Technology
Training:	At least 40 hours of relevant training
Eligibility:	Civil Service Professional eligibility or equivalent IT eligibility[3]

[1] *Rollo*, p. 75.

[2] *Id.* at 4-5.

[3] *Id.* at 39.

On June 6, 2006, the Court issued a Resolution adopting the clarifications made by the Committee on Computerization and Library on the *collatilla* "Deputy Clerk of Court" and the judicial ranking attached to the position of Chief, MISO, as follows:

1. If the appointee for the Chief of MISO is a lawyer, he/she will be given the *collatilla* "Deputy Clerk of Court" and entitled to a judicial rank. He/She will be given the rank, salary and privileges of [an RTC] judge;

2. If the appointee for the Chief of MISO is not a lawyer, he/she will only be considered as a Chief of Office. He/She will not be given the *collatilla* "Deputy Clerk of Court" and will not be entitled to a judicial rank.[4]

In a letter[5] to then Chief Justice Artemio V. Panganiban dated July 12, 2006, employees of the MISO pointed out that the revision of the QS under A.M. No. 06-3-07-SC had made the experience, training, and eligibility qualifications for Assistant Chief, MISO, higher than those for the Chief, MISO. Hence, they asked the Court to rectify the disparity.

On July 26, 2006, the Court approved the following amendments to the QS for the Assistant Chief of MISO:

Education:	Bachelor's Degree in Computer Science or any equally comparable degree, with post-graduate level (at least 15 units) in Computer Science or Information Technology
Experience:	5 years of relevant experience [in] Information and Communication [Technology] (ICT)
Training:	At least 32 hours of relevant training
Eligibility:	Civil Service Professional Eligibility or equivalent IT Eligibility[6]

On March 5, 2008, Chief Justice Reynato S. Puno approved the recommendation of the OAS to restudy the QS for the positions

[4] *Id.* at 18.

[5] *Id.* at 55-56.

[6] *Id.* at 71-72.

of Chief, MISO and Judicial Reform Program Administrator (JRPA), PMO.

In its Memorandum[7] to Chief Justice Puno dated July 10, 2008, the Office of Administrative Services (OAS) observed that the QS for the positions of Chief of MISO and JRPA of the PMO are not the same as those for the other chiefs of office in the Court, even though they have the same salary grade.

The OAS recommends that both positions should be given only to members of the Bar, since there are legal matters involved in the functions of both offices. In particular, OAS notes that the MISO Chief must know the basic legal and operational information technology (IT) needs of the Court, while the PMO Chief deals in large part with agreements, loans, and other contracts with various agencies and international funding institutions. In both cases, the specific need for IT knowledge, and project management and donor coordination, respectively, will be answered by the requirement for relevant studies and/or experience.

The OAS recommends the following QS, to wit:

	MISO Chief of Office	**PMO Judicial Reform Program Administrator**
Education	Bachelor of Laws with units and/or studies in computer science, information technology or any comparable computer education	Bachelor of Laws with units and/or studies in any of the following fields: public administration, business administration, finance, economics, social sciences, or any related field.
Experience	10 years or more of relevant supervisory work experience either in the government (acquired under career service) or private	10 years or more of relevant supervisory work experience either in the government (acquired under career service) or private sector, with at least 5 years relevant

[7] *Id.* at 74-82.

	sector, with at least 5 years relevant experience in the field of computer science or information and communication technology	experience in the field of economics, social sciences, or any related field, as well as in donor coordination and project management.
Training	32 hours of relevant experience in management and supervision	32 hours relevant training in project management and supervision
Eligibility	RA 1080 (Bar)	RA 1080 (Bar)
Collatilla	Deputy Clerk of Court	Deputy Clerk of Court
Judicial Rank	RTC Judge	RTC Judge

The OAS also restudied the QS for the Assistant Chief of Office of MISO. It suggests that the Deputy Director title of the MISO Assistant Chief of Office be reverted back to its original title, "SC Assistant Chief of Office, MISO." It further recommends the following modifications to the QS of the Assistant Chief of Office, MISO, and of the Deputy Judicial Reform Program Administrator of the PMO:

	MISO Assistant Chief of Office	**PMO Deputy Judicial Reform Program Administrator**
Education	Bachelor of Laws with units and/or studies in computer science or information technology; or completion of Masteral (sic) Degree in any computer education (sic)	Bachelor of Laws with units and/or studies in any of the following fields: public administration, finance, economics, social sciences; or completion of Masteral (sic) Degree in Public Administration, Business Administration, Finance, Economics, Social Sciences or any related field
Experience	10 years or more of relevant supervisory work	10 years or more relevant supervisory work experience

	experience either in the government (acquired under career service) or private sector with at least 3 years experience in the field of computer science or information and communication technology	either in the government (acquired under career service) or private sector with at least 3 years relevant experience in the field of economics, social sciences or any related field, as well as in donor coordination and project management
Training	At least 32 hours of relevant trainings in computer operation, information and communication technology	At least 32 hours of relevant trainings in project management and supervision
Eligibility	RA 1080 (Bar) or any appropriate CSC 2nd level eligibility	RA 1080 (Bar) or any appropriate CSC 2nd level eligibility

The OAS explained that while all SC Assistant Chiefs of Offices are required to be lawyers in their QS, this requirement may be substituted with a master's degree in the case of MISO and PMO, considering that the duties and responsibilities of these two positions involve special technical skills in computer/ information technology and project management and donor coordination, respectively.

In its Comment,[8] the MISO states that the Court has an ongoing ICT consultancy project with Indra Sistemas S.A., part of which specifically deals with the creation of a MISO Re-Engineering Development Plan (MRDP). Among the concerns studied by Indra was the staffing pattern of MISO and the QS for each position in the office's *plantilla*. Indra's recommendation for the QS of the MISO Chief recognizes that lawyers or non-lawyers may apply for the position, with the recommended QS for lawyer-applicants bearing a strong similarity to those proposed by the OAS. Indra's recommendations are as follows:

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[8] *Id.* at 125-127.

	FOR LAWYERS	FOR NON-LAWYERS
Education	Bachelor of Laws and 18 MA units in relevant ICT course, 3 years relevant ICT experience or 60 hours of ICT training or relevant ICT certification * An additional project management certification is proposed for all managerial/supervisory positions to enable them to effectively manage IT projects	Bachelor's Degree in relevant ICT course and an MBA or Post Graduate Degree in a Management related course or Bachelor's Degree in a Management-related course and an MBA or Post-graduate Degree in a Management-related course and 18 MA units in relevant ICT course, 3 years relevant ICT experience or 60 hours of ICT training or relevant ICT certification * An additional project management certification is proposed for all managerial/supervisory positions to enable them to effectively manage IT projects
Experience	10 years of supervisory experience (within or outside the Supreme Court)	10 years of supervisory experience (within or outside the Supreme Court)
Training	40 hours of relevant training in management and supervision	40 hours of relevant training in management and supervision
Eligibility	RA 1080 (Attorney)	CSC Professional or IT eligibility
	An additional project management certification is proposed for all managerial/supervisory positions to enable them to effectively manage IT projects	

On the other hand, the PMO, in its Comment,[9] maintains that the nature of the JRPA position is different from the adjudicatory and other legal functions of the other offices in the Court. It also says that the legal issues confronted by the PMO in the performance of its tasks do not require the JRPA to be a lawyer. It points out that there are four (4) lawyer positions in the PMO's *plantilla*, and these lawyers can adequately meet the PMO's legal concerns. They assist and advise the JRPA on matters requiring legal knowledge and in drafting legal instruments or documents. The PMO also states that it does not enter into contracts and agreements on its own but first secures the approval of the Court even at the initial stages of discussion with the other contracting party/parties. Instead, it emphasizes the need for experience in donor coordination and development projects, considering the nature of the PMO's work.

Finally, the Fiscal Management and Budget Office (FMBO) also submitted its Comment.[10] The FMBO agrees with the OAS recommendation to make membership in the Bar a qualification for the positions of Chief, MISO and Chief (JRPA), PMO. It also suggests that the Bachelor of Laws degree be made a minimum requirement, and that the additional units and/or study be included in the training requirement. The FMBO says that there will be no significant change in the financial remuneration for both positions under the proposed QS. The only difference will be the grant of the Special Allowance for the Judiciary (SAJ). If the proposed QS will be approved, the holders of the two positions will be accorded judicial ranking and, consequently, given the monthly SAJ.

The Court acknowledges that there is some merit in the OAS recommendation. Indeed, while the MISO and the PMO are not directly involved in the adjudicative functions of the Court, both offices operate to support the Court in its main function of deciding cases. As such, it is important that the persons who

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[9] *Id.* at 144-147.

[10] *Id.* at 128-132.

head these offices have adequate working knowledge of the Court's functions and the legal implications of their actions.

However, we must also recognize the technical nature of the positions of Chief, MISO and JRPA, PMO. The OAS itself admitted the technical character of the functions of the MISO and PMO when it said that the duties and responsibilities of Assistant Chief, MISO and Deputy JRPA, PMO, involve special technical skills in computer/information technology and project management and donor coordination, respectively.

The same specialized skills should likewise be required for the Chief of MISO and the JRPA of the PMO. As heads of these offices, the Chief of MISO and JRPA of the PMO must possess the requisite knowledge and expertise to lead their respective offices in the performance of their main tasks.

Accordingly, even as the Court sees the importance of maintaining uniformity of the QS for positions in the same level, the nature of the functions of each office must play a dominant role in determining who should head these offices. The technical or specialized skills needed for the positions of Chief of MISO and JRPA of the PMO should, therefore, be the foremost consideration in setting their respective QS. Thus, while a law degree and membership in the Bar is preferred, post-graduate studies in Computer Science (for MISO) and in public administration, finance, economics, or related fields (for JRPA of the PMO) would be adequate substitutes.

As regards the judicial ranking of the two positions, the Court reaffirms the Court's Resolution dated June 6, 2006, and applies the same to the PMO. Thus:

1. If the appointee for Chief, MISO/JRPA is a lawyer, he/she will be given the *collatilla* "Deputy Clerk of Court" and entitled to judicial rank. He/She will be given the rank, salary and privileges of [an RTC] judge;

2. If the appointee for the Chief, MISO/JRPA is not a lawyer, he/she will only be considered as a Chief of Office. He/She will not be given the *collatilla* "Deputy Clerk of Court" and will not be entitled to judicial rank.

Relative to the QS for the Assistant Chief of Office of the MISO and Deputy JRPA of the PMO, the Court agrees with the OAS recommendation, subject to the modification of the educational requirement. Considering the higher education standard required of the Chief of MISO and JRPA of the PMO, which is a Master's degree, in the case of the Assistant Chief, this may be substituted with post-graduate units in computer science or ICT, and post-graduate units in Public Administration, Business Administration, Finance, Economics, Social Sciences or any related field, respectively.

IN VIEW OF THE FOREGOING, the Court *APPROVES,* with modification, the recommendations of the OAS on the Qualification Standards for Chief of Office, Management Information Systems Office and Judicial Reform Program Administrator, Program Management Office, as follows:

	MISO Chief of Office	**PMO Judicial Reform Program Administrator**
Education	Bachelor of Laws with at least 18 units in computer science, information technology or any similar computer academic course or Bachelor's Degree in computer science or information technology and post-graduate degree, preferably in computer science or information technology	Bachelor of Laws with at least 18 units in public administration, business administration, finance, economics, social sciences or any related field or Bachelor's degree and post-graduate degree in public administration, finance, economics, social sciences or any related field
Experience	10 years or more of relevant supervisory work experience either in the government (acquired under career service) or private sector, with at least 5 years	10 years or more of relevant supervisory work experience either in the government (acquired under career service) or private sector, with at least 5 years relevant experience in the

	relevant experience in the field of computer science or information and communication technology	field of economics, social sciences, or any related field, as well as in donor coordination and project management.
Training	32 hours of relevant experience in management and supervision	32 hours relevant training in project management and supervision
Eligibility	RA 1080 (Bar), CSC Professional or IT eligibility	RA 1080 (Bar) or CSC Professional

and the Qualification Standards for Assistant Chief of Office, MISO and Deputy Judicial Reform Program Administrator, PMO:

	MISO Assistant Chief of Office	**PMO Deputy Judicial Reform Program Administrator**
Education	Bachelor of Laws with units and/or studies in computer science or information technology or post-graduate units in computer science or information technology	Bachelor of Laws with units and/or studies in public administration, finance, economics, social sciences or any related field or post-graduate units in public administration, business administration, finance, economics, social sciences or any related field
Experience	10 years or more of relevant supervisory work experience either in the government (acquired under career service) or private sector with at least 3 years experience in the field of computer science or information	10 years or more of relevant supervisory work experience either in the government (acquired under career service) or private sector with at least 3 years of relevant experience in the field of economics, social sciences or any related field,

	and communication technology	as well as in donor coordination and project management
Training	At least 32 hours of relevant trainings in computer operation, information and communication technology	At least 32 hours of relevant trainings in project management and supervision
Eligibility	RA 1080 (Bar) or any appropriate CSC 2nd level eligibility	RA 1080 (Bar) or any appropriate CSC 2nd level eligibility

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Corona, Carpio Morales, Chico-Nazario, Velasco, Jr., Leonardo-de Castro, Brion, Peralta, Bersamin, Del Castillo, and *Abad, JJ.,* concur.

EN BANC

[G.R. No. 169641. September 10, 2009]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **RICHARD O. SARCIA,** *accused-appellant.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; INCONSISTENCIES ON MINOR DETAILS AND COLLATERAL MATTERS DOES NOT AFFECT VERACITY AND WEIGHT OF TESTIMONIES WHERE THERE IS CONSISTENCY IN RELATING THE PRINCIPAL

OCCURRENCE AND THE POSITIVE IDENTIFICATION OF THE ACCUSED. — [I]nconsistencies in the testimonies of witnesses, which refer only to minor details and collateral matters, do not affect the veracity and weight of their testimonies where there is consistency in relating the principal occurrence and the positive identification of the accused. Slight contradictions in fact even serve to strengthen the credibility of the witnesses and prove that their testimonies are not rehearsed. Nor are such inconsistencies, and even improbabilities, unusual, for there is no person with perfect faculties or senses. The alleged inconsistencies in this case are too inconsequential to overturn the findings of the court *a quo*. It is important that the two prosecution witnesses were one in saying that it was accused-appellant who sexually abused AAA. Their positive, candid and straightforward narrations of how AAA was sexually abused by accused-appellant evidently deserve full faith and credence. When the rape incident happened, AAA was only five (5) years old; and when she and her cousin testified, they were barely 9 and 11 years old, respectively. This Court has had occasion to rule that the alleged inconsistencies in the testimonies of the witnesses can be explained by their age and their inexperience with court proceedings, and that even the most candid of witnesses commit mistakes and make confused and inconsistent statements. This is especially true of young witnesses, who could be overwhelmed by the atmosphere of the courtroom. Hence, there is more reason to accord them ample space for inaccuracy.

2. ID.; ID.; ID.; FAILURE TO RECALL THE EXACT DATE OF THE CRIME IS NOT AN INDICATION OF FALSE TESTIMONY, FOR EVEN DISCREPANCIES REGARDING EXACT DATES OF RAPES ARE INCONSEQUENTIAL AND IMMATERIAL AND CANNOT DISCREDIT THE CREDIBILITY OF THE VICTIM AS A WITNESS. — Accused-appellant capitalizes on AAA's inability to recall the exact date when the incident in 1996 was committed. Failure to recall the exact date of the crime, however, is not an indication of false testimony, for even discrepancies regarding exact dates of rapes are inconsequential and immaterial and cannot discredit the credibility of the victim as a witness. In *People v. Purazo*, We ruled: We have ruled, time and again that the date is not an essential element of the crime of rape, for the gravamen of the offense is carnal knowledge of a woman. As such, the time

or place of commission in rape cases need not be accurately stated. As early as 1908, we already held that where the time or place or any other fact alleged is not an essential element of the crime charged, conviction may be had on proof of the commission of the crime, even if it appears that the crime was not committed at the precise time or place alleged, or if the proof fails to sustain the existence of some immaterial fact set out in the complaint, provided it appears that the specific crime charged was in fact committed prior to the date of the filing of the complaint or information within the period of the statute of limitations and at a place within the jurisdiction of the court.

3. ID.; ID.; ID.; DELAY IN FILING OF CASE DOES NOT AFFECT CREDIBILITY IF REASON FOR THE DELAY IS SUFFICIENTLY EXPLAINED. — [W]itnesses' credibility is not affected by the delay in the filing of the case against accused-appellant. Neither does the delay bolster accused-appellant's claim that the only reason why this case was filed against him was "to help Salvacion Bobier get a conviction of this same accused-appellant in the case of murder filed by Salvacion Bobier for the death of her granddaughter Mae Christine Camu on May 7, 2000." The rape victim's delay or hesitation in reporting the crime does not destroy the truth of the charge nor is it an indication of deceit. It is common for a rape victim to prefer silence for fear of her aggressor and the lack of courage to face the public stigma of having been sexually abused. In *People v. Coloma* we even considered an 8-year delay in reporting the long history of rape by the victim's father as understandable and not enough to render incredible the complaint of a 13-year-old daughter. Thus, in the absence of other circumstances that show that the charge was a mere concoction and impelled by some ill motive, delay in the filing of the complainant is not sufficient to defeat the charge. Here, the failure of AAA's parents to immediately file this case was sufficiently justified by the complainant's father in the latter's testimony.

4. ID.; ID.; DEFENSE OF DENIAL; CANNOT PREVAIL OVER THE POSITIVE AND UNEQUIVOCAL IDENTIFICATION OF APPELLANT BY THE OFFENDED PARTY AND OTHER WITNESSES. — Accused-appellant's defense of denial was properly rejected. Time and time again, we have

ruled that denial like alibi is the weakest of all defenses, because it is easy to concoct and difficult to disprove. Furthermore, it cannot prevail over the positive and unequivocal identification of appellant by the offended party and other witnesses. Categorical and consistent positive identification, absent any showing of ill motive on the part of the eyewitness testifying on the matter, prevails over the appellants' defense of denial and alibi. The shallow hypothesis put forward by accused-appellant that he was accused of raping AAA due to the instigation of Salvacion Bobier hardly convinces this Court. On this score, the trial court aptly reached the following conclusion: . . . True, Salvacion Bobier actively assisted AAA's family file the instant case against the accused, but the Court believes [AAA's] parents finally decided to file the rape case because after they have come to realize after what happened to Mae Christine Camu that what previously [AAA and her cousin] told her mother and which the latter had continually ignored is after all true.

5. ID.; ID.; CREDIBILITY OF WITNESSES; TESTIMONY OF RAPE VICTIMS WHO ARE YOUNG AND IMMATURE DESERVE FULL CREDENCE; IT IS IMPOSSIBLE FOR A GIRL OF COMPLAINANT'S AGE TO FABRICATE A CHARGE SO HUMILIATING TO HERSELF AND HER FAMILY HAD SHE NOT BEEN SUBJECTED TO THE PAINFUL EXPERIENCE OF SEXUAL ABUSE. — AAA was barely 9 years of age when she testified. It has been stressed often enough that the testimony of rape victims who are young and immature deserve full credence. It is improbable for a girl of complainant's age to fabricate a charge so humiliating to herself and her family had she not been truly subjected to the painful experience of sexual abuse. At any rate, a girl of tender years, innocent and guileless, cannot be expected to brazenly impute a crime so serious as rape to any man if it were not true. Parents would not sacrifice their own daughter, a child of tender years at that, and subject her to the rigors and humiliation of public trial for rape, if they were not motivated by an honest desire to have their daughter's transgressor punished accordingly. Hence, the logical conclusion is that no such improper motive exists and that her testimony is worthy of full faith and credence.

6. CRIMINAL LAW; RAPE; A MEDICAL REPORT IS NOT INDISPENSABLE IN A PROSECUTION FOR RAPE. —

Accused-appellant also contends that he could not be liable for rape because there is no proof that he employed force, threats or intimidation in having carnal knowledge of AAA. Where the girl is below 12 years old, as in this case, the only subject of inquiry is whether "carnal knowledge" took place. Proof of force, intimidation or consent is unnecessary, since none of these is an element of statutory rape. There is a conclusive presumption of absence of free consent when the rape victim is below the age of twelve.

7. ID.; ID.; PENALTY OF DEATH SHALL BE IMPOSED WHEN THE VICTIM OF RAPE IS A CHILD BELOW SEVEN YEARS OLD; CASE AT BAR. — Article 335 of the Revised Penal Code, as amended by Republic Act No. 7659, was the governing law at the time the accused-appellant committed the rape in question. Under the said law, the penalty of death shall be imposed when the victim of rape is a child below seven years of age. In this case, as the age of AAA, who was five (5) years old at the time the rape was committed, was alleged in the information and proven during trial by the presentation of her birth certificate, which showed her date of birth as January 16, 1991, the death penalty should be imposed.

8. ID.; ID.; WHEN THE OFFENDER IS A MINOR UNDER 18 YEARS, THE PENALTY NEXT LOWER THAN THAT PRESCRIBED BY LAW SHALL BE IMPOSED BUT ALWAYS IN THE PROPER PERIOD; PROPER IMPOSABLE PENALTY FOR THE ACCUSED-APPELLANT IS *RECLUSION PERPETUA*. — [T]he Court finds ground for modifying the penalty imposed by the CA. We cannot agree with the CA's conclusion that the accused-appellant cannot be deemed a minor at the time of the commission of the offense to entitle him to the privileged mitigating circumstance of minority pursuant to Article 68(2) of the Revised Penal Code. When accused-appellant testified on March 14, 2002, he admitted that he was 24 years old, which means that in 1996, he was 18 years of age. As found by the trial court, the rape incident could have taken place "in any month and date in the year 1996." Since the prosecution was not able to prove the exact date and time when the rape was committed, it is not certain that the crime of rape was committed on or after he reached 18 years of age in 1996. In assessing the attendance of the mitigating circumstance of

minority, all doubts should be resolved in favor of the accused, it being more beneficial to the latter. In fact, in several cases, this Court has appreciated this circumstance on the basis of a lone declaration of the accused regarding his age. Under Article 68 of the Revised Penal Code, when the offender is a minor under 18 years, the penalty next lower than that prescribed by law shall be imposed, but always in the proper period. However, for purposes of determining the proper penalty because of the privileged mitigating circumstance of minority, the penalty of death is still the penalty to be reckoned with. Thus, the proper imposable penalty for the accused-appellant is *reclusion perpetua*.

9. ID.; CIVIL LIABILITY; THE FACT OF MINORITY OF THE OFFENDER AT THE TIME OF THE COMMISSION OF THE OFFENSE HAS NO BEARING ON THE GRAVITY AND EXTENT OF INJURY CAUSED TO THE VICTIM AND HER FAMILY, PARTICULARLY CONSIDERING THE CIRCUMSTANCES OF THE PRESENT CASE. — [A]ccording to law and jurisprudence, civil indemnity is in the nature of actual and compensatory damages for the injury caused to the offended party and that suffered by her family, and moral damages are likewise compensatory in nature. The fact of minority of the offender at the time of the commission of the offense has no bearing on the gravity and extent of injury caused to the victim and her family, particularly considering the circumstances attending this case. Here, the accused-appellant could have been eighteen at the time of the commission of the rape. He was accorded the benefit of the privileged mitigating circumstance of minority because of a lack of proof regarding his actual age and the date of the rape rather than a moral or evidentiary certainty of his minority. In any event, notwithstanding the presence of the privileged mitigating circumstance of minority, which warrants the lowering of the public penalty by one degree, there is no justifiable ground to depart from the jurisprudential trend in the award of damages in the case of qualified rape, considering the compensatory nature of the award of civil indemnity and moral damages. This was the same stance this Court took in *People v. Candelario*, a case decided on July 28, 1999, which did not reduce the award of damages. At that time, the damages amounted to ₱75,000.00 for civil indemnity and ₱50,000.00 for moral damages, even if the public penalty imposed on the accused was lowered by one degree,

because of the presence of the privileged mitigating circumstance of minority. The principal consideration for the award of damages, under the ruling in *People v. Salome* and *People v. Quiachon* is the **penalty provided by law or imposable for the offense because of its heinousness**, **not** the public penalty **actually** imposed on the offender.

10. ID.; ID.; THE LITMUS TEST IN THE DETERMINATION OF THE CIVIL INDEMNITY IS THE HEINOUS CHARACTER OF THE CRIME COMMITTED, WHICH WOULD HAVE WARRANTED THE IMPOSITION OF THE DEATH PENALTY, REGARDLESS OF WHETHER THE PENALTY ACTUALLY IMPOSED IS REDUCED TO *RECLUSION PERPETUA*. — Regarding the civil indemnity and moral damages, *People v. Salome* explained the basis for increasing the amount of said civil damages as follows: The Court, likewise, affirms the civil indemnity awarded by the Court of Appeals to Sally in accordance with the ruling in *People v. Sambrano* which states: "As to damages, we have held that **if the rape is perpetrated with any of the attending qualifying circumstances that require the imposition of the death penalty**, the civil indemnity for the victim shall be ₱75,000.00 . . . Also, in rape cases, moral damages are awarded without the need of proof other than the fact of rape because it is assumed that the victim has suffered moral injuries entitling her to such an award. However, the trial court's award of ₱50,000.00 as moral damages should also be increased to ₱75,000 pursuant to current jurisprudence on qualified rape." It should be noted that while the new law prohibits *the imposition* of the death penalty, **the penalty provided for by law for a heinous offense is still death and the offense is still heinous**. Consequently, the civil indemnity for the victim is still ₱75,000.00. *People v. Quiachon* also ratiocinates as follows: With respect to the award of damages, the appellate court, following prevailing jurisprudence, correctly awarded the following amounts; ₱75,000.00 as civil indemnity **which is awarded if the crime is qualified by circumstances warranting the imposition of the death penalty**; ₱75,000.00.00 as moral damages because the victim is assumed to have suffered moral injuries, hence, entitling her to an award of moral damages even without proof thereof, x x x **Even if** the penalty of death is not to be imposed on the appellant because of the prohibition in R.A. No. 9346, **the civil indemnity**

of ₱75,000.00 is still proper because, following the ratiocination in *People v. Victor*, **the said award is not dependent on the actual imposition of the death penalty but on the fact that qualifying circumstances warranting the imposition of the death penalty attended the commission of the offense**. The Court declared that the award of ₱75,000.00 shows "**not only a reaction to the apathetic societal perception of the penal law and the financial fluctuations over time but also the expression of the displeasure of the court of the incidence of heinous crimes against chastity.**" The litmus test therefore, in the determination of the civil indemnity is the heinous character of the crime committed**,** which would have warranted the imposition of the death penalty, regardless of whether the penalty actually imposed is reduced to *reclusion perpetua*.

11. ID.; ID.; EXEMPLARY DAMAGES; SINCE THE COMPENSATORY DAMAGES, SUCH AS THE CIVIL INDEMNITY AND MORAL DAMAGES, ARE INCREASED WHEN QUALIFIED RAPE IS COMMITTED, THE EXEMPLARY DAMAGES SHOULD LIKEWISE BE INCREASED IN ACCORDANCE WITH PREVAILING JURISPRUDENCE. — As to the award of exemplary damages, Article 2229 of the Civil Code provides that exemplary or corrective damages are imposed in addition to the moral, temperate, liquidated or compensatory damages. Exemplary damages are not recoverable as a matter of right. The requirements of an award of exemplary damages are: (1) they may be imposed by way of example in addition to compensatory damages, and only after the claimant's right to them has been established; (2) they cannot be recovered as a matter of right, *their determination depending upon the amount of compensatory damages that may be awarded to the claimant*; (3) the act must be accompanied by bad faith or done in a wanton, fraudulent, oppressive or malevolent manner. Since the compensatory damages, such as the civil indemnity and moral damages, are increased when qualified rape is committed, the exemplary damages should likewise be increased in accordance with prevailing jurisprudence.

12. ID.; ID.; R.A. NO. 9334 (JUVENILE JUSTICE AND WELFARE ACT OF 2006); ALLOWS RETROACTIVE APPLICATION TO THOSE WHO HAVE BEEN CONVICTED

AND ARE SERVING SENTENCE AT THE TIME OF ITS EFFECTIVITY AND WHO WERE BELOW THE AGE OF 18 AT THE TIME OF ITS COMMISSION. — [W]hen accused-appellant was detained at the New Bilibid Prison pending the outcome of his appeal before this Court, Republic Act (R.A.) No. 9344, the *Juvenile Justice and Welfare Act of 2006* took effect on May 20, 2006. The RTC decision and CA decision were promulgated on January 17, 2003 and July 14, 2005, respectively. The promulgation of the sentence of conviction of accused-appellant handed down by the RTC was not suspended as he was about 25 years of age at that time, in accordance with Article 192 of Presidential Decree (P.D.) No. 603, *The Child and Youth Welfare Code* and Section 32 of A.M. No. 02-1-18-SC, the *Rule on Juveniles in Conflict with the Law*. Accused-appellant is now approximately 31 years of age. He was previously detained at the Albay Provincial Jail at Legaspi City and transferred to the New Bilibid Prison, Muntinlupa City on October 13, 2003. R.A. No. 9344 provides for its retroactive application as follows: Sec. 68. *Children Who Have Been Convicted and are Serving Sentence.* — Persons who have been convicted and are serving sentence at the time of the effectivity of this Act, and who were below the age of eighteen (18) years at the time of the commission of the offense for which they were convicted and are serving sentence, shall likewise benefit from the retroactive application of this Act. x x x The aforequoted provision allows the retroactive application of the Act to those who have been convicted and are serving sentence at the time of the effectivity of this said Act, and who were below the age of 18 years at the time of the commission of the offense. With more reason, the Act should apply to this case wherein the conviction by the lower court is still under review.

13. ID.; ID.; ID.; AUTOMATIC SUSPENSION OF SENTENCE; APPLICABLE TO HEINOUS CRIME; THE LAW DOES NOT MAKE ANY DISTINCTION AS TO THE NATURE OF THE OFFENSE COMMITTED BY THE CHILD IN CONFLICT WITH THE LAW. — Sec. 38 of R.A. No. 9344 provides for the automatic suspension of sentence of a child in conflict with the law, even if he/she is already 18 years of age or more at the time he/she is found guilty of the offense charged. The provision makes no distinction as to the nature of the offense committed by the child in conflict with the law,

unlike P.D. No. 603 and A.M. No. 02-1-18-SC. The said P.D. and Supreme Court (SC) Rule provide that the benefit of suspended sentence would not apply to a child in conflict with the law if, among others, he/she has been convicted of an offense punishable by death, *reclusion perpetua* or life imprisonment. In construing Sec. 38 of R.A. No. 9344, the Court is guided by the basic principle of statutory construction that when the law does not distinguish, we should not distinguish. Since R.A. No. 9344 does not distinguish between a minor who has been convicted of a capital offense and another who has been convicted of a lesser offense, the Court should also not distinguish and should apply the automatic suspension of sentence to a child in conflict with the law who has been found guilty of a heinous crime. Moreover, the legislative intent, to apply to heinous crimes the automatic suspension of sentence of a child in conflict with the law can be gleaned from the Senate deliberations on Senate Bill No. 1402 (Juvenile Justice and Delinquency Prevention Act of 2005), the pertinent portion of which is quoted below: If a mature minor, maybe 16 years old to below 18 years old is charged, accused with, or may have committed a serious offense, and may have acted with discernment, then the child could be recommended by the Department of Social Welfare and Development (DSWD), by the Local Council for the Protection of Children (LCPC), or by my proposed Office of Juvenile Welfare and Restoration to go through a judicial proceeding; but *the welfare, best interests, and restoration of the child should still be a primordial or primary consideration. Even in heinous crimes, the intention should still be the child's restoration, rehabilitation and reintegration.* x x x

14. ID.; ID.; ID.; WHILE THE PROVISION ON SUSPENSION OF SENTENCE IS NO LONGER APPLICABLE TO ACCUSED-APPELLANT, HE IS HOWEVER ENTITLED TO APPROPRIATE DISPOSITION UNDER SECTION 51 OF R.A. NO. 9334 WHICH PROVIDES FOR THE CONFINEMENT OF CONVICTED CHILDREN IN AGRICULTURAL CAMPS AND OTHER TRAINING FACILITIES. — [W]hile Sec. 38 of R.A. No. 9344 provides that suspension of sentence can still be applied even if the child in conflict with the law is already eighteen (18) years of age or more at the time of the pronouncement of his/her guilt, Sec. 40 of the same law limits the said suspension of sentence

until the said child reaches the maximum age of 21, thus: Sec. 40. *Return of the Child in Conflict with the Law to Court*. — If the court finds that the objective of the disposition measures imposed upon the child in conflict with the law have not been fulfilled, or if the child in conflict with the law has willfully failed to comply with the condition of his/her disposition or rehabilitation program, the child in conflict with the law shall be brought before the court for execution of judgment. If said child in conflict with the law has reached eighteen (18) years of age while under suspended sentence, the court shall determine whether to discharge the child in accordance with this Act, to order execution of sentence, **or to extend the suspended sentence for a certain specified period or until the child reaches the maximum age of twenty-one (21) years.** To date, accused-appellant is about 31 years of age, and the judgment of the RTC had been promulgated, even before the effectivity of R.A. No. 9344. Thus, the application of Secs. 38 and 40 to the suspension of sentence is now moot and academic. However, accused-appellant shall be entitled to appropriate disposition under Sec. 51 of R.A. No. 9344, which provides for the confinement of convicted children as follows: Sec. 51. *Confinement of Convicted Children in Agricultural Camps and Other Training Facilities*. — A child in conflict with the law **may**, after conviction and upon order of the court, be made to serve his/her sentence, in lieu of confinement in a regular penal institution, in an agricultural camp and other training facilities that may be established, maintained, supervised and controlled by the BUCOR, in coordination with the DSWD. The civil liability resulting from the commission of the offense is not affected by the appropriate disposition measures and shall be enforced in accordance with law.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
L.A.M. Caayao Law & Notary Offices for respondent.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

On automatic review is the decision[1] dated July 14, 2005 of the Court of Appeals (CA) in *CA-G.R. CR-HC No. 00717* which affirmed, with modifications, an earlier decision[2] of the Regional Trial Court (RTC) of Ligao City, Branch 13, in Criminal Case No. 4134, finding herein accused-appellant Richard O. Sarcia *alias* "Nogi" guilty beyond reasonable doubt of the crime of rape[3] committed against AAA,[4] and sentenced him to suffer the penalty of *Reclusion Perpetua* and to pay the amount of ₱50,000.00 as civil indemnity, ₱50,000.00 as moral damages, and the cost of the suit. However, the CA modified the penalties imposed by the RTC by imposing the death penalty, increasing the award of civil indemnity to ₱75,000.00, and awarding ₱25,000.00 as exemplary damages, aside from the ₱50,000.00 for moral damages.

The crime of rape was allegedly committed sometime in 1996 against AAA, a five (5) year old girl. After almost four (4) years, AAA's father filed a complaint[5] for acts of lasciviousness against herein accused-appellant on July 7, 2000. Upon review of the evidence, the Office of the Provincial Prosecutor at Ligao, Albay upgraded the charge to rape.[6] The Information[7] dated September 5, 2000 reads:

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[1] Penned by Associate Justice Vicente S.E. Veloso, with Associate Justice Roberto A. Barrios (ret.) and Associate Justice Amelita G. Tolentino, concurring; *rollo*, pp. 3-33.

[2] Penned by Judge Jose S. Sañez; CA Record, pp. 21-30.

[3] Under Art. 335 of the Revised Penal Code as amended by Rep. Act No. 7659.

[4] The real name of the victim is withheld to protect her identity and privacy pursuant to Section 29 of Republic Act No. 7610, Section 44 of Republic Act No. 9262; and Section 40 of A.M. No. 04-10-11-SC. See our ruling in *People v. Cabalquinto*, G. R. No. 167693, September 19, 2006, 502 SCRA 419.

[5] RTC Record, p. 1.

[6] *Id*. at 12.

[7] *Id*. at 13.

That sometime in 1996 at Barangay Doña Tomasa, Municipality of Guinobatan, Province of Albay, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, with lewd and unchaste design, and by means of force, threats and intimidation, did then and there willfully, unlawfully and feloniously have sexual intercourse with [AAA], who was then 6 years of age, against her will and consent, to her damage and prejudice.

ACTS CONTRARY TO LAW.

At his arraignment on October 25, 2000, accused-appellant, with the assistance of his counsel, entered a plea of not guilty.[8] Thereafter, trial on the merits ensued.

The prosecution presented the oral testimonies of the victim AAA; her minor cousin; her father; and Dr. Joana Manatlao, the Municipal Health Officer of Guinobatan, Albay. The defense presented the accused-appellant himself, who vehemently denied committing the crimes imputed to him and Manuel Casimiro, Clerk of Court II of the Municipal Trial Court at Guinobatan, Albay.

On January 17, 2003, the trial court rendered its Decision[9] finding the accused-appellant guilty of the crime of rape and imposed the penalty mentioned above.

The record of this case was forwarded to this Court in view of the Notice of Appeal filed by the accused- appellant.[10]

Accused-appellant filed his Appellant's Brief[11] on July 15, 2004, while the People, through the Office of the Solicitor General, filed its Appellee's Brief[12] on December 15, 2004.

Pursuant to our pronouncement in *People v. Mateo*,[13] modifying the pertinent provisions of the Revised Rules on Criminal Procedure

[8] *Id.* at 22.

[9] *Supra* note 2.

[10] CA Record, p. 31.

[11] *Id.* at 49-56.

[12] *Id.* at 73-105.

[13] G.R. Nos. 147678-87, July 7, 2004, 433 SCRA 640, 657-658.

insofar as they provide for direct appeals from the RTC to this Court in cases in which the penalty imposed by the trial court is death, *reclusion perpetua* or life imprisonment, and the Resolution dated September 19, 1995 in "Internal Rules of the Supreme Court," the case was transferred, for appropriate action and disposition, to the CA where it was docketed as *CA-G.R. CR-H.C. No. 00717.*

As stated at the beginning hereof, the CA, in its decision of July 14, 2005, in *CA-G.R. CR-H.C. No. 000717*, affirmed with modification the judgment of conviction pronounced by the trial court. We quote the *fallo* of the CA decision:

> WHEREFORE, the judgment of conviction is **AFFIRMED**. The accused, Richard Sarcia *y* Olivera, is ordered to suffer the **penalty of DEATH**, and to pay the victim, [AAA], the amount of (1) ₱75,000.00 as civil indemnity; (2) ₱50,000.00 as moral damages, and (3) ₱25,000.00 as exemplary damages.
>
> Let the entire records of this case be elevated to the Supreme Court for review, pursuant to A.M. No. 00-5-03-SC (Amendments to the Revised Rules of Criminal Procedure to Govern Death Penalty Cases), which took effect on October 15, 2004.
>
> SO ORDERED.

On September 30, 2005, the case was elevated to this Court for further review.[14]

In our Resolution[15] of November 15, 2005, we required the parties to simultaneously submit their respective supplemental briefs. Accused-appellant filed his Supplemental Brief[16] on April 7, 2006. Having failed to submit one, the Office of the Solicitor General (OSG) was deemed to have waived the filing of its supplemental brief.

In his Brief filed before the CA, accused-appellant raised the following assignment of errors:

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[14] *Rollo*, p. 1.

[15] *Id.* at 34.

[16] *Id.* at 40-44.

I

THE LOWER COURT GRAVELY ERRED IN GIVING CREDENCE TO THE TESTIMONY OF [AAA], [her cousin] and [her father].

II

THE LOWER COURT GLARINGLY ERRED IN REJECTING THE DEFENSE OF ALIBI INTERPOSED BY THE ACCUSED WHICH IS MORE CREDIBLE.

III

THE LOWER COURT GRAVELY ERRED IN NOT ACQUITTING THE ACCUSED RICHARD SARCIA.

The evidence for the prosecution is summarized by the OSG in the Appellee's Brief, as follows:

On December 16, 1996, five-year-old [AAA], together with her [cousin and two other playmates], was playing in the yard of Saling Crisologo near a mango tree.

Suddenly, appellant appeared and invited [AAA] to go with him to the backyard of Saling Crisologo's house. She agreed. Unknown to appellant, [AAA's cousin] followed them.

Upon reaching the place, appellant removed [AAA's] shorts and underwear. He also removed his trousers and brief. Thereafter, he ordered [AAA] to lie down on her back. Then, he lay on top of her and inserted his penis into [AAA's] private organ. Appellant made an up-and-down movement ("*Nagdapadapa tabi*"). [AAA] felt severe pain inside her private part and said "*aray*." She also felt an intense pain inside her stomach.

[AAA's cousin], who positioned herself around five (5) meters away from them, witnessed appellant's dastardly act. Horrified, [AAA's cousin] instinctively rushed to the house of [AAA's] mother, her aunt Emily, and told the latter what she had seen. [AAA's] mother answered that they (referring to {AAA and her cousin} were still very young to be talking about such matters.

Meanwhile, after satisfying his lust, appellant stood up and ordered [AAA] to put on her clothes. Appellant then left.

Perplexed, [AAA's cousin] immediately returned to the backyard of Saling Crisologo where she found [AAA] crying. Appellant, however,

was gone. [AAA's cousin] approached [AAA] and asked her what appellant had done to her. When [AAA] did not answer, [her cousin] did not ask her any further question and just accompanied her home.

At home, [AAA] did not tell her mother what appellant had done to her because she feared that her mother might slap her. Later, when her mother washed her body, she felt a grating sensation in her private part. Thereafter, [AAA] called for [her cousin]. [AAA's cousin] came to their house and told [AAA's] mother again that appellant had earlier made an up-and-down movement on top of [AAA]. [AAA's mother], however did not say anything. At that time, [AAA's] father was working in Manila.

Dr. Joana Manatloa is the Municipal Health Officer of Guinobatan, Albay. She testified that: (1) it was the rural health officer, Dr. Reantaso, who conducted a physical examination on [AAA]; (2) Dr. Reantaso prepared and signed a medico-legal certificate containing the result of [AAA]'s examination; (3) Dr. Reantaso, however, had already resigned as rural health officer of Guinobatan, Albay; (4) as a medical doctor, she can interpret, the findings in said medico-legal certificate issued to [AAA]; (5) [AAA]'s medical findings are as follows: "negative for introital vulvar laceration nor scars, perforated hymen, complete, pinkish vaginal mucosa, vaginal admits little finger with resistance; (6) the finding "negative for introital bulvar laceration nor scars" means, in layman's language, that there was no showing of any scar or wound, and (7) there is a complete perforation of the hymen which means that it could have been subjected to a certain trauma or pressure such as strenuous exercise or the entry of an object like a medical instrument or penis.[17]

On the other hand, the trial court summarized the version of the defense as follows:

Richard Sarcia, 24 years old, single, student and a resident of Doña Tomasa, Guinobatan, Albay denied he raped [AAA]. While he knows [AAA's] parents, because sometimes they go to their house looking for his father to borrow money, he does not know [AAA] herself. His father retired as a fireman from Crispa in 1991 while his mother worked as an agriculturist in the Municipality of Teresa, Antipolo, Rizal. As an agriculturist of the Department of Agriculture, his mother would bring seedlings and attend seminars in Batangas

[17] CA Record, pp. 77-105.

and Baguio. They were residing in Cainta, Rizal when sometime in 1992 they transferred residence to Guinobatan, Albay. His father is from barangay Masarawag while his mother is from barangay Doña Tomasa both of Guinobatan, Albay. After their transfer in Guinobatan, his mother continued to be an agriculturist while his father tended to his 1-hectare coconut land. Richard testified he was between fourteen (14) and fifteen (15) years old in 1992 when they transferred to Guinobatan. Between 1992 and 1994 he was out of school. But from 1994 to 1998 he took his high school at Masarawag High School. His daily routine was at about 4:00 o'clock in the afternoon after school before proceeding home he would usually play basketball at the basketball court near the church in Doña Tomasa about 1 kilometer away from their house. When her mother suffered a stroke in 1999 he and his father took turns taking care of his mother. Richard denied molesting other girls . . . and was most surprised when he was accused of raping [AAA]. He knows Saling Crisologo and the latter's place which is more than half kilometer to their house. Richard claimed Salvacion Bobier, grandmother of Mae Christine Camu, whose death on May 7, 2000 was imputed to him and for which a case for Murder under Criminal Case No. 4087 was filed against him with the docile cooperation of [AAA's] parents who are related to Salvacion, concocted and instigated [AAA's] rape charge against him to make the case for Murder against him stronger and life for him miserable. He was incarcerated on May 10, 2000 for the Murder charge and two (2) months later while he already in detention, the rape case supposedly committed in 1996 was filed against him in the Municipal Trial Court (MTC) of Guinobatan, Albay. He was to learn about it from his sister, Marivic, on a Sunday afternoon sometime on July 20, 2000 when his sister visited him in jail. He naturally got angry when he heard of this rape charge because he did not do such thing and recalled telling his sister they can go to a doctor and have the child examine to prove he did not rape her. Subsequently, from his sister again he was to learn that the rape case was ordered dismissed.

On cross-examination, Richard admitted [AAA's] mother, is also related to his father, [AAA mother's] father, being a second cousin of his father. Richard is convinced it is not the lending of money by his father to the AAA's family as the motive for the latter to file the rape case against him but the instigation of Salvacion Bobier.

Manuel A. Casimiro, Clerk of Court II of the Municipal Trial Court (MTC), Guinobatan, Albay, testified on the records of Criminal Case No. 7078 filed in MTC Guinobatan, Albay against Richard Sarcia

for Rape in relation to RA 7610 relative to the alleged withdrawal of said rape case but the accused through counsel failed to formally offer the marked exhibits relative to said case.[18]

Accused-appellant alleges that the trial court erred in convicting him, as the prosecution was not able to prove his guilt beyond reasonable doubt. He assailed the credibility of the prosecution witnesses, AAA, her cousin and her father on the following grounds: (1) the testimonies of AAA and her cousin were inconsistent with each other; (2) the victim was confused as to the date and time of the commission of the offense; (3) there was a four-year delay in filing the criminal case, and the only reason why they filed the said case was "to help Salvacion Bobier get a conviction of this same accused in a murder case filed by said Salvacion Bobier for the death of her granddaughter Mae Christine Camu on May 7, 2000." Accused-appellant stressed that the same Salvacion Bobier helped AAA's father in filing the said case for rape. Accused-appellant also claimed that the prosecution failed to prove that he employed force, threats or intimidation to achieve his end. Finally, accused-appellant harped on the finding in the medical certificate issued by Dr. Reantaso and interpreted by Dr. Joana Manatlao, stating "negative for introital bulvar laceration nor scar which means that there was no showing of any scar or wound."

In his Appellee's Brief accused-appellant pointed out the inconsistencies between AAA's and her cousin's testimonies as follows: (1) the cousin testified that she played with AAA at the time of the incident, while AAA testified that she was doing nothing before accused-appellant invited her to the back of the house of a certain Saling; (2) the cousin testified that when she saw accused-appellant doing the push-and-pull motion while on top of AAA, the latter shouted in a loud voice contrary to AAA's testimony that when accused-appellant was inside her and started the up-and-down motion, she said "*aray*"; (3) when the cousin returned to AAA after telling the latter's mother what accused-appellant had done to AAA, she found AAA crying. AAA however testified that, after putting on her clothes, she

[18] *Id*. at 49-55.

invited the cousin to their house; and (4) the cousin testified that other children were playing at the time of the incident, but AAA testified that there were only four of them who were playing at that time.

As it is oft-repeated, inconsistencies in the testimonies of witnesses, which refer only to minor details and collateral matters, do not affect the veracity and weight of their testimonies where there is consistency in relating the principal occurrence and the positive identification of the accused. Slight contradictions in fact even serve to strengthen the credibility of the witnesses and prove that their testimonies are not rehearsed. Nor are such inconsistencies, and even improbabilities, unusual, for there is no person with perfect faculties or senses.[19] The alleged inconsistencies in this case are too inconsequential to overturn the findings of the court *a quo*. It is important that the two prosecution witnesses were one in saying that it was accused-appellant who sexually abused AAA. Their positive, candid and straightforward narrations of how AAA was sexually abused by accused-appellant evidently deserve full faith and credence. When the rape incident happened, AAA was only five (5) years old; and when she and her cousin testified, they were barely 9 and 11 years old, respectively. This Court has had occasion to rule that the alleged inconsistencies in the testimonies of the witnesses can be explained by their age and their inexperience with court proceedings, and that even the most candid of witnesses commit mistakes and make confused and inconsistent statements. This is especially true of young witnesses, who could be overwhelmed by the atmosphere of the courtroom. Hence, there is more reason to accord them ample space for inaccuracy.[20]

Accused-appellant capitalizes on AAA's inability to recall the exact date when the incident in 1996 was committed. Failure to recall the exact date of the crime, however, is not an indication

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[19] *People v. Perreras, et al.*, G.R. No. 139622, July 31, 2001, 362 SCRA 202, 210.

[20] *People v. Amazan, et al.*, G.R. Nos. 136251, 138606 & 138607, January 16, 2001, 349 SCRA 218, 230.

of false testimony, for even discrepancies regarding exact dates of rapes are inconsequential and immaterial and cannot discredit the credibility of the victim as a witness.[21] In *People v. Purazo*,[22] We ruled:

> We have ruled, time and again that the date is not an essential element of the crime of rape, for the gravamen of the offense is carnal knowledge of a woman. As such, the time or place of commission in rape cases need not be accurately stated. As early as 1908, we already held that where the time or place or any other fact alleged is not an essential element of the crime charged, conviction may be had on proof of the commission of the crime, even if it appears that the crime was not committed at the precise time or place alleged, or if the proof fails to sustain the existence of some immaterial fact set out in the complaint, provided it appears that the specific crime charged was in fact committed prior to the date of the filing of the complaint or information within the period of the statute of limitations and at a place within the jurisdiction of the court.

Also in *People v. Salalima*,[23] the Court held:

> Failure to specify the exact dates or time when the rapes occurred does not *ipso facto* make the information defective on its face. The reason is obvious. The precise date or time when the victim was raped is not an element of the offense. The gravamen of the crime is the fact of carnal knowledge under any of the circumstances enumerated under Article 335 of the Revised Penal Code. As long as it is alleged that the offense was committed at any time as near to the actual date when the offense was committed an information is sufficient. In previous cases, we ruled that allegations that rapes were committed "*before and until October 15, 1994*," "*sometime in the year 1991 and the days thereafter*," "*sometime in November 1995 and some occasions prior and/or subsequent thereto*" and "*on or about and sometime in the year 1988*" constitute sufficient compliance with Section 11, Rule 110 of the Revised Rules on Criminal Procedure.

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[21] *People v. Lilo*, G. R. Nos. 140736-39, February 4, 2003, 396 SCRA 674, 680.

[22] G.R. No. 133189, May 5, 2003, 402 SCRA 541, 550.

[23] G.R. Nos. 137969-71, August 15, 2001, 363 SCRA 192, 201.

In this case, AAA's declaration that the rape incident took place on December 15, 1996 was explained by the trial court, and we quote:

> The rape took place in 1996. As earlier noted by the Court the date December 15, 1996 mentioned by [AAA] may have been arbitrarily chosen by the latter due to the intense cross-examination she was subjected but the Court believes it could have been in any month and date in the year 1996 as in fact neither the information nor [AAA's] sworn statement mention the month and date but only the year.[24]

Likewise, witnesses' credibility is not affected by the delay in the filing of the case against accused-appellant. Neither does the delay bolster accused-appellant's claim that the only reason why this case was filed against him was "to help Salvacion Bobier get a conviction of this same accused-appellant in the case of murder filed by Salvacion Bobier for the death of her granddaughter Mae Christine Camu on May 7, 2000."

The rape victim's delay or hesitation in reporting the crime does not destroy the truth of the charge nor is it an indication of deceit. It is common for a rape victim to prefer silence for fear of her aggressor and the lack of courage to face the public stigma of having been sexually abused. In *People v. Coloma*[25] we even considered an 8-year delay in reporting the long history of rape by the victim's father as understandable and not enough to render incredible the complaint of a 13-year-old daughter. Thus, in the absence of other circumstances that show that the charge was a mere concoction and impelled by some ill motive, delay in the filing of the complainant is not sufficient to defeat the charge. Here, the failure of AAA's parents to immediately file this case was sufficiently justified by the complainant's father in the latter's testimony, thus:

> Q But, did you not say, please correct me if I am wrong, you got angry when your wife told you that something happened to Hazel way back in 1996?
> A Yes, sir.

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[24] CA Record, p. 29.

[25] G.R. No. 95755, May 18, 1993, 222 SCRA 255.

Q Yet, despite your anger you were telling us that you waited until June to file this case?

A After I heard about the incident, I and my wife had a talk for which reason that during that time we had no money yet to use in filing the case, so we waited. When we were able to save enough amounts, we filed the case.[26]

Accused-appellant also contends that he could not be liable for rape because there is no proof that he employed force, threats or intimidation in having carnal knowledge of AAA. Where the girl is below 12 years old, as in this case, the only subject of inquiry is whether "carnal knowledge" took place. Proof of force, intimidation or consent is unnecessary, since none of these is an element of statutory rape. There is a conclusive presumption of absence of free consent when the rape victim is below the age of twelve.[27]

Accused-appellant harps on the medical report, particularly the conclusion quoted as follows: "negative for introital bulvar laceration nor scars, which means, in layman language, that there was no showing of any scar or wound." The Court has consistently ruled that the presence of lacerations in the victim's sexual organ is not necessary to prove the crime of rape and its absence does not negate the fact of rape. A medical report is not indispensable in a prosecution for rape.[28] What is important is that AAA's testimony meets the test of credibility, and that is sufficient to convict the accused.

Accused-appellant's defense of denial was properly rejected. Time and time again, we have ruled that denial like alibi is the weakest of all defenses, because it is easy to concoct and difficult to disprove. Furthermore, it cannot prevail over the positive and unequivocal identification of appellant by the offended party and other witnesses. Categorical and consistent positive identification, absent any showing of ill motive on the part of

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[26] TSN, July 12, 2001, p. 20.

[27] *People v. Rote*, G.R. No. 146188, December 11, 2003, 418 SCRA 275, 285.

[28] *People v. Dizon*, G.R. No. 129236, October 17, 2001, 367 SCRA 417, 428.

the eyewitness testifying on the matter, prevails over the appellants' defense of denial and alibi.[29] The shallow hypothesis put forward by accused-appellant that he was accused of raping AAA due to the instigation of Salvacion Bobier hardly convinces this Court. On this score, the trial court aptly reached the following conclusion:

> . . . True, Salvacion Bobier actively assisted AAA's family file the instant case against the accused, but the Court believes [AAA's] parents finally decided to file the rape case because after they have come to realize after what happened to Mae Christine Camu that what previously [AAA and her cousin] told her mother and which the latter had continually ignored is after all true.

AAA was barely 9 years of age when she testified. It has been stressed often enough that the testimony of rape victims who are young and immature deserve full credence. It is improbable for a girl of complainant's age to fabricate a charge so humiliating to herself and her family had she not been truly subjected to the painful experience of sexual abuse. At any rate, a girl of tender years, innocent and guileless, cannot be expected to brazenly impute a crime so serious as rape to any man if it were not true.[30] Parents would not sacrifice their own daughter, a child of tender years at that, and subject her to the rigors and humiliation of public trial for rape, if they were not motivated by an honest desire to have their daughter's transgressor punished accordingly.[31] Hence, the logical conclusion is that no such improper motive exists and that her testimony is worthy of full faith and credence.

The guilt of accused-appellant having been established beyond reasonable doubt, we discuss now the proper penalty to be imposed on him.

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[29] *People v. Sansaet*, G.R. No. 139330, February 6, 2002, 376 SCRA 426, 432.

[30] *People v. Segovia*, G.R. No. 138974, September 19, 2002, 389 SCRA 420, 427.

[31] *People v. Las Piñas, Jr.*, G.R. No. 133444, February 20, 2002, 377 SCRA 377, 389.

Article 335 of the Revised Penal Code, as amended by Republic Act No. 7659,[32] was the governing law at the time the accused-appellant committed the rape in question. Under the said law, the penalty of death shall be imposed when the victim of rape is a child below seven years of age. In this case, as the age of AAA, who was five (5) years old at the time the rape was committed, was alleged in the information and proven during trial by the presentation of her birth certificate, which showed her date of birth as January 16, 1991, the death penalty should be imposed.

However, this Court finds ground for modifying the penalty imposed by the CA. We cannot agree with the CA's conclusion that the accused-appellant cannot be deemed a minor at the time of the commission of the offense to entitle him to the privileged mitigating circumstance of minority pursuant to Article 68(2)[33] of the Revised Penal Code. When accused-appellant testified on March 14, 2002, he admitted that he was 24 years

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[32] Article 335 of the Revised Penal Code, as amended by Republic Act No. 7659 which restored the death penalty for heinous crimes effective December 31, 1993, states:

Art. 335. *When and how rape is committed*. — Rape is committed by having carnal knowledge of a woman under any of the following circumstances:

x x x x x x x x x

3. When the woman is under twelve years of age or is demented.

x x x x x x x x x

The death penalty shall also be imposed if the crime of rape is committed with any of the following attendant circumstances:

x x x x x x x x x

4. When the victim is a religious or child below seven (7) years old.

[33] ART. 68. — *Penalty to be imposed upon a person under eighteen years of age*. — When the offender is a minor under eighteen years and his case is one coming under the provisions of the paragraph next to the last of article 80 of this Code, the following rules shall be observed:

x x x x x x x x x

2. Upon a person over fifteen and under eighteen years of age the penalty next lower than that prescribed by the law shall be imposed, but always in the proper penalty.

old, which means that in 1996, he was 18 years of age. As found by the trial court, the rape incident could have taken place "in any month and date in the year 1996." Since the prosecution was not able to prove the exact date and time when the rape was committed, it is not certain that the crime of rape was committed on or after he reached 18 years of age in 1996. In assessing the attendance of the mitigating circumstance of minority, all doubts should be resolved in favor of the accused, it being more beneficial to the latter. In fact, in several cases, this Court has appreciated this circumstance on the basis of a lone declaration of the accused regarding his age.[34]

Under Article 68 of the Revised Penal Code, when the offender is a minor under 18 years, the penalty next lower than that prescribed by law shall be imposed, but always in the proper period. However, for purposes of determining the proper penalty because of the privileged mitigating circumstance of minority, the penalty of death is still the penalty to be reckoned with.[35] Thus, the proper imposable penalty for the accused-appellant is *reclusion perpetua*.

It is noted that the Court is granted discretion in awarding damages provided in the Civil Code, in case a crime is committed. Specifically, Article 2204 of the Civil Code provides that "in crimes, the damages to be adjudicated may be respectively increased or lessened according to the aggravating or mitigating circumstances." The issue now is whether the award of damages should be reduced in view of the presence here of the privileged mitigating circumstance of minority of the accused at the time of the commission of the offense.

A review of the nature and purpose of the damages imposed on the convicted offender is in order. Article 107 of the Revised Penal Code defines the term "indemnification," which is included in the civil liability prescribed by Article 104 of the same Code, as follows:

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[34] *People v. Calpito*, G.R. No. 123298, November 27, 2003, 416 SCRA 491, 496.

[35] *People v. Quitorio*, G.R. No. 116765, January 28, 1998, 285 SCRA 196, 220.

Art. 107. *Indemnification-What is included.* — Indemnification for consequential damages shall include not only those caused the injured party, but also those suffered by his family or by a third person by reason of the crime.

Relative to civil indemnity, *People v. Victor*[36] ratiocinated as follows:

The lower court, however, erred in categorizing the award of ₱50,000.00 to the offended party as being in the nature of moral damages. We have heretofore explained in *People v. Gementiza* that the indemnity authorized by our criminal law as civil liability *ex delicto* for the offended party, in the amount authorized by the prevailing judicial policy and aside from other proven actual damages, is itself equivalent to actual or compensatory damages in civil law. It is not to be considered as moral damages thereunder, the latter being based on different jural foundations and assessed by the court in the exercise of sound discretion.

One other point of concern has to be addressed. Indictments for rape continue unabated and the legislative response has been in the form of higher penalties. The Court believes that, on like considerations, the jurisprudential path on the civil aspect should follow the same direction. Hence, starting with the case at bar, if the crime of rape is committed or effectively qualified by any of the circumstances under which the death penalty is authorized by the present amended law, the indemnity for the victim shall be in the increased amount of not less than ₱75,000.00. This is not only a reaction to the apathetic societal perception of the penal law, and the financial fluctuations over time, but also an expression of the displeasure of the Court over the incidence of heinous crimes against chastity. (Emphasis Supplied)

The Court has had the occasion to rule that moral damages are likewise compensatory in nature. In *San Andres v. Court of Appeals*,[37] we held:

x x x Moral damages, though incapable of pecuniary estimation, are in the category of an award designed to compensate the claimant

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[36] G.R. No. 127903, July 9, 1998, 292 SCRA 186, 200-201.

[37] G.R. No. 59493, August 21, 1982, 116 SCRA 81, 85.

for actual injury suffered and not to impose a penalty on the wrongdoer. (Emphasis Supplied)

In another case, this Court also explained:

> What we call moral damages are treated in American jurisprudence as compensatory damages awarded for mental pain and suffering or mental anguish resulting from a wrong (25 C.J.S. 815).[38] (Emphasis Supplied)

Thus, according to law and jurisprudence, civil indemnity is in the nature of actual and compensatory damages for the injury caused to the offended party and that suffered by her family, and moral damages are likewise compensatory in nature. The fact of minority of the offender at the time of the commission of the offense has no bearing on the gravity and extent of injury caused to the victim and her family, particularly considering the circumstances attending this case. Here, the accused-appellant could have been eighteen at the time of the commission of the rape. He was accorded the benefit of the privileged mitigating circumstance of minority because of a lack of proof regarding his actual age and the date of the rape rather than a moral or evidentiary certainty of his minority.

In any event, notwithstanding the presence of the privileged mitigating circumstance of minority, which warrants the lowering of the public penalty by one degree, there is no justifiable ground to depart from the jurisprudential trend in the award of damages in the case of qualified rape, considering the compensatory nature of the award of civil indemnity and moral damages. This was the same stance this Court took in *People v. Candelario*,[39] a case decided on July 28, 1999, which did not reduce the award of damages. At that time, the damages amounted to ₱75,000.00 for civil indemnity and ₱50,000.00 for moral damages, even if the public penalty imposed on the accused was lowered by one degree, because of the presence of the privileged mitigating circumstance of minority.

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[38] *Bagumbayan Corp. v. Intermediate Appellate Court*, G.R. No. 66274, September 30, 1984, 132 SCRA 441, 446.

[39] G.R. No. 125550, July 28, 1999, 311 SCRA 475.

The principal consideration for the award of damages, under the ruling in *People v. Salome*[40] and *People v. Quiachon*[41] is the **penalty provided by law or imposable for the offense because of its heinousness**, **not** the public penalty **actually** imposed on the offender.

Regarding the civil indemnity and moral damages, *People v. Salome* explained the basis for increasing the amount of said civil damages as follows:

> The Court, likewise, affirms the civil indemnity awarded by the Court of Appeals to Sally in accordance with the ruling in *People v. Sambrano* which states:
>
> "As to damages, we have held that **if the rape is perpetrated with any of the attending qualifying circumstances that require the imposition of the death penalty**, the civil indemnity for the victim shall (sic) ₱75,000.00 . . . Also, in rape cases, moral damages are awarded without the need (sic) proof other than the fact of rape because it is assumed that the victim has suffered moral injuries entitling her to such an award. However, the trial court's award of ₱50,000.00 as moral damages should also be increased to ₱75,000 pursuant to current jurisprudence on qualified rape."
>
> It should be noted that while the new law prohibits *the imposition* of the death penalty, **the penalty provided for by law for a heinous offense is still death and the offense is still heinous**. Consequently, the civil indemnity for the victim is still ₱75,000.00.

People v. Quiachon also ratiocinates as follows:

> With respect to the award of damages, the appellate court, following prevailing jurisprudence, correctly awarded the following amounts; ₱75,000.00 as civil indemnity **which is awarded if the crime is qualified by circumstances warranting the imposition of the death penalty**; ₱75,000.00.00 as moral damages because the victim is assumed to have suffered moral injuries, hence, entitling her to an award of moral damages even without proof thereof, x x x
>
> **Even if** the penalty of death is not to be imposed on the appellant because of the prohibition in R.A. No. 9346, **the civil indemnity**

[40] G.R. No. 169077, August 31, 2006, 500 SCRA 659, 676.

[41] G.R. No. 170236, August 31, 2006, 500 SCRA 704, 720.

of ₱75,000.00 is still proper because, following the ratiocination in *People v. Victor*, **the said award is not dependent on the actual imposition of the death penalty but on the fact that qualifying circumstances warranting the imposition of the death penalty attended the commission of the offense**. The Court declared that the award of ₱75,000.00 shows "**not only a reaction to the apathetic societal perception of the penal law and the financial fluctuations over time but also the expression of the displeasure of the court of the incidence of heinous crimes against chastity.**"

The litmus test therefore, in the determination of the civil indemnity is the heinous character of the crime committed, which would have warranted the imposition of the death penalty, regardless of whether the penalty actually imposed is reduced to *reclusion perpetua*.

As to the award of exemplary damages, Article 2229 of the Civil Code provides that exemplary or corrective damages are imposed in addition to the moral, temperate, liquidated or compensatory damages. Exemplary damages are not recoverable as a matter of right. The requirements of an award of exemplary damages are: (1) they may be imposed by way of example in addition to compensatory damages, and only after the claimant's right to them has been established; (2) they cannot be recovered as a matter of right, *their determination depending upon the amount of compensatory damages that may be awarded to the claimant*; (3) the act must be accompanied by bad faith or done in a wanton, fraudulent, oppressive or malevolent manner.[42] Since the compensatory damages, such as the civil indemnity and moral damages, are increased when qualified rape is committed, the exemplary damages should likewise be increased in accordance with prevailing jurisprudence.[43]

In sum, the increased amount of ₱75,000.00 each as civil indemnity and moral damages should be maintained. It is also

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[42] *Gatmaitan v. Gonzales*, G.R. No. 149226, June 26, 2006, 461 SCRA 591, 605; *Octot v. Ybañez*, G.R. No. L-48643, January 18, 1982, 111 SCRA 84.

[43] *People v. Veluz*, G.R. No. 167755, November 28, 2008; *People v. Sambrano*, G.R. No. 143708, February 24, 2003, 398 SCRA 106, 117.

proper and appropriate that the award of exemplary damages be likewise increased to the amount of ₱30,000.00 based on the latest jurisprudence on the award of damages on qualified rape. Thus, the CA correctly awarded ₱75,000.00 as civil indemnity. However the award of ₱50,000.00 as moral damages is increased to ₱75,000.00[44] and that of ₱25,000.00 as exemplary damages is likewise increased to ₱30,000.00.[45]

Meanwhile, when accused-appellant was detained at the New Bilibid Prison pending the outcome of his appeal before this Court, Republic Act (R.A.) No. 9344, the *Juvenile Justice and Welfare Act of 2006* took effect on May 20, 2006. The RTC decision and CA decision were promulgated on January 17, 2003 and July 14, 2005, respectively. The promulgation of the sentence of conviction of accused-appellant handed down by the RTC was not suspended as he was about 25 years of age at that time, in accordance with Article 192 of Presidential Decree (P.D.) No. 603, *The Child and Youth Welfare Code*[46]

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[44] *Ibid.*

[45] *People v. Regalario*, G. R. No. 174483, March 31, 2009.

[46] ART. 192. *Suspension of Sentence and Commitment of Youthful Offender*. — If after hearing the evidence in the proper proceedings, the court should find that the youthful offender has committed the acts charged against him, the court, shall determine the imposable penalty, including any civil liability chargeable against him. However, instead of pronouncing judgment of conviction, the court upon application of the youthful offender and if it finds that the best interest of the public as well as that of the offender will be served thereby, may suspend all further proceedings and commit such minor to the custody or care of the Department of Social Welfare and Development and/or to any training institution operated by the government or any other responsible person until he shall have reached twenty-one years of age, or for a shorter period as the court may deem proper, after considering the reports and recommendations of the Department of Social Welfare and Development or the government training institution or responsible persons under whose care he has been committed.

Upon receipt of the application of the youthful offender for suspension of his sentence, the court may require the Department of Social Welfare and Development to prepare and submit to the court a social case study report over the offender and his family.

The youthful offender shall be subject to visitation and supervision by the representative of the Department of Social Welfare and Development or

and Section 32 of A.M. No. 02-1-18-SC, the *Rule on Juveniles in Conflict with the Law*.[47] Accused-appellant is now approximately 31 years of age. He was previously detained at the Albay Provincial Jail at Legaspi City and transferred to the New Bilibid Prison, Muntinlupa City on October 13, 2003.

R.A. No. 9344 provides for its retroactive application as follows:

Sec. 68. *Children Who Have Been Convicted and are Serving Sentence.* — Persons who have been convicted and are serving sentence at the time of the effectivity of this Act, and who were below the age of eighteen (18) years at the time of the commission of the

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government training institution as the court may designate subject to such conditions as it may prescribe.

The benefits of this article shall not apply to a youthful offender who has once enjoyed suspension of sentence under its provisions or to one who is convicted for an offense punishable by death or life imprisonment or to one who is convicted for an offense by the Military Tribunals. (As amended by P.D. Nos. 1179 and 1210) (Emphasis ours).

[47] Sec. 32. *Automatic Suspension of Sentence and Disposion Orders.* — The sentence shall be suspended without need of application by the juvenile in conflict with the law. The court shall set the case for disposition conference within fifteen (15) days from the promulgation of sentence which shall be attended by the social worker of the Family Court, the juvenile, and his parents or guardian *ad litem*. It shall proceed to issue any or a combination of the following disposition measures best suited to the rehabilitation and welfare of the juvenile; care, guidance, and supervision orders; Drug and alcohol treatment; Participation in group counseling and similar activities; Commitment to the Youth Rehabilitation Center of the DSWD or other centers for juvenile in conflict with the law authorized by the Secretary of DSWD.

The Social Services and Counseling Division (SSCD) of the DSWD shall monitor the compliance by the juvenile in conflict with the law with the disposition measure and shall submit regularly to the Family Court a status and progress report on the matter. The Family Court may set a conference for the evaluation of such report in the presence, if practicable, of the juvenile, his parents or guardian, and other persons whose presence may be deemed necessary.

The benefits of suspended sentence shall not apply to a juvenile in conflict with the law who has once enjoyed suspension of sentence, or to one who is convicted of an offense punishable by death, *reclusion perpetua* or life imprisonment, or when at the time of promulgation of judgment the juvenile is already eighteen (18) years of age or over. (Emphasis ours)

offense for which they were convicted and are serving sentence, shall likewise benefit from the retroactive application of this Act. x x x

The aforequoted provision allows the retroactive application of the Act to those who have been convicted and are serving sentence at the time of the effectivity of this said Act, and who were below the age of 18 years at the time of the commission of the offense. With more reason, the Act should apply to this case wherein the conviction by the lower court is still under review. Hence, it is necessary to examine which provisions of R.A. No. 9344 shall apply to accused-appellant, who was below 18 years old at the time of the commission of the offense.

Sec. 38 of R.A. No. 9344 provides for the automatic suspension of sentence of a child in conflict with the law, even if he/she is already 18 years of age or more at the time he/she is found guilty of the offense charged. It reads:

Sec. 38. *Automatic Suspension of Sentence*. — Once the child who is under eighteen (18) years of age at the time of the commission of the offense is found guilty of the offense charged, the court shall determine and ascertain any civil liability which may have resulted from the offense committed. However, instead of pronouncing the judgment of conviction, the court shall place the child in conflict with the law under suspended sentence, without need of application: Provided, however, That suspension of sentence shall still be applied even if the juvenile is already eighteen (18) of age or more at the time of the pronouncement of his/her guilt.

Upon suspension of sentence and after considering the various circumstances of the child, the court shall impose the appropriate disposition measures as provided in the Supreme Court on Juvenile in Conflict with the Law.

The above-quoted provision makes no distinction as to the nature of the offense committed by the child in conflict with the law, unlike P.D. No. 603 and A.M. No. 02-1-18-SC.[48] The said P.D. and Supreme Court (SC) Rule provide that the benefit

[48] See Notes Nos. 46 and 47.

of suspended sentence would not apply to a child in conflict with the law if, among others, he/she has been convicted of an offense punishable by death, *reclusion perpetua* or life imprisonment. In construing Sec. 38 of R.A. No. 9344, the Court is guided by the basic principle of statutory construction that when the law does not distinguish, we should not distinguish.[49] Since R.A. No. 9344 does not distinguish between a minor who has been convicted of a capital offense and another who has been convicted of a lesser offense, the Court should also not distinguish and should apply the automatic suspension of sentence to a child in conflict with the law who has been found guilty of a heinous crime.

Moreover, the legislative intent, to apply to heinous crimes the automatic suspension of sentence of a child in conflict with the law can be gleaned from the Senate deliberations[50] on Senate Bill No. 1402 (Juvenile Justice and Delinquency Prevention Act of 2005), the pertinent portion of which is quoted below:

> If a mature minor, maybe 16 years old to below 18 years old is charged, accused with, or may have committed a serious offense, and may have acted with discernment, then the child could be recommended by the Department of Social Welfare and Development (DSWD), by the Local Council for the Protection of Children (LCPC), or by my proposed Office of Juvenile Welfare and Restoration to go through a judicial proceeding; but *the welfare, best interests, and restoration of the child should still be a primordial or primary consideration. Even in heinous crimes, the intention should still be the child's restoration, rehabilitation and reintegration.* x x x (Italics supplied)

Nonetheless, while Sec. 38 of R.A. No. 9344 provides that suspension of sentence can still be applied even if the child in conflict with the law is already eighteen (18) years of age or more at the time of the pronouncement of his/her guilt, Sec. 40

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[49] *People v. Sandiganbayan*, G.R. Nos. 147706-07, February 16, 2005, 451 SCRA 413, 421.

[50] Senate Bill No. 1402 on Second Reading by the 13th Congress, 2nd Regular Session, No. 35, held on November 9, 2005, amendments by Senator Miriam Defensor-Santiago.

of the same law limits the said suspension of sentence until the said child reaches the maximum age of 21, thus:

> Sec. 40. *Return of the Child in Conflict with the Law to Court.* — If the court finds that the objective of the disposition measures imposed upon the child in conflict with the law have not been fulfilled, or if the child in conflict with the law has willfully failed to comply with the condition of his/her disposition or rehabilitation program, the child in conflict with the law shall be brought before the court for execution of judgment.
>
> If said child in conflict with the law has reached eighteen (18) years of age while under suspended sentence, the court shall determine whether to discharge the child in accordance with this Act, to order execution of sentence, **or to extend the suspended sentence for a certain specified period or until the child reaches the maximum age of twenty-one (21) years.** (emphasis ours)

To date, accused-appellant is about 31 years of age, and the judgment of the RTC had been promulgated, even before the effectivity of R.A. No. 9344. Thus, the application of Secs. 38 and 40 to the suspension of sentence is now moot and academic.[51] However, accused-appellant shall be entitled to appropriate disposition under Sec. 51 of R.A. No. 9344, which provides for the confinement of convicted children as follows:

> Sec. 51. *Confinement of Convicted Children in Agricultural Camps and Other Training Facilities.* — A child in conflict with the law **may**, after conviction and upon order of the court, be made to serve his/her sentence, in lieu of confinement in a regular penal institution, in an agricultural camp and other training facilities that may be established, maintained, supervised and controlled by the BUCOR, in coordination with the DSWD.

The civil liability resulting from the commission of the offense is not affected by the appropriate disposition measures and shall be enforced in accordance with law.[52]

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[51] *Padua v. People*, G.R. No. 168546, July 23, 2008, 559 SCRA 519, 534-535.

[52] Sections 38 and 39 of R.A. No. 9344.

WHEREFORE, the decision of the CA dated July 14, 2005 in *CA-G.R. CR-H.C. No. 00717* is hereby *AFFIRMED with the following MODIFICATIONS*: (1) the penalty of death imposed on accused-appellant is reduced to *reclusion perpetua*;[53] and (2) accused-appellant is ordered to pay the victim the amount of ₱75,000.00 and ₱30,000.00 as moral damages and exemplary damages, respectively. The award of civil indemnity in the amount of ₱75,000.00 is maintained. However, the case shall be *REMANDED* to the court *a quo* for appropriate disposition in accordance with Sec. 51 of R.A. 9344.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Corona, Carpio Morales, Chico-Nazario, Velasco, Jr., Nachura, Brion, Peralta, Bersamin, Del Castillo, and *Abad, JJ.,* concur.

EN BANC

[G.R. No. 177531. September 10, 2009]

CIVIL SERVICE COMMISSION, *petitioner, vs.* **FATIMA A. MACUD,** *respondent.*

SYLLABUS

1. POLITICAL LAW; CONSTITUTIONAL COMMISSIONS; CIVIL SERVICE COMMISSION (CSC); CONSTITUTIONAL BODY CHARGED WITH THE ESTABLISHMENT AND ADMINISTRATION OF A CAREER SERVICE WHICH EMBRACES ALL BRANCHES AND AGENCIES OF THE GOVERNMENT; SPECIAL LAWS SUCH AS R.A. 4670 (*MAGNA CARTA* FOR PUBLIC SCHOOL TEACHERS)

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[53] *Supra* Note 35.

DOES NOT DIVEST THE COMMISSION OF ITS INHERENT POWER TO SUPERVISE AND DISCIPLINE ALL MEMBERS OF THE CIVIL SERVICE INCLUDING PUBLIC SCHOOL TEACHERS. — As the Solicitor General correctly argues, petitioner CSC is the constitutional body charged with the establishment and administration of a career civil service which embraces all branches and agencies of the government. xxx In the recent case of *Civil Service Commission v. Alfonso*, the Court held that special laws such as R.A. 4670 did not divest the CSC of its inherent power to supervise and discipline all members of the civil service, including public school teachers. To quote from that decision: As the central personnel agency of the government, **the CSC has jurisdiction to supervise the performance of and discipline, if need be, all government employees,** including those employed in government-owned or controlled corporations with original charters such as PUP. Accordingly, all PUP officers and employees, **whether they be classified as teachers or professors pursuant to certain provisions of law, are deemed, first and foremost, civil servants accountable to the people** and answerable to the CSC in cases of complaints lodged by a citizen against them as public servants. x x x We are not unmindful of certain special laws that allow the creation of disciplinary committees and governing bodies in different branches, subdivisions, agencies and instrumentalities of the government to hear and decide administrative complaints against their respective officers and employees. Be that as it may, **we cannot interpret the creation of such bodies nor the passage of laws such as — R.A. Nos. 8292 and 4670 allowing for the creation of such disciplinary bodies — as having divested the CSC of its inherent power to supervise and discipline government employees, including those in the academe.** To hold otherwise **would not only negate the very purpose for which the CSC was established,** *i.e.* to instill professionalism, integrity, and accountability in our civil service, **but would also impliedly amend the Constitution itself.**

2. ID.; ID.; ID.; WHERE AN ADMINISTRATIVE CASE INVOLVES ALLEGED FRAUDULENT PROCUREMENT OF AN ELIGIBILITY OR QUALIFICATION FOR EMPLOYMENT IN THE CIVIL SERVICE, IT IS BUT PROPER THAT THE CSC WOULD HAVE JURISDICTION

OVER THE CASE FOR IT IS IN THE BEST POSITION TO DETERMINE IF THERE HAS BEEN A VIOLATION OF ITS RULES AND REGULATIONS. — This Court has also previously held in *Civil Service Commission v. Albao* that the CSC has the authority to directly institute proceedings to discipline a government employee in order to protect the integrity of the civil service. The relevant portion of our ruling in *Albao* follows: The present case, however, **partakes of an act by petitioner to protect the integrity of the civil service** system . . . It falls under the provisions of **Sec. 12, par. 11, on administrative cases instituted by it directly.** This is an integral **part of its duty, authority and power to administer the civil service system and protect its integrity, as provided in Article IX-B, Sec. 3 of the Constitution, by removing from its list of eligibles those who falsified their qualifications.** This is to be distinguished from ordinary proceedings intended to *discipline* a *bona fide* member of the system, for acts or omissions that constitute violations of the law or the rules of the service. Indeed, where an administrative case involves the alleged fraudulent procurement of an eligibility or qualification for employment in the civil service, it is but proper that the CSC would have jurisdiction over the case for it is in the best position to determine if there has been a violation of civil service rules and regulations.

3. ID.; ID.; ID.; APPELLATE COURT'S RELIANCE ON *FABELLA V. COURT OF APPEALS* IS MISPLACED; SAID CASE DOES NOT INVOLVE A CONFLICT BETWEEN THE JURISDICTION OF THE CSC OVER ADMINISTRATIVE CASES OF PUBLIC SCHOOL TEACHERS AND THE JURISDICTION OF THE INVESTIGATING COMMITTEE UNDER SECTION 9 OF R.A. 4650. — The CA's reliance on *Fabella v. Court of Appeals* is misplaced. That case did not involve a conflict between the jurisdiction of the CSC over administrative cases of public school teachers and the jurisdiction of the investigating committee under Section 9 of R.A. 4670. The doctrine in *Fabella* is simply that in a proceeding pending before the investigating committee the procedure set down in R.A. 4670 must be adhered to as a requirement of due process. Indeed, in *Office of the Ombudsman v. Masing*, we held: **It is erroneous, therefore, for respondents to contend that R.A. No. 4670 confers an exclusive disciplinary authority on the DECS over public**

school teachers and prescribes an exclusive procedure in administrative investigations involving them. R.A. No. 4670 was approved on June 18, 1966. On the other hand, the 1987 Constitution was ratified by the people in a plebiscite in 1987. . . It is basic that the 1987 Constitution should not be restricted in its meaning by a law of earlier enactment. . . However, repeals by implication are not favored, and courts have the duty to harmonize, so far as it is practicable, apparently conflicting or inconsistent provisions. **Therefore, the statement in *Fabella* that Section 9 of R.A. No. 4670 reflects the legislative intent to impose a standard and a separate set of procedural requirements in connection with administrative proceedings involving public school teachers should be construed as referring only to the *specific* procedure to be followed in administrative investigations conducted by the DECS.**

4. ID.; ID.; ID.; AFTER PARTICIPATING IN THE PROCEEDINGS BEFORE THE CSC, RESPONDENT IS EFFECTIVELY BARRED BY ESTOPPEL FROM CHALLENGING THE COMMISSION'S JURISDICTION. — [I]t is now too late for respondent to challenge the jurisdiction of the CSC. After participating in the proceedings before the CSC, respondent is effectively barred by estoppel from challenging the CSC's jurisdiction. While it is a rule that a jurisdictional question may be raised anytime, this, however, admits of an exception where, as in this case, estoppel has supervened. Here, respondent participated actively in the proceedings before CSCRO XII and voluntarily submitted to its jurisdiction with the filing of her Answer, Motion to Reset the Hearing, Urgent Motion for Reconsideration, as well as in seeking affirmative relief from it and in subsequently filing an appeal to the CSC Central Office. In all these instances and even in her petition with the CA, respondent never raised the issue of lack of jurisdiction of the CSC. Her only jurisdictional objection was that her case should have been investigated by CSCRO XVI (ARMM), as she was a teacher in a public school located within the geographical area of the ARMM. However, by invoking the jurisdiction of CSCRO XVI-ARMM, respondent, in effect, fully recognized the jurisdiction of the CSC to hear and decide the case against her.

5. ID.; ID.; ID.; NO DENIAL OF DUE PROCESS, MUCH LESS, LACK OF JURISDICTION ON THE PART OF THE CSC IN TAKING COGNIZANCE OF THE CASE; RESPONDENT WAS PROPERLY INFORMED OF THE CHARGES, SHE SUBMITTED AN ANSWER AND WAS GIVEN THE OPPORTUNITY TO DEFEND HERSELF. — It was the CA in its May 25, 2006 Decision that first espoused the theory the CSC had no jurisdiction, not for the reasons cited by respondent, but in view of Section 9 of R.A. 4670. In any event, it cannot be denied that respondent was formally charged after a finding that a *prima facie* case for dishonesty, grave misconduct and conduct prejudicial to the best interest of the service lay against her. She was properly informed of the charges. She submitted an Answer and was given the opportunity to defend herself. Petitioner cannot, therefore, claim that there was a denial of due process, much less, lack of jurisdiction on the part of the CSC to take cognizance of the case. One cannot belatedly reject or repudiate a tribunal's decision after voluntarily submitting to its jurisdiction, just to secure affirmative relief against one's opponent or after failing to obtain such relief. The Court has time and again frowned 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. The defense of lack of jurisdiction fails in light of respondent's active participation in the administrative proceedings before the CSC.

6. ID.; ID.; ID.; RESPONDENT'S CULPABILITY FOR DISHONESTY, GRAVE MISCONDUCT AND CONDUCT PREJUDICIAL TO THE BEST INTEREST OF THE SERVICE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE. — [R]espondent's culpability for dishonesty, grave misconduct and conduct prejudicial to the best interest of the service are supported by substantial evidence. An examination of her 2002 and 1987 Personal Data Sheets (PDS) reveals that her signatures and pictures thereon are markedly different from those in her Application Form (AF) and the Picture Seat Plan (PSP) for the October 1994 Professional Board Examination for Teachers (PBET). There was likewise a discrepancy between respondent's date of birth, which appeared on her 2002 PDS (December 15, 1965), and the birth date indicated in her AF and PSP (December 15, 1958). Respondent failed to offer a

reasonable explanation for this. We find incredible respondent's unsubstantiated claim that she used to believe her birth year to be 1958 but was later informed by persons who knew the circumstances of her birth that she was purportedly born in 1965. If respondent's defenses were true, then she should have produced her birth records and the testimonial or expert evidence that allegedly could exculpate her. Unfortunately, she did not present such evidence. As held in *Civil Service Commission v. Colanggo*, a finding of guilt in administrative cases before the CSC, if supported by substantial evidence (or "that amount of evidence which a reasonable mind might accept as adequate to justify a conclusion"), will be sustained by this Court. It must be stressed that dishonesty and grave misconduct have always been and should remain anathema in the civil service. They inevitably reflect on the fitness of a civil servant to continue in office. When an officer or employee is disciplined, the object sought is not the punishment of such officer or employee but the improvement of the public service and the preservation of the public's faith and confidence in the government.

APPEARANCES OF COUNSEL

The Solicitor General for petitioner.
Ating D. Diacat for respondent.

D E C I S I O N

LEONARDO-DE CASTRO, *J.*:

In this petition for review on *certiorari* under Rule 45 of the Rules of Court, petitioner seeks to set aside and annul the Decision[1] dated May 25, 2006 and the Resolution[2] dated April 12, 2007 rendered by the Court of Appeals (CA), in *CA-G.R. SP No. 00480*.

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[1] Penned by Associate Justice Myrna Dimaranan-Vidal, with Associate Justices Romulo V. Borja and Ramon R. Garcia, concurring; *rollo*, pp. 66-77.

[2] *Id*. at 78-81.

The CA decision set aside an earlier resolution[3] of the Civil Service Commission (CSC) Central Office as well as the decision[4] of Civil Service Commission Regional Office (CSCRO) XII which found respondent guilty of Dishonesty, Grave Misconduct and Conduct Prejudicial to the Best Interest of the Service on the ground of lack of jurisdiction.

The undisputed facts, as found by the CA, are quoted hereunder:

> As a requirement for her appointment as Teacher I of the Department of Education, Marawi City, petitioner FATIMA A. MACUD submitted her Personal Data Sheet (PDS) to the CSC Regional Office XII. Her declaration in the said PDS that she successfully passed the 23 October 1994 Professional Board Examination for Teachers (PBET) in Iligan City was the moving force which led to the instant controversy.
>
> Investigations were thereupon conducted by CSC Regional Office XII (CSCRO XII) anent petitioner's PBET pursuant to its Standard Operating Procedure (SOP) to verify the eligibility of newly appointed teachers. Thereafter, on 27 November 2002, petitioner was formally charged with Dishonesty, Grave Misconduct and Conduct Prejudicial to the Best Interest of the Service before the same regional office, to wit:
>
> 1. On April 10, 2002, Fatima A. Macud was appointed as Teacher I of the Department of Education- Marawi City Division by City Schools Division Superintendent Olindang G. Dimaampao;
>
> 2. In support of her appointment, Macud submitted a copy of her Personal Data Sheet (PDS) dated January 25, 2002. In the said PDS, particularly in item no. 19 thereof, Macud claims to have taken and passed the October 23, 1994 Professional Board Examination for Teachers (PBET) in Iligan City with a rating of 76.26%;
>
> 3. As a standard operating procedure, this Office verified the claimed eligibility of Macud with her examination records, namely: the Application Form (AF) to the said examination and the Picture-Seat Plan (PSP) of Room No. 16 at St. Michael's College, Iligan City;

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[3] *Id*. at 129-140.

[4] *Id*. at 101-105.

4. In the examination of Macud's PDS, the AF and the PSP, the following were revealed:

   4.1 There is a disparity in Macud's date of birth as appearing in the AF and PSP as against her PDS accomplished on January 25, 2002. December 15, 1958 appeared as her date of birth in the AF and PSP while it is December 15, 1965 that appeared in her PDS;

   4.2 A comparison of the facial features of Macud in the picture attached to her PDS *vis-à-vis* her features as shown in the picture attached to the AF and PSP shows an obvious dissemblance;

   4.3 The signature of Macud as appearing in her PDS is likewise different from that affixed in her AF and PSP.

The foregoing facts clearly show that Macud deliberately allowed another person to take for and in her behalf the October 23, 1994 PBET in Iligan City.

WHEREFORE, Fatima A. Macud is hereby formally charged with Dishonesty, Grave Misconduct and Conduct Prejudicial to the Best Interest of the Service. Accordingly, she is given five (5) days from receipt hereof to submit to this Office a written answer under oath, together with the affidavit of her witnesses and documentary evidence, if any. She shall state whether she elects a formal investigation or waives the same. Respondent is also informed of her right to engage the service of a counsel of her choice.

In her Answer, petitioner asserted that she personally took the PBET on 23 October 1994 in Iligan City. While she admitted item nos. 1, 2, 4.1, 4.3 of the formal charge filed against her, *supra*, petitioner vehemently denied item no. 4.2 by alleging that the dissemblance of her picture attached to her AF and PSP from her picture pasted on her PDS was because the two pictures were taken on two different occasions, *i.e.*, her picture in the AF and PSP was taken in 1993 while that of the PDS was taken in 2002, roughly nine (9) years apart from each other. Anent the disparity in her signatures, petitioner reasoned out that it was the result of the change of her status, *i.e.*, she eventually got married and had to use the surname of her husband. With respect to her date of birth, she alleged that her known and recognized date of birth prior and up to 1994 was 15

December 1958. Thereafter, she was informed that her correct date of birth is 15 December 1965, as indicated in her PDS dated 25 January 2002.

On 19 August 2003, CSCRO XII conducted a formal investigation. However, petitioner failed to attend. Nevertheless, the investigation proceeded with the presentation of documentary evidence against her, *viz*: Application Form filled out by Fatima Ali on 23 October 1994 for the PBET; Picture-Seat Plan (PSP) of Room #16, St. Michael's College, Iligan City; Personal Data Sheet (PDS) of Fatima Ali-Macud dated 25 January 2002; Appointment of Fatima Ali-Macud as Teacher I (Regular Permanent) in the Department of Education-Division of Marawi City issued by Supt. Olindang G. Dimaampao dated 10 April 2002; Personal Data Sheet (PDS) of Fatima C. Ali dated 1 November 1987.

On 27 January 2004, the CSCRO XII rendered a Decision, the dispositive portion thereof reads:

> WHEREFORE, Fatima A. Macud is hereby found guilty of Dishonesty, Grave Misconduct and Conduct Prejudicial to the Best Interest of the Service. Accordingly, she should be meted the penalty of dismissal from the service with all the accessory penalties, including perpetual disqualification from holding public office in the future. Furthermore, the Civil Service eligibility of Macud is hereby revoked and cancelled.
>
> Let copies of this Decision be furnished the respondent in her address on record; the Division Superintendent, Department of Education (DepEd) - Iligan City Branch; the Office for Legal Affairs (OLA), Civil Service Commission (CSC); the Civil Service Commission Field Office (CSCFO) for Lanao del Sur and Marawi City; the Personnel Inspection and Audit Division (PIAD) and the Examination and Placement Services Division (EPSD), both of this Office, for their information.

The petitioner's motion for reconsideration of the Decision, *supra*, was denied by the CSCRO XII on 23 March 2004.

On her Appeal to the CSC Central Office, petitioner raised the following issues:

1. Whether or not the Civil Service Commission-Regional Office No. XII, Cotabato City, has jurisdiction over the

person of the respondent-appellant and, therefore has jurisdiction to try and decide the case;

2. Whether or nor respondent-appellant committed, in fact and in law, the charges of Dishonesty, Grave Misconduct, and Conduct Prejudicial to the Best Interest of Service;

3. Whether or not the PBET Civil Service Eligibility can be revoked and cancelled *motu proprio* without the benefit of basic due process requirements of notice and hearing.

On 15 June 2005, the CSC rendered Resolution No. 050780, denying petitioner's appeal, the *fallo* thereof states:

> WHEREFORE, the appeal of Fatima A. Macud is hereby DISMISSED. Accordingly, the Civil Service Commission Regional Office No. XII Decisions dated January 27, 2004, finding her guilty of Dishonesty, Grave Misconduct, and Conduct Prejudicial to the Best Interest of Service, and dated March 23, 2004 denying Macud's motion for reconsideration are hereby AFFIRMED.[5]

Aggrieved with the ruling of the CSC, respondent Macud elevated the matter to the CA by way of a petition for *certiorari*, docketed as *CA-G.R. SP No. 00480*. In support of her CA petition, respondent raised the following arguments:

(a) It was not the CSCRO XII that had jurisdiction over the case and person of respondent but the CSCRO XVI (ARMM) since respondent was assigned to a public school located in Marawi City within the territorial jurisdiction of the Autonomous Region of Muslim Mindanao (ARMM).

(b) There was no substantial evidence to prove the charges against respondent, since (i) no witnesses were presented to authenticate the photographs in the various forms used by the CSC in determining respondent's guilt; (ii) no expert evidence was presented to determine the genuineness of the handwriting/ signatures in the questioned forms; and (iii) the true birth date of respondent was never established by convincing proof such as her birth certificate.

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[5] *Id*. at 67-71.

On December 13, 2001, the CA promulgated its assailed decision granting respondent's petition and setting aside the decisions of the CSC Central Office and CSCRO XII on the sole ground of lack of jurisdiction. In so ruling, the CA declared:

> [T]he CSC has no jurisdiction to hear and decide the instant case. x x x Republic Act No. 4670 or the *Magna Carta* for Public School Teachers of 1966 is the law in point.
>
> x x x x x x x x x
>
> In *Armand Fabella, et al vs. Court of Appeals, et al,* the Supreme Court emphatically ruled that RA 4670, otherwise known as the Magna Carta for Public School Teachers, specifically covers and governs administrative proceedings involving public school teachers. x x x
>
> Although under Presidential Decree No. 807 (PD 807) or the Civil Service Law, the Civil Service embraces every branch, agency, subdivision, and instrumentality of the government, including government-owned or controlled corporations whether performing governmental or proprietary function, the CSC does not have original jurisdiction over an administrative case against public school teacher. Jurisdiction over administrative cases of public school teachers is lodged with the Investigating Committee created pursuant to Section 9 of RA 4670, *supra*, now being implemented by Section 2, Chapter VII of DECS Order No. 33, S. 1999, otherwise known as the DECS Rules of Procedure.
>
> x x x x x x x x x
>
> Certainly as petitioner is covered by RA 4670, it is the Investigating Committee that should have investigated her case conformably with Section 9 of RA 4670, *supra*, and not the CSC. Thus, all proceedings undertaken by the latter with respect to the instant case are necessarily void.[6]

Petitioner's subsequent motion for reconsideration was denied by the CA in its Resolution dated April 12, 2007.

Hence, the instant petition anchored on the following grounds:

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[6] *Id*. at 73-75.

I

The Honorable Court of Appeals erred in ruling that the Investigating Committee formed under R.A. 4670 has exclusive jurisdiction to try the administrative case against respondent.

II

The Honorable Court of Appeals erred in holding that respondent is not estopped from impugning the jurisdiction of the CSC on the ground that lack of jurisdiction could be assailed at anytime of the proceedings.

Petitioner asserts that it has jurisdiction to take cognizance of the case against respondent pursuant to Presidential Decree (P.D.) No. 807 (Civil Service Law), which provides that the civil service embraces every branch, agency, subdivision and instrumentality of the government;[7] and Executive Order (E.O.) No. 292 (Administrative Code of 1987), which grants the CSC the power to hear and decide administrative cases instituted by it directly.[8] Petitioner also avers that respondent is estopped from assailing the jurisdiction of the CSC after having participated in the proceedings therein.

On the other hand, respondent maintains that as a teacher, jurisdiction over the administrative case against her is lodged with a committee constituted under Section 9 of Republic Act (R.A.) No. 4670 (*Magna Carta* for Public School Teachers) and not with the CSC, because R.A. No. 4670 specifically governs administrative proceedings involving public school teachers.

We grant the petition.

As the Solicitor General correctly argues, petitioner CSC is the constitutional body charged with the establishment and administration of a career civil service which embraces all branches and agencies of the government.

Article IX-B, Section 2(1) of the 1987 Constitution provides:

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[7] Article IV, Section 4.

[8] Book V, Title I, Subtitle A, Chapter 3, Section 12 (11).

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

Section 3 of the same Article further states:

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

Section 12, Chapter 3, Title I (A), Book V of E.O. No. 292 (the Administrative Code of 1987) likewise pertinently provides:

Section 12. *Powers and Functions.* — The Commission shall have the following powers and functions:

(1) Administer and enforce the constitutional and statutory provisions on the merit system for all levels and ranks in the Civil Service;

(2) Prescribe, amend and enforce rules and regulations for carrying into effect the provisions of the Civil Service Law and other pertinent laws;

x x x x x x x x x

(11) Hear and decide administrative cases instituted by or brought before it directly or on appeal, including contested appointments, and review decisions and actions of agencies attached to it…

x x x x x x x x x

(14) Take appropriate action on all appointments and other personnel matters in the Civil Service including extension of service beyond retirement age;

x x x x x x x x x

In the recent case of *Civil Service Commission v. Alfonso*,[9] the Court held that special laws such as R.A. 4670 did not divest the CSC of its inherent power to supervise and discipline all members of the civil service, including public school teachers. To quote from that decision:

> As the central personnel agency of the government, **the CSC has jurisdiction to supervise the performance of and discipline, if need be, all government employees**, including those employed in government-owned or controlled corporations with original charters such as PUP. Accordingly, all PUP officers and employees, **whether they be classified as teachers or professors pursuant to certain provisions of law, are deemed, first and foremost, civil servants accountable to the people** and answerable to the CSC in cases of complaints lodged by a citizen against them as public servants. xxx
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> x x x x x x x x x
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> We are not unmindful of certain special laws that allow the creation of disciplinary committees and governing bodies in different branches, subdivisions, agencies and instrumentalities of the government to hear and decide administrative complaints against their respective officers and employees. Be that as it may, **we cannot interpret the creation of such bodies nor the passage of laws such as – R.A. Nos. 8292 and 4670 allowing for the creation of such disciplinary bodies – as having divested the CSC of its inherent power to supervise and discipline government employees, including those in the academe.** To hold otherwise **would not only negate the very purpose for which the CSC was established**, *i.e.* to instill professionalism, integrity, and accountability in our civil service, **but would also impliedly amend the Constitution itself.** (emphasis supplied)

This Court has also previously held in *Civil Service Commission v. Albao*[10] that the CSC has the authority to directly institute proceedings to discipline a government employee in order to protect the integrity of the civil service. The relevant portion of our ruling in *Albao* follows:

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[9] G.R. No. 179452, June 11, 2009.

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

The present case, however, **partakes of an act by petitioner to protect the integrity of the civil service** system . . . It falls under the provisions of **Sec. 12, par. 11, on administrative cases instituted by it directly**. This is an integral **part of its duty, authority and power to administer the civil service system and protect its integrity, as provided in Article IX-B, Sec. 3 of the Constitution, by removing from its list of eligibles those who falsified their qualifications**. This is to be distinguished from ordinary proceedings intended to *discipline* a *bona fide* member of the system, for acts or omissions that constitute violations of the law or the rules of the service.[11] (emphasis supplied)

Indeed, where an administrative case involves the alleged fraudulent procurement of an eligibility or qualification for employment in the civil service, it is but proper that the CSC would have jurisdiction over the case for it is in the best position to determine if there has been a violation of civil service rules and regulations.

The CA's reliance on *Fabella v. Court of Appeals*[12] is misplaced. That case did not involve a conflict between the jurisdiction of the CSC over administrative cases of public school teachers and the jurisdiction of the investigating committee under Section 9 of R.A. 4670. The doctrine in *Fabella* is simply that in a proceeding pending before the investigating committee the procedure set down in R.A. 4670 must be adhered to as a requirement of due process.

Indeed, in *Office of the Ombudsman v. Masing*,[13] we held:

It is erroneous, therefore, for respondents to contend that R.A. No. 4670 confers an exclusive disciplinary authority on the DECS over public school teachers and prescribes an exclusive procedure in administrative investigations involving them. R.A. No. 4670 was approved on June 18, 1966. On the other hand, the 1987 Constitution was ratified by the people in a plebiscite

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[11] *Id.* at 558.

[12] G.R. No. 110379, November 28, 1997, 282 SCRA 256.

[13] G.R. Nos. 165416, 165584 and 165731, January 22, 2008, 542 SCRA 253, 275, 276.

in 1987. . . It is basic that the 1987 Constitution should not be restricted in its meaning by a law of earlier enactment . . . However, repeals by implication are not favored, and courts have the duty to harmonize, so far as it is practicable, apparently conflicting or inconsistent provisions. **Therefore, the statement in *Fabella* that Section 9 of R.A. No. 4670 reflects the legislative intent to impose a standard and a separate set of procedural requirements in connection with administrative proceedings involving public school teachers should be construed as referring only to the *specific* procedure to be followed in administrative investigations conducted by the DECS**. (emphasis supplied)

Moreover, it is now too late for respondent to challenge the jurisdiction of the CSC. After participating in the proceedings before the CSC, respondent is effectively barred by estoppel from challenging the CSC's jurisdiction. While it is a rule that a jurisdictional question may be raised anytime, this, however, admits of an exception where, as in this case, estoppel has supervened.[14]

Here, respondent participated actively in the proceedings before CSCRO XII and voluntarily submitted to its jurisdiction with the filing of her Answer, Motion to Reset the Hearing, Urgent Motion for Reconsideration, as well as in seeking affirmative relief from it and in subsequently filing an appeal to the CSC Central Office. In all these instances and even in her petition with the CA, respondent never raised the issue of lack of jurisdiction of the CSC. Her only jurisdictional objection was that her case should have been investigated by CSCRO XVI (ARMM), as she was a teacher in a public school located within the geographical area of the ARMM. However, by invoking the jurisdiction of CSCRO XVI-ARMM, respondent, in effect, fully recognized the jurisdiction of the CSC to hear and decide the case against her.

It was the CA in its May 25, 2006 Decision that first espoused the theory the CSC had no jurisdiction, not for the reasons cited by respondent, but in view of Section 9 of R.A. 4670.

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[14] *Bayoca v. Nogales*, G.R. No. 138201, September 12, 2000, 340 SCRA 154, 169. *See* also *Civil Service Commission v. Alfonso*, *supra* note 9.

In any event, it cannot be denied that respondent was formally charged after a finding that a *prima facie* case for dishonesty, grave misconduct and conduct prejudicial to the best interest of the service lay against her. She was properly informed of the charges. She submitted an Answer and was given the opportunity to defend herself. Petitioner cannot, therefore, claim that there was a denial of due process, much less, lack of jurisdiction on the part of the CSC to take cognizance of the case.

One cannot belatedly reject or repudiate a tribunal's decision after voluntarily submitting to its jurisdiction, just to secure affirmative relief against one's opponent or after failing to obtain such relief. The Court has time and again frowned 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.[15] The defense of lack of jurisdiction fails in light of respondent's active participation in the administrative proceedings before the CSC.

Further, respondent's culpability for dishonesty, grave misconduct and conduct prejudicial to the best interest of the service are supported by substantial evidence. An examination of her 2002 and 1987 Personal Data Sheets (PDS)[16] reveals that her signatures and pictures thereon are markedly different from those in her Application Form (AF)[17] and the Picture Seat Plan (PSP) for the October 1994 Professional Board Examination for Teachers (PBET).[18] There was likewise a discrepancy between respondent's date of birth, which appeared on her 2002 PDS (December 15, 1965), and the birth date indicated in her AF and PSP (December 15, 1958). Respondent failed to offer a reasonable explanation for this. We find incredible respondent's unsubstantiated claim that she used to believe her birth year to be 1958 but was later informed by persons who knew the

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[15] *David v. Cordova,* G.R. No. 152992, July 28, 2005, 464 SCRA 384, 401.

[16] *Rollo*, pp. 95, 98-99.

[17] *Id*. at 94.

[18] *Id*. at 93.

circumstances of her birth that she was purportedly born in 1965. If respondent's defenses were true, then she should have produced her birth records and the testimonial or expert evidence that allegedly could exculpate her. Unfortunately, she did not present such evidence.

As held in *Civil Service Commission v. Colanggo*,[19] a finding of guilt in administrative cases before the CSC, if supported by substantial evidence (or "that amount of evidence which a reasonable mind might accept as adequate to justify a conclusion"), will be sustained by this Court.

It must be stressed that dishonesty and grave misconduct have always been and should remain anathema in the civil service. They inevitably reflect on the fitness of a civil servant to continue in office. When an officer or employee is disciplined, the object sought is not the punishment of such officer or employee but the improvement of the public service and the preservation of the public's faith and confidence in the government.[20]

WHEREFORE, the petition is hereby *GRANTED*. The appealed decision of the CA in *CA-G.R. SP No. 00480* is hereby *REVERSED* and *SET ASIDE* and CSC Resolution No. 050780 dated June 15, 2005 and CSC-RO XII Decisions dated January 27, 2004 and March 23, 2004 are *REINSTATED*.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Carpio, Corona, Carpio Morales, Chico-Nazario, Velasco, Jr., Nachura, Brion, Peralta, Bersamin, Del Castillo, and *Abad, JJ.,* concur.

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[19] G.R. No. 174935, April 30, 2008, 553 SCRA 640, 646.

[20] *Civil Service Commission v. Cortez*, G.R. No. 155732, June 3, 2004, 430 SCRA 593, 607-608.

EN BANC

[G.R. No. 188456. September 10, 2009]

H. HARRY L. ROQUE, JR., JOEL R. BUTUYAN, ROMEL R. BAGARES, ALLAN JONES F. LARDIZABAL, GILBERT T. ANDRES, IMMACULADA D. GARCIA, ERLINDA T. MERCADO, FRANCISCO A. ALCUAZ, MA. AZUCENA P. MACEDA, and ALVIN A. PETERS, *petitioners, vs.* **COMMISSION ON ELECTIONS, Represented by HON. CHAIRMAN JOSE MELO, COMELEC SPECIAL BIDS and AWARDS COMMITTEE, represented by its CHAIRMAN HON. FERDINAND RAFANAN, DEPARTMENT OF BUDGET and MANAGEMENT, represented by HON. ROLANDO ANDAYA, TOTAL INFORMATION MANAGEMENT CORPORATION and SMARTMATIC INTERNATIONAL CORPORATION,** *respondents.*

PETE QUIRINO-QUADRA, *petitioner-in-intervention.*

SENATE OF THE PHILIPPINES, represented by its President, JUAN PONCE ENRILE, *movant-intervenor.*

SYLLABUS

1. POLITICAL LAW; JUDICIAL DEPARTMENT; POWER OF JUDICIAL REVIEW; RULE ON *LOCUS STANDI*; MAY BE RELAXED WHEN PUBLIC INTEREST SO REQUIRES SUCH AS WHEN THE MATTER IS OF TRANSCENDENTAL IMPORTANCE. — It is true, as postulated, that to have standing, one must, as a rule, establish having suffered some actual or threatened injury as a result of the alleged illegal government conduct; that the injury is fairly traceable to the challenged action; and that the injury is likely to be redressed by a favorable action. The prescription on standing, however, is a matter of procedure. Hence, it may be relaxed, as the Court has often relaxed the rule for non-traditional plaintiffs, like ordinary citizens and taxpayers, when the public interest so requires, such as when the matter is of transcendental importance, of overarching significance to society, or of paramount public

interest. As we wrote in *Chavez v. PCGG*, where issues of public importance are presented, there is no necessity to show that the suitor has experienced or is in actual danger of suffering direct and personal injury as the requisite injury is assumed.

2. ID.; ID.; ID.; THE POLICY ON HIERARCHY OF COURTS IS NOT AN IRON-CLAD RULE; THE COURT MAY TURN A BLIND EYE TO THE JUDICIAL STRUCTURE IF WARRANTED BY THE NATURE OF THE ISSUES AND FOR EXCEPTIONALLY COMPELLING REASONS. — There is no doubt in our mind, however, about the compelling significance and the transcending public importance of the one issue underpinning this petition: the success–and the far-reaching grim implications of the failure–of the nationwide automation project that will be implemented *via* the challenged automation contract. The doctrinal formulation may vary, but the bottom line is that the Court may except a particular case from the operations of its rules when the demands of justice so require. Put a bit differently, rules of procedure are merely tools designed to facilitate the attainment of justice. Accordingly, technicalities and procedural barriers should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid adherence to the rules of procedure. This postulate on procedural technicalities applies to matters of *locus standi* and the presently invoked principle of hierarchy of courts, which discourages direct resort to the Court if the desired redress is within the competence of lower courts to grant. The policy on the hierarchy of courts, which petitioners indeed failed to observe, is not an iron-clad rule. For indeed the Court has full discretionary power to take cognizance and assume jurisdiction of special civil actions for *certiorari* and *mandamus* filed directly with it for exceptionally compelling reasons or if warranted by the nature of the issues clearly and specifically raised in the petition. The exceptions that justify a deviation from the policy on hierarchy appear to obtain under the premises. The Court will for the nonce thus turn a blind eye to the judicial structure intended, first and foremost, to provide an orderly dispensation of justice.

3. ID.; ELECTION LAWS; COMMISSION ON ELECTIONS (COMELEC); AUTOMATED ELECTION SYSTEM ACT (RA 9369); 2010 ELECTIONS AUTOMATION PROJECT; CONSTITUTIONALITY OF AUTOMATION CONTRACT;

***SMARTMATIC-TIM* JOINT VENTURE EXISTENCE, DULY ESTABLISHED. —** The duly notarized JVA, as couched, explained the nature and the limited purpose of the joint venture and expressly defined, among other things, the composition, scope, and the 60-40 capital structure of the aggroupment. The JVA also contains provisions on the management and division of profits. Article 3. of the JVA delineates the respective participations and responsibilities of the joint venture partners in the automation project. Given the foregoing perspective, the Court is at a loss to understand how petitioners can assert that the Smartmatic-TIM consortium has failed to prove its joint venture existence and/or to submit evidence as would enable the Comelec to know such items as who it is dealing with, which between the partners has control over the decision-making process, the amount of investment to be contributed by each partner, the parties' shares in the profits and like details. Had petitioners only bothered to undertake the usual due diligence that comes with good judgment and examined the eligibility envelope of the Smartmatic-TIM joint venture, they would have discovered that their challenge to and arguments against the joint venture and its JVA have really no factual basis.

4. ID.; ID.; ID.; ID.; ID.; ID.; FACT OF NON-INCORPORATION HAS NO VITIATING EFFECT ON THE VALIDITY OF THE TENDER OFFERS; INCORPORATION IS NOT A PART OF THE PASS/FAIL CRITERIA USED IN DETERMINING ELIGIBILITY UNDER THE BIDDING GROUND RULES. — It ought to be stressed, however, that the fact of non-incorporation was without a vitiating effect on the validity of the tender offers. For the bidding ground rules, as spelled out primarily in the RFP and the clarificatory bid bulletins, does not require, for bidding purposes, that there be an incorporation of the bidding joint ventures or consortiums. In fact, Bid Bulletin Nos. 19 and 20 recognize the existence and the acceptability of proposals of unincorporated joint ventures. In response to a poser, for example, regarding the 60% Filipino ownership requirement in a joint venture arrangement, the SBAC, in its Bid Bulletin No. 22, stated: "*In an* ***unincorporated joint venture****, determination of the required Filipino participation may be made by examining the terms and conditions of the [JVA] and other supporting financial documents submitted by the joint venture*." Petitioners, to be sure, have not shown

that incorporation is part of the pass/fail criteria used in determining eligibility.

5. ID.; ID.; ID.; ID.; ID.; ID.; THE PARTNERSHIP OF *SMARTMATIC-TIM* MEETS THE COURT'S DEFINITION OF A JOINT VENTURE WHICH REQUIRES "COMMUNITY OF INTEREST IN THE PERFORMANCE OF THE SUBJECT MATTER." — Petitioners have made much of the Court's ruling in *Information Technology Foundation of the Philippines [Infotech] v. Comelec*, arguing in relation thereto that the partnership of Smartmatic and TIM does not meet the Court's definition of a *joint venture* which requires "*community of interest in the performance of the subject matter.*" Petitioners' invocation of *Infotech* is utterly misplaced. Albeit *Infotech* and this case are both about modernizing the election process and bidding joint ventures, the relevant parallelism ends there. Cast as they are against dissimilar factual milieu, one cannot plausibly set *Infotech* side with and contextually apply to this case the *ratio* of *Infotech*. Suffice it to delve on the most glaring of differences. In *Infotech*, the winning bid pertained to the consortium of Mega Pacific, a purported joint venture. Extant records, however, do not show the formation of such joint venture, let alone its composition. To borrow from the *ponencia* of then Justice, later Chief Justice, Artemio Panganiban, "*there is no sign whatsoever of any [JVA], consortium agreement [or] memorandum agreement* x x x *executed among the members of the purported consortium*." There was in fine no evidence to show that the alleged joint venture partners agreed to constitute themselves into a single entity solidarily responsible for the entirety of the automation contract. Unlike the purported Mega Pacific consortium in *Infotech*, the existence in this case of the bidding joint venture of Smartmatic and TIM is properly documented and spread all over the bid documents. And to stress, TIM and Smartmatic, in their JVA, unequivocally agreed between themselves to perform their respective undertakings. And over and beyond their commitments to each other, they undertook to incorporate, if called for by the bidding results, a JVC that shall be solidarily liable with them for any actionable breach of the automation contract.

6. ID.; ID.; ID.; ID.; ID.; ID.; NO REQUIREMENT UNDER RA 8436, THE "ELECTION MODERNIZATION ACT" THAT

ALL THE SUPPLIERS, MANUFACTURERS OR DISTRIBUTORS INVOLVED IN THE TRANSACTION SHOULD BE PART OF THE JOINT VENTURE. — Petitioners' beef against the TIM-Smartmatic JVA is untenable. First off, the Comelec knows the very entities whom they are dealing with, which it can hold solidary liable under the automation contract, should there be contract violation. Secondly, there is no requirement under either RA 8436, as amended, or the RFP, that all the suppliers, manufacturers or distributors involved in the transaction should be part of the joint venture. On the contrary, the Instruction to Bidders—as petitioners themselves admit—allows the bidder to subcontract portions of the goods or services under the automation project. To digress a bit, petitioners have insisted on the non-existence of a *bona fide* JVA between TIM and Smartmatic. Failing to gain traction for their indefensible posture, they would thrust on the Court the notion of an invalid joint venture due to the non-inclusion of more companies in the existing TIM-Smartmatic joint venture. The irony is not lost on the Court.

7. ID.; ID.; ID.; ID.; "PILOT TESTING" OF THE PRECINCT-COUNT OPTIC SCAN (PCOS) TECHNOLOGY IS NOT NECESSARY; A PILOT TEST IS NOT A MANDATORY REQUIREMENT FOR THE CHOICE OF SYSTEM IN, OR A PREREQUISITE FOR, THE FULL AUTOMATION OF THE MAY 2010 ELECTIONS. — The pilot testing of the technology in question in an actual, scheduled electoral exercise under harsh conditions would have been the ideal norm in computerized system implementation. The underscored proviso of Sec. 6 of RA 8436 is not, however, an authority for the proposition that the pilot testing of the PCOS in the 2007 national elections in the areas thus specified is an absolute must for the machines' use in the 2010 national/local elections. The Court can concede that said proviso, with respect to the May 2007 elections, commands the Comelec to automate in at least 12 defined areas of the country. But the bottom line is that the required 2007 automation, be it viewed in the concept of a pilot test or not, is not a mandatory requirement for the choice of system in, or a prerequisite for, the full automation of the May 2010 elections.

8. ID.; ID.; ID.; ID.; TO ARGUE THAT "PILOT TESTING" IS A CONDITION PRECEDENT TO A FULL AUTOMATION

WOULD DOUBTLESS UNDERMINE THE PURPOSE OF R.A. 9369; SECTION 6 OF RA 8436, AS AMENDED, LIKEWISE, UNMISTAKABLY CONVEYS THE IDEA OF UNCONDITIONAL FULL AUTOMATION OF THE 2010 ELECTIONS. — To argue that pilot testing is a condition precedent to a full automation in 2010 would doubtless undermine the purpose of RA 9369. For, as aptly observed during the oral arguments, if there was no political exercise in May 2007, the country would theoretically be barred forever from having full automation. Sec. 6 of the amended RA 8436, as couched, therefore, unmistakably conveys the idea of unconditional full automation in the 2010 elections. A construal making pilot testing of the AES a prerequisite or condition *sine qua non* to putting the system in operation in the 2010 elections is tantamount to reading into said section something beyond the clear intention of Congress, as expressed in the provision itself. We reproduce with approval the following excerpts from the comment of the Senate itself: The plain wordings of RA 9369 (that amended RA 8436) commands that the 2010 elections shall be fully automated, and such full automation is not conditioned on "pilot testing" in the May 2007 elections. Congress merely gave COMELEC the flexibility to partially use the AES in some parts of the country for the May 2007 elections.

9. ID.; ID.; ID.; ID.; PCOS TECHNOLOGY HAS DEMONSTRATED ITS CAPABILITY AND SUCCESS IN A LOCAL AND FOREIGN ELECTORAL EXERCISE. — What may be taken as mandatory prerequisite for the full automation of the 2010 regular national/ local elections is that the system to be procured for that exercise be a technology tested either here or abroad. The ensuing Section 8 of RA 8436, as amended, says so. xxx **With respect to the May 10, 2010 elections and succeeding electoral exercises**, **the system procured must have demonstrated capability and been successfully used in prior electoral exercise here or abroad**. **Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.** While the underscored portion makes reference to a "2007 pilot exercise," what it really exacts is that, for the automation of the May 2010 and subsequent elections, the PCOS or any AES to be procured must have demonstrated its capability and success in either a local or a foreign electoral exercise. And as expressly declared by the provision,

participation in the 2007 electoral exercise is not a guarantee nor is it conclusive of the system's fitness. In this regard, the Court is inclined to agree with private respondents' interpretation of the underscored portion in question: "The provision clearly conveys that the [AES] to be used in the 2010 elections need not have been used in the 2007 elections, and that the demonstration of its capability need not be in a previous Philippine election. Demonstration of the success and capability of the PCOS may be in an electoral exercise in a foreign jurisdiction." As determined by the Comelec, the PCOS system had been successfully deployed in previous electoral exercises in foreign countries, such as Ontario, Canada; and New York, USA, albeit Smartmatic was not necessarily the system provider. But then, RA 9369 does not call for the winning bidder of the 2010 automation project and the deploying entity/provider in the foreign electoral exercise to be one and the same entity. Neither does the law incidentally require that the system be first used in an archipelagic country or with a topography or a voting population similar to or approximating that of the Philippines.

10. ID.; ID.; ID.; ID.; ENACTMENT OF RA 9525 OR THE "FULL AUTOMATION SPECIAL APPROPRIATION ACT" IS A COMPELLING INDICATION THAT IT WAS NEVER CONGRESS' INTENT TO MAKE THE "PILOT TESTING" OF A PARTICULAR AUTOMATED ELECTION SYSTEM IN 2007 ELECTIONS A CONDITION PRECEDENT TO ITS USE OR AWARD OF THE 2010 AUTOMATION PROJECT. — Any lingering doubt on the issue of whether or not full automation of the 2010 regular elections can validly proceed without a pilot run of the AES should be put to rest with the enactment in March 2009 of RA 9525, in which Congress appropriated PhP 11.301 billion to automate the 2010 elections, subject to compliance with the transparency and accuracy requirements in selecting the relevant technology of the machines, thus: Sec. 2. *Use of Funds*. — x x x *Provided, however*, That disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution, the provisions of **[RA] No. 9369** and other election laws incorporated in said Act as to ensure the conduct of a free, orderly, clean, honest and credible election and shall adopt such measures that will guaranty transparency and accuracy in the selection of the relevant technology of

the machines to be used on May 10, 2010 automated national and local elections. It may safely be assumed that Congress approved the bill that eventually became RA 9525, fully aware that the system using the PCOS machines were not piloted in the 2007 electoral exercise. The enactment of RA 9525 is to us a compelling indication that it was never Congress' intent to make the pilot testing of a particular automated election system in the 2007 elections a condition precedent to its use or award of the 2010 Automation Project. The comment-in-intervention of the Senate says as much.

11. ID.; ID.; ID.; ID.; PCOS MEETS MINIMUM CAPABILITIES STANDARDS. — The Court is fairly satisfied that the Comelec has adopted a rigid technical evaluation mechanism, a set of 26-item/check list criteria, as will be enumerated shortly, to ensure compliance with the above minimum systems capabilities. The SBAC Memorandum of June 03, 2009, as approved by Comelec Res. 8608, categorically stated that the SBAC-TWG submitted its report that TIM/Smartmatic's proposed systems and machines PASSED all the end-to-end demo tests using the aforementioned 26-item criteria, inclusive of the accuracy rating test of at least 99.955%. As appearing in the SBAC-TWG report. Given the foregoing and absent empirical evidence to the contrary, the Court, presuming regularity in the performance of regular duties, takes the demo-testing thus conducted by SBAC-TWG as a reflection of the capability of the PCOS machines, although the tests, as Comelec admits, were done literally in the *Palacio del Governador* building, where a room therein simulated a town, the adjoining room a city, *etc*. Perusing the RFP, however, the real worth of the PCOS system and the machines will of course come after they shall have been subjected to the gamut of acceptance tests expressly specified in the RFP, namely, the lab test, field test, mock election test, transmission test and, lastly, the final test and sealing procedure of all PCOS and CCS units using the actual Election Day machine configuration. Apropos the counting-accuracy feature of the PCOS machines, petitioners no less impliedly admit that the web page they appended to their petition, showing a 2% to 10% failing rate, is no longer current. And if they bothered to examine the current website of Smartmatic specifically dealing with its SAES 1800, the PCOS system it offered, they would have readily seen that the advertised accuracy rating is over "99.99999%." Moreover, a

careful scrutiny of the old webpage of Smartmatic reveals that the 2% to 10% failure rate applied to "optical scanners" and not to SAES. Yet the same page discloses that the SAES has "100%" accuracy. Clearly, the alleged 2% to 10% failing rate is now irrelevant and the Court need not belabor this and the equally irrelevant estoppel principle petitioners impose on us.

12. ID.; ID.; ID.; ID.; NO ABDICATION OF COMELEC'S MANDATE AND RESPONSIBILITY. — In not so many words during the oral arguments and in their respective Memoranda, public and private respondents categorically rejected outright allegations of abdication by the Comelec of its constitutional duty. The petitioners, to stress, are strangers to the automation contract. Not one participated in the bidding conference or the bidding proper or even perhaps examined the bidding documents and, therefore, none really knows the real intention of the parties. As case law tells us, the court has to ferret out the real intent of the parties. What is fairly clear in this case, however, is that petitioners who are not even privy to the bidding process foist upon the Court their own view on the stipulations of the automation contract and present to the Court what they think are the parties' true intention. It is a study of outsiders appearing to know more than the parties do, but actually speculating what the parties intended.

13. ID.; ID.; ID.; ID.; ROLE OF SMARTMATIC-TIM CORPORATION IS BASICALLY TO SUPPLY GOODS NECESSARY FOR THE ELECTION AUTOMATION PROJECT; IT IS THE COMELEC WHICH, AT THE END OF THE DAY, WILL BE CONDUCTING THE ELECTION THRU ITS PERSONNEL AND WHOEVER IT DEPUTIZES. — With the view we take of the automation contract, the role of Smartmatic TIM Corporation is basically to supply the goods necessary for the automation project, such as but not limited to the PCOS machines, PCs, electronic transmission devices and related equipment, both hardware and software, and the technical services pertaining to their operation. As lessees of the goods and the back-up equipment, the corporation and its operators would provide assistance with respect to the machines to be used by the Comelec which, at the end of the day, will be conducting the election thru its personnel and whoever it deputizes. And if only to emphasize a point, Comelec's contract is with Smartmatic TIM Corporation of

which Smartmatic is a 40% minority owner, per the JVA of TIM and Smartmatic and the Articles of Incorporation of Smartmatic TIM Corporation. Accordingly, any decision on the part or on behalf of Smartmatic will not be binding on Comelec. As a necessary corollary, the board room voting arrangement that Smartmatic and TIM may have agreed upon as joint venture partners, inclusive of the veto vote that one may have power over the other, should really be the least concern of the Comelec.

14. ID.; ID.; ID.; ID.; ANTI-DUMMY LAW (COMMONWEALTH ACT NO. 108) FINDS NO APPLICATION IN CASE AT BAR; NO CONSTITUTIONAL OR STATUTORY PROVISION CLASSIFYING AS A NATIONALIZED ACTIVITY THE LEASE OF GOODS AND TECHNICAL SERVICES FOR THE AUTOMATION OF AN ELECTION. — The Anti-Dummy Law has been enacted to limit the enjoyment of certain economic activities to Filipino citizens or corporations. For liability for violation of the law to attach, it must be established that there is a law limiting or reserving the enjoyment or exercise of a right, franchise, privilege, or business to citizens of the Philippines or to corporations or associations at least 60 per centum of the capital of which is owned by such citizens. In the case at bench, the Court is not aware of any constitutional or statutory provision classifying as a nationalized activity the lease or provision of goods and technical services for the automation of an election. In fact, Sec. 8 of RA 8436, as amended, vests the Comelec with specific authority to acquire AES from foreign sources, thus: SEC 12. *Procurement of Equipment and Materials*. — To achieve the purpose of this Act, the Commission is authorized **to** procure, x x x, by **purchase, lease**, rent or other forms of acquisition, supplies, equipment, materials, **software, facilities**, and other services, from local or **foreign sources** x x x.

15. ID.; ID.; ID.; ID.; THE COMELEC DOES NOT FALL UNDER THE CATEGORY OF A GOVERNMENT OWNED AND CONTROLLED CORPORATION, AN AGENCY OR MUNICIPAL CORPORATION CONTEMPLATED IN EXECUTIVE ORDER NO. 584, SERIES OF 2006, "LIMITING CONTRACTS FOR THE SUPPLY OF MATERIALS, GOODS AND COMMODITIES TO GOVERNMENT OWNED OR CONTROLLED

CORPORATION, COMPANY, AGENCY OR MUNICIPAL CORPORATION" TO CORPORATIONS THAT ARE 60% FILIPINO. — Petitioners cite Executive Order No. (EO) 584, Series of 2006, purportedly limiting "contracts for the supply of materials, goods and commodities to government-owned or controlled corporation, company, agency or municipal corporation" to corporations that are 60% Filipino. We do not quite see the governing relevance of EO 584. For let alone the fact that RA 9369 is, in relation to EO 584, a subsequent enactment and, therefore, enjoys primacy over the executive issuance, the Comelec does fall under the category of a government-owned and controlled corporation, an agency or a municipal corporation contemplated in the executive order.

16. ID.; ID.; ID.; ID.; ALTHOUGH THE AUTOMATED ELECTION SYSTEM (AES) HAS ITS FLAWS, THE COMELEC AND *SMARTMATIC-TIM* MADE IT CERTAIN THAT THE SYSTEM IS WELL-PROTECTED WITH SUFFICIENT SECURITY MEASURES IN ORDER TO ENSURE HONEST ELECTIONS. — A view has been advanced regarding the susceptibility of the AES to hacking, just like the voting machines used in certain precincts in Florida, USA in the Gore-Bush presidential contests. However, an analysis of post-election reports on the voting system thus used in the US during the period material and the AES to be utilized in the 2010 automation project seems to suggest stark differences between the two systems. The first relates to the Source Code, defined in RA 9369 as "human readable instructions that define what the computer equipment will do." The Source Code for the 2010 AES shall be available and opened for review by political parties, candidates and the citizens' arms or their representatives; whereas in the US precincts aforementioned, the Source Code was alleged to have been kept secret by the machine manufacture company, thus keeping the American public in the dark as to how exactly the machines counted their votes. And secondly, in the AES, the PCOS machines found in the precincts will also be the same device that would tabulate and canvass the votes; whereas in the US, the machines in the precincts did not count the votes. Instead the votes cast appeared to have been stored in a memory card that was brought to a counting center at the end of the day. As a result, the hacking and cheating may have possibly occurred at the counting center. Additionally, with the AES, the possibility of system hacking

is very slim. The PCOS machines are only online when they transmit the results, which would only take around one to two minutes. In order to hack the system during this tiny span of vulnerability, a super computer would be required. Noteworthy also is the fact that the memory card to be used during the elections is encrypted and read-only––meaning no illicit program can be executed or introduced into the memory card. Therefore, even though the AES has its flaws, Comelec and Smartmatic have seen to it that the system is well-protected with sufficient security measures in order to ensure honest elections.

PUNO, *C.J., separate concurring opinion:*

1. POLITICAL LAW; ELECTION LAWS; COMMISSION ON ELECTIONS (COMELEC); AUTOMATED ELECTION SYSTEM (AES) ACT (RA 9369); CONDUCT OF "PILOT EXERCISE" OF THE AES IS A CONDITION PRECEDENT TO ITS NATIONWIDE IMPLEMENTATION. — Section 5 should be interpreted to mean that the COMELEC is authorized to use an AES as long as the following requisites are complied with: (1) for the regular national and local elections, which shall be held immediately after the effectivity of the Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao; (2) that local government units whose officials have been the subject of administrative charges within sixteen months prior to the May 14, 2007 elections shall not be chosen; and (3) that no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. And, when the above conditions are complied with, the AES shall be implemented nationwide in succeeding regular national and local elections. The last sentence of the provision which provides that "[i]n succeeding regular national or local elections, the AES shall be implemented nationwide" may appear as not connected to the enumeration of requirements for the use of an AES. But this does not mean that it can be read in isolation and independently from the rest of the provision. Section 5 expressly declares that the COMELEC's authority to use the AES on a nationwide scale is contingent on the prior conduct of partial automation in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao.

2. ID.; ID.; ID.; ID.; THE WORD "PILOT TESTING" MAY NOT HAVE BEEN USED IN THE PROVISION BUT THE INTENT TO INITIALLY USE THE AES IS EVIDENT IN ITS TEXT BY THE USE OF THE WORD "SHALL."— The word "pilot testing" may not have been used in the provision, but the intent to test the use of an AES is evident in its text. The mandatory nature of the initial conduct of an automated election in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao is highlighted by the use of the word **shall**. That this is a condition precedent before a full nationwide automated election can be used in the succeeding elections is buttressed by the use of the words **provided, that**. Thus, the COMELEC is authorized to use an AES, provided that the AES is first used in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao, after which, in the following regular national and local elections, the AES shall be implemented nationwide.

3. ID.; ID.; ID.; ID.; ENACTMENT OF RA 9525 OR THE "FULL AUTOMATION SPECIAL APPROPRIATION ACT" HAS IMPLIEDLY REPEALED THE "PILOT EXERCISE" REQUIREMENT. — There is unmistakable evidence of the legislative intent to implement a full nationwide automation of the May 2010 elections. It is impossible to give effect to this intent and at the same time comply with the condition precedent of conducting pilot exercises in selected areas. The irreconcilability between Section 5 of RA 8436, as amended, and Section 2 of RA 9525 is apparent for Congress could not have maintained the requirement of a pilot exercise as a condition precedent to full automation when it had made it absolutely clear that it wanted to push through with a full nationwide AES this May 2010. Laws of Congress have equal intrinsic dignity and effect; and the implied repeal of a prior by a subsequent law of that body must depend upon its intention and purpose in enacting the subsequent law. What is necessary is a manifest indication of a legislative purpose to repeal. Repeal by implication proceeds from the premise that where a statute of a later date clearly reveals an intention on the part of the legislature to abrogate a prior act on the subject, that intention must be given effect.

4. ID.; ID.; ID.; ID.; JOINT VENTURE AGREEMENT (JVA) OF SMARTMATIC-TIM WAS DULY SUBMITTED; THE

TERMS OF REFERENCE (TOR) AND REQUEST FOR PROPOSAL (RFP) MADE BY THE COMELEC DOES NOT REQUIRE THAT A JOINT VENTURE BIDDER BE INCORPORATED UPON THE SUBMISSION OF ITS BID. — It should be noted that the TOR/RFP made by the COMELEC does *not* require that a joint venture bidder be incorporated **upon the submission of its bid**. Section 2.2.4 of Part IX (B) of the TOR/RFP declares "[m]anufacturers, suppliers and/or distributors forming themselves into a joint venture [. . .]" as eligible to participate in the bidding for the 2010 Automation Project, without any incorporated *vs.* unincorporated dichotomy. That the TOR/RFP does not specifically call for incorporation at the time of the bidding is significant, because Philippine law admits of a distinction between simple joint ventures and ordinary corporations. In ***Aurbach, et al. v. Sanitary Wares Manufacturing Corporation, et al.***, a joint venture was likened by this Court to a partnership, thus: The legal concept of a joint venture is of common law origin. It has no precise legal definition, but it has been generally understood to mean an organization formed for some temporary purpose. It is hardly distinguishable from the partnership, since their elements are similar — community of interest in the business, sharing of profits and losses, and a mutual right of control. The main distinction cited by most opinions in common law jurisdiction is that the partnership contemplates a general business with some degree of continuity, while the joint venture is formed for the execution of a single transaction, and is thus of a temporary nature. This observation is not entirely accurate in this jurisdiction, since under the Civil Code, a partnership may be particular or universal, and a particular partnership may have for its object a specific undertaking. It would seem therefore that under Philippine law, a joint venture is a form of partnership and should thus be governed by the law of partnerships. The Supreme Court has however recognized a distinction between these two business forms, and has held that although a corporation cannot enter into a partnership contract, it may however engage in a joint venture with others. But any remaining doubt as to the need for incorporation is dispelled by Bid Bulletin No. 19 and Bid Bulletin No. 22, issued by the COMELEC-SBAC to provide clarifications to prospective bidders. Both documents acknowledge that a bid by a joint

venture may be made either through a joint venture corporation (JVC) or an **unincorporated joint venture** (UJV).

5. ID.; ID.; ID.; ID.; ANTI-DUMMY LAW (COMMONWEALTH ACT NO. 108) NOT VIOLATED BY SMARTMATIC-TIM JOINT VENTURE AGREEMENT; NO CONSTITUTIONAL OR STATUTORY PROVISION CLASSIFYING THE LEASE OR PROVISION OF GOODS AND TECHNICAL SERVICES FOR THE AUTOMATION OF AN ELECTION AS A NATIONALIZED ACTIVITY. — I concur fully with the *ponencia* of Mr. Justice Velasco on this point. There is no constitutional or statutory provision classifying the lease or provision of goods and technical services for the automation of an election as a nationalized activity. To be sure, Section 12 of RA 8436, as amended by RA 9369, explicitly authorizes the COMELEC to procure supplies, equipment, materials, software, facilities, and other services from foreign sources. Petitioners cannot rely on Executive Order No. 584 (EO 584), containing the Seventh Regular Foreign Investment Negative List, which cites "contracts for the supply of materials, goods and commodities to [a] government-owned or controlled corporation, company, agency or municipal corporation" as limited to forty percent (40%) foreign equity. The reliance cannot be countenanced in light of two basic principles of statutory construction. First, *leges posteriores priores contrarias abrogant*. In case of an irreconcilable conflict between two laws of different vintages, the later enactment prevails. The rationale is simple: a later law repeals an earlier one because it is the later legislative will. RA 9369, which allows the COMELEC to procure AES supplies and equipment from foreign sources, became law in 2007, whereas EO 584 is an executive issuance in 2006. Second, *lex specialis derogat generali.* General legislation must give way to special legislation on the same subject, and generally is so interpreted as to embrace only cases in which the special provisions are not applicable. In other words, where two statutes are of equal theoretical application to a particular case, the one specially designed therefor should prevail. RA 9369 specifically covers a well-defined subject (*i.e.*, procurement for election automation), whereas EO 584 has a more universal scope. In sum, there is no constitutional or statutory Filipino-foreign equity ceiling to speak of, and the Anti-Dummy Law does not find application to the case at bar.

6. ID.; ID.; ID.; ID.; PROVISIONS IN THE JVA GIVING SMARTMATIC EFFECTIVE CONTROL OVER SMARTMATIC TIM CORPORATION ARE LEGITIMATE MINORITY PROTECTION DEVICES INTENDED TO PROTECT THE MINORITY FROM THE WHIMS AND CAPRICES OF THE NON-EXPERT MAJORITY. — The petitioners, however, allege that the sixty percent (60%) interest of TIM in the JVC was merely simulated. They point to certain provisions in the JVA as denoting that effective control over Smartmatic TIM Corporation was given to Smartmatic. Specifically, petitioners assail the following: (1) The mandatory presence of at least one of the nominated Directors of Smartmatic to establish a quorum of the Board of Directors, pursuant to Article 4.3 of the JVA; (2) The veto power in the Board of Directors granted by TIM to Smartmatic to authorize certain important financial and technical actions, pursuant to Article 4.5 of the JVA; (3) The mandatory presence of the Director representing Smartmatic to establish a quorum of the Executive Committee (EXECOM), pursuant to Article 4.7 of the JVA; and (4) The sole right of Smartmatic to nominate the (a) Chairman of the Board, (b) the Treasurer, and (c) the Corporate Secretary, and TIM's corresponding duty to elect said nominees, pursuant to Articles 4.10 and 4.11 of the JVA. But far from establishing the tyranny of the minority, these provisions may be viewed as **legitimate minority protection devices**. Through them, Smartmatic sought to protect its huge investment in the Automation Project. Without these protective provisions, Smartmatic would be helplessly exposed to the risk of being outvoted on significant corporate activities and decisions — including decisions on technical matters falling within its field of expertise, for which it is primarily responsible (as against TIM) under the express terms of the COMELEC's bidding rules and the Automation Contract itself. If that would come to pass, Smartmatic could not perform its part of the Contract and the end result would be the ruin of its investment. To be sure, our lawmakers wanted the foreign joint venture to be autonomous in carrying out its technical functions, and intended to protect it from the whims and caprices of the non-expert majority.

7. ID.; ID.; ID.; ID.; "PRIOR SUCCESSFUL USE" QUALIFICATION OF THE PRECINCT-COUNT OPTIC SCAN (PCOS) TECHNOLOGY HAS BEEN COMPLIED

WITH. — It is obvious that the PCOS and CCOS machines are based on the same optical scan technology. The sole difference is that the PCOS machines dispense with the physical transportation of the ballots to the designated counting centers, since the votes will be counted in the precinct itself and the results electronically transmitted to the municipal, provincial and national Board of Canvassers. Tellingly, but for their sweeping and convenient conclusion that "[e]ven if a PCOS [machine] is an OMR [Optical Mark Reader] [machine], nevertheless[,] it is totally different from a CCOS [machine]," the petitioners were silent on this point. In any event, the AES procured by COMELEC for the 2010 elections has been successfully used in prior electoral exercises in (i) New Brunswick, Canada; (ii) Ontario, Canada; and (iii) New York; the United States of America. The petitioners nevertheless question the certifications submitted to this effect, arguing that these were issued not to the Smartmatic-TIM joint venture, but to a third party — Dominion Voting Systems. I find this argument meritless, for it foists unto the law an imaginary requirement. As the COMELEC correctly observed, what the law requires is that the **system** must have been successfully utilized in a prior electoral exercise, not that the **provider** (*i.e.*, Smartmatic TIM Corporation) should have been the one that previously used or employed the system. Considering that the system subject of the certifications is the same one procured by the COMELEC for the 2010 elections, the prior successful use requirement has been adequately met. At any rate, the clear terms of the Licensing Agreement between Smartmatic and Dominion Voting Systems indicate that the former is the entity licensed exclusively by the latter to use the system in the Philippines.

8. ID.; ID.; ID.; ID.; NO GRAVE ABUSE OF DISCRETION ON THE PART OF THE COMELEC IN AWARDING THE AUTOMATION CONTRACT TO SMARTMATIC-TIM CORPORATION; COURTS WILL NOT INTERFERE IN MATTERS THAT ARE ADDRESSED TO THE SOUND DISCRETION OF GOVERNMENT AGENCIES ENTRUSTED WITH THE REGULATION OF ACTIVITIES COMING UNDER THEIR SPECIAL TECHNICAL KNOWLEDGE AND TRAINING. — We cannot close our eyes to the fact that the TWG's technical evaluation of the AES was corroborated by knowledgeable and impartial third

parties: the law-mandated Official Observers. In their respective reports to the COMELEC, the PPCRV and the Office of the Ombudsman found the system procured and the attendant COMELEC proceedings to be consistent, transparent, and in consonance with the relevant laws, jurisprudence and the terms of reference. Accordingly, I do not find any grave abuse of discretion on the part of the COMELEC in awarding the Automation Contract to the Smartmatic TIM Corporation. It has approved the PCOS system, and we are bereft of the right to supplant its judgment. Hoary is the principle that the courts will not interfere in matters that are addressed to the sound discretion of government agencies entrusted with the regulation of activities coming under their special technical knowledge and training.

9. ID.; ID.; ID.; ID.; NO ABDICATION BY THE COMELEC OF ITS DUTY TO ENFORCE LAWS. — Abdication denotes a relinquishment or surrender of authority, which has not been done by the COMELEC. The COMELEC identified the type of technology, specifications and capabilities of the system to be used in the 2010 elections; and the bidders were required to submit their bids in accordance with the COMELEC's stipulations. All the choices made by the winning bidder were to be subject to approval by the COMELEC, and "the final design and functionality of the system shall still be subject to [its] final customization requirements." It is clear that the COMELEC has not abdicated its constitutional and legal mandate to control and supervise the elections. Smartmatic and TIM are merely service providers or lessors of goods and services to the Commission. Indeed, Article 6.7 of the Automation Contract, provides that "the entire process of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials." This control and supervision by the COMELEC was assured in the June 23, 2009 hearing of the Senate Committee on Constitutional Amendments and Revision of Codes and Laws. Finally, the power and duty of the COMELEC to administer election laws and to have control and supervision over the automated elections is not incompatible with the decision to subcontract services that may be better performed by those who are well-equipped to handle complex technological matters with respect to the implementation of the AES. The subcontractor cannot act independently of the COMELEC.

10. ID.; ID.; ID.; ID.; FULL AUTOMATION WILL NOT COMPLETELY CLEANSE THE DIRT IN OUR ELECTORAL SYSTEM BUT IT IS A BIG FORWARD STEP WHICH CAN LEAD US TO THE GATEWAY OF REAL DEMOCRACY WHERE THE VOTE OF THE PEOPLE IS SACRED AND SUPREME. — We are not unaware of the many doomsday scenarios peddled by doubting Thomases if the coming May 2010 elections will be fully automated. To downgrade these scenarios, let it be emphasized that the PCOS System procured by COMELEC is a paper-based system. It has a provision for system auditability and a voter-verified paper trail. The official ballots may be compared with their digital images stored in the memory cards. All actions done on the machine are stored and can be printed out by the BEI chairperson as an audit log, which includes time stamps. And in the event of problems arising from non-functioning PCOS machines, the official ballots cast in the precincts, which have previously been fed into the locked ballot box, could be used for a manual recount. With these safeguards, the fear of automation failure should not overwhelm us. We have been bedevilled in the past by elections that are not free, fair and honest. These elections have made a mockery of our democracy for they frustrated the sovereign right of the people to choose who ought to rule them. These elections have also resulted in instability of governments whose legitimacy has been placed in doubt. All these elections were conducted manually. For the first time, we shall be conducting our May 2010 elections through full automation. To be sure, full automation will not completely cleanse the dirt in our electoral system. But it is a big forward step which can lead us to the gateway of real democracy where the vote of the people is sacred and supreme.

CORONA, *J., separate opinion:*

1. POLITICAL LAW; ELECTION LAWS; COMMISSION ON ELECTIONS (COMELEC); RA 8436 (ELECTION MODERNIZATION ACT): SECTIONS 5 AND 12 OF RA 8436 NEITHER REMOVES OR CONSTRAINS THE MANDATE OF THE COMELEC TO IMPLEMENT AN AUTOMATED ELECTION SYSTEM (AES) NATIONWIDE BEGINNING THE 2010 ELECTIONS. — Petitioners claim that the impugned notice of award and contract contravene

Sections 5 and 12 of RA 8436, as amended, because they authorize the use of PCOS machines that have never undergone pilot-testing. The view of petitioners is, however, at odds with the plain language of the law and the proceedings of the Senate. The aforecited provisions do not limit or restrict the statutory mandate of the Comelec to implement a nationwide AES beginning the 2010 elections. The provisos of Section 5 merely prescribe the minimum scope of, as well as the conditions for, the implementation of an AES by the Comelec in the 2007 elections. On the other hand, Section 12 simply regulates the capability of the supplies, equipment, materials, software, facilities and other services which the Comelec can procure. **Neither provision, however, removes or constrains the mandate of the Comelec to implement an AES nationwide beginning the 2010 elections.**

2. ID.; ID.; ID.; ID.; ID.; THE DIRECTIVE OF THE LAW IS CLEAR THAT THE NATIONWIDE IMPLEMENTATION OF THE AES COMMENCES IN THE 2010 ELECTIONS; LAWS ARE TO BE INTERPRETED IN A WAY THAT WILL RENDER THEM EFFECTIVE, NOT IN A MANNER THAT WILL MAKE THEM INOPERATIVE. — The proviso of Section 5 of RA 8436, as amended, merely delineates the minimum scope of implementation of the AES for the 2007 elections. More significantly, in the event that no AES was implemented in the 2007 elections, Section 5 does not prohibit the Comelec from implementing an AES nationwide starting in the 2010 elections. Rather, the last clause of Section 5 is categorical that "**in succeeding regular national or local elections, an AES shall be implemented nationwide**." And the 2010 elections were the elections that immediately followed the 2007 elections, the regular elections "held immediately after effectivity of [RA 9369]." In other words, the directive of the law itself is clear: **the nationwide implementation of the AES commences in the 2010 elections**. Laws are to be interpreted in a way that will render them effective, not in a manner that will make them inoperative. To insist, as petitioners do, that no nationwide AES can be implemented in the 2010 elections because no AES was implemented in the 2007 elections is to disregard the categorical language of the law. It frustrates and defeats the legislative intent to fully automate the 2010 elections. Indeed, if petitioners' argument were to be pursued to its (not-so-) logical conclusion, RA 8436, as amended by

RA 9369, would be a dead law. Under petitioners' theory, no AES can be implemented in any future election unless Congress enacts another law. This is so because, according to petitioners themselves, the "condition precedent" for any nationwide implementation of the AES — the implementation of the AES in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao in the 2007 elections — was not complied with.

3. ID.; ID.; ID.; ID.; ID.; CONSIDERING THAT RA 9369 (AUTOMATED ELECTION SYSTEM ACT) TOOK EFFECT ONLY ON FEBRUARY 10, 2007, IT WAS ALMOST IMPOSSIBLE TO UTILIZE AN AES IN AT LEAST TWO HIGHLY URBANIZED CITIES AND TWO PROVINCES EACH IN LUZON, VISAYAS AND MINDANAO DURING THE MAY 14, 2007 ELECTIONS; THE LAW OBLIGES NO ONE TO PERFORM AN IMPOSSIBILITY AND LAWS AND RULES MUST BE INTERPRETED IN A WAY THAT THEY ARE IN ACCORDANCE WITH LOGIC, COMMON SENSE, REASON AND PRACTICALITY. — Considering that RA 9369 took effect only on February 10, 2007, it was almost impossible to utilize an AES even in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao during the May 14, 2007 elections. Considering that, from the effectivity date of RA 9369, there was only a little over three months left before the 2007 elections, the additional burden (on the preparations for the 2007 elections) of the procurement process for and implementation of even a partial AES of the said elections would have been a superhuman task. More significantly, the 2007 appropriations for the Comelec did not include a budget for AES. The convergence of time and funding constraints made the implementation of any AES in the 2007 elections impossible for the Comelec to conduct. *Nemo tenetur ad impossibile.* The law obliges no one to perform an impossibility. Laws and rules must be interpreted in a way that they are in accordance with logic, common sense, reason and practicality.

4. ID.; ID.; ID.; ID.; ID.; THE COMELEC ACTED PURSUANT TO ITS MANDATE AND DID NOT VIOLATE SECTION 5 OF RA 8436 AS AMENDED BY RA 9369 WHEN IT ISSUED THE NOTICE OF AWARD TO AND EXECUTED THE CONTRACT WITH SMARTMATIC-TIM FOR THE

NATIONWIDE IMPLEMENTATION OF AN AES IN THE 2010 ELECTIONS. — Under Section 5 in relation to Section 1 of RA 8436, as amended, the mandate of the Comelec to prescribe the adoption and use of an AES is complete. It can determine which suitable technology of demonstrated capability to adopt for an AES. It can determine which, between a paper-based or a direct recording electronic election system, is more appropriate and practical. More notably, in the 2007 elections, it could decide whether to implement an AES within a maximum scope of all areas in the country or within the minimum scope of two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao. And in the 2010 and succeeding elections, its **unqualified mandate** is to implement an AES nationwide. Therefore, when it issued the notice of award to and executed the contract with Smartmatic-TIM for the nationwide implementation of an AES in the 2010 elections, the Comelec acted pursuant to its mandate and did not violate Section 5 of RA 8436 as amended by RA 9369.

5. ID.; ID.; ID.; ID.; ID.; SECTION 12 OF RA 8436 MERELY REQUIRES AN AUTOMATED ELECTION SYSTEM THAT HAS DEMONSTRATED CAPABILITY AND HAS BEEN SUCCESSFULLY USED IN A PRIOR ELECTORAL EXERCISE HERE OR ABROAD; IT SUFFICES THAT THE SYSTEM CAN BE SHOWN TO HAVE BEEN VIABLE IN AN ELECTION ABROAD. — Neither did the Comelec violate Section 12 of RA 8436, as amended. The provision merely requires that, to implement a nationwide AES starting from the 2010 elections, the Comelec must procure a system that has a demonstrated capability and has been successfully used in a prior electoral exercise here or **abroad**, though application of the system in the 2007 elections would not have been conclusive evidence of its fitness. Clearly, it is not imperative that the system was successfully applied in the 2007 elections; it suffices that the system can be shown to have been viable in an election abroad. As the Comelec averred, the system it procured for the 2010 elections was successfully employed in prior electoral exercises in New Brunswick and New York in 2008 and in Ontario in 2009.

6. ID.; ID.; ID.; ID.; ID.; RA 9184 (GOVERNMENT PROCUREMENT REFORM ACT) AND ITS IMPLEMENTING RULES ONLY REQUIRE THAT THE

JOINT VENTURE AGREEMENT (JVA) BE VALID AND NOTARIZED; INCORPORATION OF A JVA UNDER THE CORPORATION CODE THROUGH REGISTRATION WITH THE SECURITIES AND EXCHANGE COMMISSION IS NOT ESSENTIAL FOR ITS VALIDITY. — Petitioners exaggerate the eligibility requirements of the law. RA 9184 and its implementing rules only require that the JVA be valid and notarized. Incorporation of a JVA under the Corporation Code through registration with the SEC is not essential for the validity of a JVA. So long as it meets the essential requisites of a contract and is embodied in a public document, a JVA is valid regardless of its incorporation through registration with the SEC. Where the law makes no distinction, no distinction need be made. Since the validity of the JVA is separate and distinct from its incorporation, I cannot subscribe to petitioners' position that the incorporation of the Smartmatic and TIM JVA must also be required for purposes of the bidding. To hold that the JVA ought to be accompanied by articles of incorporation is to unduly add to the requirement of the law and its implementing regulations, in the guise of interpretation or construction.

7. ID.; ID.; ID.; ID.; ID.; NO REQUIREMENT UNDER RA 9184 THAT ALL THE SUPPLIERS, MANUFACTURERS OR DISTRIBUTORS INVOLVED IN THE TRANSACTION SHOULD BE PART OF THE JOINT VENTURE. — The intention of RA 9184 is not to compel government agencies to deal with every copyright-holder, exclusive manufacturer and exclusive distributor; otherwise, it will restrict the mode of procurement to direct contracting only. Thus, there is no compulsion under the law for the Comelec to contract with Dominion as the holder of the copyright to the PCOS machine or with Jarltech as the manufacturer thereof or 2Go as the transporter/distributor of the PCOS machines. What is crucial is that Smartmatic-TIM assumes solidary liability for the principal prestation of the July 10, 2009 contract and the RFP, and that it stipulates (under Article 3.3 of the contract) that "the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve [it] of said obligations and concomitant liabilities."

8. ID.; ID.; ID.; ID.; ID.; NATIONALITY REQUIREMENT; IT IS NOT THE MANAGEMENT BUT THE OWNERSHIP OF

THE JOINT VENTURE SMARTMATIC-TIM WHICH IS REQUIRED TO BE AT LEAST 60% FILIPINO. — It is not the management but the ownership of the joint venture Smartmatic-TIM which is required to be at least 60% Filipino. The board of directors of a corporation is a creation of the stockholders and, as such, the board controls and directs the affairs of the corporation by delegation of the stockholders. Hence, the authority to be exercised by the board of directors of the joint venture of Smartmatic-TIM is actually the authority of the stockholders of TIM and Smartmatic from which the joint venture derives its authority. As the source of the authority, the stockholders may by auto-limitation impose restraints or restrictions on their own powers such as that allegedly done by TIM in its joint venture with Smartmatic. Besides, issues on the distribution of management powers in the joint venture are a purely business prerogative in which the Court would rather not meddle.

9. ID.; ID.; ID.; ID.; ID.; CONTRACT WITH *SMARTMATIC-TIM* DID NOT DIMINISH COMELEC'S CONSTITUTIONAL MANDATE. — For the 2010 automated elections, the Comelec exercises not only exclusive supervision and control of the electoral process, including the discretion over which suitable technology to adopt and use. Article 6.7 of the contract reiterates the authority of the Comelec over the purely electoral component of the process, thus: 6.7 Subject to the provisions of the General Instructions to be issued by the Commission *En Banc*, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by Comelec's personnel and officials x x x. With respect to the technical component of the Comelec's authority in the automation of elections, several specialized units have been created under RA 8436 and RA 9369 to support the Commission: (1) an Information Technology Department tasked to carry out the full administration and implementation of the AES; (2) an Advisory Council on Information and Communication and Technology, headed by the Chairman of the Commission, tasked to recommend the technology to be applied in the AES and to advise and assist in the review of its system's planning, inception, development, testing, operationalization and evaluation stages and in the identification, assessment and resolution of systems problems or inadequacies, and (3) a Technical Evaluation Committee tasked to certify

that, based on documented evaluation, the hardware and software components of the chosen AES are operating properly, securely, and accurately, in accordance with the provisions of RA 9369. Moreover, under the contract, the Comelec committed to create a project management office (PMO) that will oversee the execution and implementation of the automation project. Thus, both under the law and the contract, it is clear that each of the foregoing units of the Comelec is assigned specific technical functions in support of the AES.

10. ID.; ID.; ID.; ID.; ID.; *SMARTMATIC-TIM* IS GIVEN A SPECIFIC AND LIMITED TECHNICAL TASK TO ASSIST THE COMELEC IN IMPLEMENTING THE AES; THE HIGHLY SPECIALIZED LANGUAGE OF THE CONTRACT CIRCUMSCRIBES THE ROLE OF SMARTMATIC-TIM. — Smartmatic is given a specific and limited technical task to assist the Comelec in implementing the AES. The highly specialized language of the contract circumscribes the role of Smartmatic. For instance, while, under Article 6.7, the counting and canvassing of votes are the responsibilities of the Comelec, under Article 3.3, the technical aspects of the "counting and canvassing software and hardware, including transmission configuration and system integration," and the "[prevention] and troubleshooting [of] technical problems that may arise during the election" are the responsibilities of Smartmatic. The delineation of roles is clear and the tasks assigned to Smartmatic are specific. By no stretch of interpretation can Article 3.3 be deemed to mean that Smartmatic shall count and canvass the votes. Still under Article 6.7, it is the Comelec through its personnel and officials that shall conduct the entire processes of voting, counting, transmission, consolidation and canvassing of votes. The Comelec, jointly with Smartmatic, will ensure that the performance, completion and final results of these processes meet the stipulated specifications and schedules. This a reasonable assignment of role to Smartmatic, considering that, under Articles 3.1.a, 3.1.b and 3.2 of the contract, Smartmatic-TIM undertakes to ensure the proper, satisfactory and timely execution and completion of the entire scope of the project. There is no reason to view it as a diminution of the exclusive mandate of the Comelec to control the conduct of the elections. It has likewise not been established that, under Article 7.4 of the contract, the Comelec abnegated its mandate. It must be

borne in mind that the contract entered into by the Comelec is a mere lease with option to purchase. Hence, it will be grossly disadvantageous to the Comelec if, upon delivery of the goods by Smartmatic-TIM, custody thereof will be immediately transferred to it, for then liability for damage to or loss of the goods while in storage will be borne by it. It is bad enough that Filipino taxpayers are footing the bill for the continued storage of machines in the scrapped Mega Pacific consortium automation deal. It will be worse if they should likewise be answerable for any PCOS machine that is damaged or lost during storage.

11. ID.; ID.; ID.; ID.; ID.; SANCTITY OF THE BALLOT AND INTEGRITY OF THE AUTOMATED ELECTORAL PROCESS NOT COMPROMISED BY THE AUTOMATION CONTRACT. — There is no showing that the size and form of the PCOS ballot as prescribed by the Comelec do not fulfill the minimum contents required by Congress. In fact, the three-foot, two-page ballot filled with 600 entries in font 10 was deliberately adopted by the Comelec to conform to the requirements of existing laws on the number of elective positions, and in anticipation of the possible number of candidates vying for these positions. Moreover, there is no inherent flaw in the voting procedure adopted by the Comelec whereby each voter must manually feed the ballot into the PCOS machine. There are sufficient safeguards to the secrecy of the voting process in that the voter alone will hold the ballot and feed it to the PCOS machine. It is all up to the voter whether to discard caution and disclose the contents of the ballot. The law can only do so much in protecting its sanctity. Besides, assuming that the requirement under the contract between the Comelec and Smartmatic-TIM as to the size of the ballot poses concerns in connection with the secrecy of the ballot, the Comelec is not without power to issue the necessary rules and regulations that will effectively address them. Such rules and regulations may include the specific manner on how assistance on feeding the ballot to a PCOS machine may be rendered to a voter to avoid compromising the secrecy of the ballot.

12. ID.; ID.; ID.; ID.; ID.; THE FUNCTION OF THE COURT IS MERELY TO DECIDE IF AUTOMATION AND ITS IMPLEMENTING CONTRACTS ARE LEGAL OR NOT

AND NOT TO FIND FAULT IN IT AND CERTAINLY, NOT TO DETERMINE TO WHAT EXTENT THE LAW SHOULD BE OR SHOULD NOT BE IMPLEMENTED. — It has not been satisfactorily shown that the Advisory Council and the Technical Evaluation Committee have shirked their duties. They have not even been given the chance to perform them yet they are already being torpedoed. At this point, the Court should not even attempt to interfere in the work of these specialized bodies and arrogate their functions by deciding highly technical issues that are within their expertise and knowledge, and which the law itself has assigned to them for determination. The Court has to exercise judicial restraint and not pretend to be an expert in something it is not really familiar with. Our function is merely to decide if automation and its implementing contract(s) are legal or not. It is not to find fault in it and certainly, not to determine to what extent the law should be or should not be implemented. After a half century of electoral debacle, there looms in the horizon the dawn of a truly honest, systematic and modern electoral system. But we have to cast our fears and insecurities aside, and take the first step —– unsure as it may be —– to witness its coming.

13. ID.; ID.; ID.; ID.; ID.; GIVE THE AUTOMATED ELECTION SYSTEM A CHANCE. — We are the final generation of an old civilization and the first generation of a new one. Much of our personal confusion, anguish and disorientation can be traced directly to the conflict within us and within our political institutions, between the dying Second Wave civilization and the emergent Third Wave civilization that is thundering in to take its place. Toffler's words fittingly describe the state of our electoral system. Congress has vested the Comelec with the authority to modernize the Philippine electoral system through the adoption of an AES. In the exercise of the said authority and considering the nature of the office of the Comelec as an independent constitutional body specifically tasked to enforce and administer all laws relative to the conduct of elections, the Comelec enjoys wide latitude in carrying out its mandate. No worst-case scenarios painted by doomsayers, no speculative political catastrophe should be the basis of invalidating the Comelec's official acts. Only when the exercise by the Comelec of its discretion is done with grave abuse will this Court nullify the challenged discretionary act. Otherwise, the institutional independence of the Comelec will be unduly

restricted and eroded, and its constitutional and statutory prerogatives encroached upon. This Court should not allow that in any situation. This Court should not allow that in this case. Let us welcome the significant change in our electoral system that is the automated election system. The future is upon us. It beckons as it poses the challenge of spurring technological innovation and safeguarding values like accuracy and transparency in our electoral system. Let us not turn our backs on it simply out of speculation and fear. Let us give it a chance.

CARPIO, *J., dissenting opinion:*

1. POLITICAL LAW; JUDICIAL DEPARTMENT; POWER OF JUDICIAL REVIEW; RULE ON *LOCUS STANDI*; THE UNDERLYING IMPORTANT PUBLIC INTEREST INVOLVED IN THE CONTRACT OF ENSURING THE CONDUCT OF FREE, ORDERLY, CLEAN, HONEST AND CREDIBLE ELECTIONS SUFFICES TO VEST LEGAL STANDING TO PETITIONERS AS CITIZENS. — The threshold issues respondents raise on petitioners' lack of *locus standi* and non-exhaustion of administrative remedies were similarly raised and found surmountable in *Infotech*. There, as here, the individual petitioners were citizens and taxpayers who sought immediate recourse from this Court in a petition for *certiorari* to annul the award of the contract to use an automated election system in the 2004 elections. The Court in *Infotech* found the petitioners' status as taxpayers sufficient to give them personality to file the suit since the contract involved the disbursement of public funds. The underlying important public interest involved in the contract in *Infotech*, as here, of ensuring the "conduct of free, orderly, clean, honest and credible elections" also suffices to vest legal standing to petitioners as citizens.

2. ID.; ID.; ID.; NATURE OF PETITION ALLOWS APPLICATION OF SOME EXCEPTIONS TO THE RULE ON PRIOR RESORT TO ADMINISTRATIVE REMEDIES; RESORT TO THE COURT IS THE PLAIN, SPEEDY AND ADEQUATE REMEDY AND THERE IS URGENT NEED FOR JUDICIAL INTERVENTION. — Direct resort to this Court was not deemed fatal to the cause of the petitioners in *Infotech* for facts peculiar

to that case and because the nature of the petition allows for the application of some exceptions to the rule on prior resort to administrative remedies, namely, the unreasonability of insisting on compliance with the rule, resort to this Court is the plain, speedy and adequate remedy, and there is urgent need for judicial intervention. These exceptions equally apply here and doubly serve as grounds to reject the COMELEC's objection on prematurity of this suit. Indeed, waiting until after the Contract has been implemented, as what the COMELEC wants petitioners to do, is a sure way to moot any challenges to its validity. Nor can the rule of mandating observance of hierarchy of courts bar resolution of this suit on the merits. Just as we found it proper to review the contract in *Infotech*, we should do so now for the same reasons that we waived compliance with the rule on exhausting remedies before the COMELEC.

3. ID.; ELECTION LAWS; COMMISSION ON ELECTIONS (COMELEC); RA 8436 (ELECTION MODERNIZATION ACT): USE OF AN AUTOMATED ELECTION SYSTEM (AES) NATIONWIDE UNDER THE CONTRACT VIOLATES SECTION 5 OF RA 8436, AS AMENDED; SAID PROVISION OF THE LAW IMPOSES A TWO-TIERED USE OF AN AUTOMATED ELECTION SYSTEM. — The framework of using an automated election system in a staggered, dual-phased manner in RA 9369 is not novel. The same legislative scheme was adopted by Congress in RA 8436, although the controlled variable in the first phase of RA 8436 was not the scope of the electoral area but the positions included in the automated tallying. Thus, instead of limiting the use of an automation system in highly urbanized areas and provinces in the first phase, RA 8436 mandated the use of an automated system in the 11 May 1998 elections to canvass the votes cast "only for the positions of president, vice-president, senators, and parties, organizations or coalitions participating under the party-list system." One need not search far and wide to see the wisdom, logic and practicality for this legislative insistence on transforming our electoral processes from manual to automated **gradually in phases**. As Senator Gordon puts it, the ultimate goal is to "take the kinks out of the system" before deploying it full scale. **Indeed, in systems implementation, a pilot run or a parallel run before full turn-over to the new system is a norm**. Thus, even as Congress gave the COMELEC discretion in choosing the appropriate technology, Congress insisted on

a phased implementation involving local government units from each of our three major island groupings cognizant as it was of the difficulties inherent in automating elections in an archipelago as dispersed as ours, with an average nationwide telecommunications coverage of not more than 75%.

4. ID.; ID.; ID.; THE LEGISLATIVE INTENT BEHIND SECTION 5 AS AMENDED IS AN AUTOMATED ELECTION SYSTEM LIMITED TO PARTIAL AUTOMATION COVERING AT LEAST TWO HIGHLY URBANIZED CITIES AND TWO PROVINCES EACH IN LUZON, VISAYAS AND MINDANAO; THE OFFICE OF STATUTORY INTERPRETATION HAS NEVER BEEN TO PRIVILEGE THE LETTER OF THE LAW OVER ITS SPIRIT BUT TO BREATHE LIGHT TO THE LEGISLATIVE INTENT EVEN TO THE EXTENT OF IGNORING THE TEXT. — The office of statutory interpretation has never been to privilege the letter of the law over its spirit. On the contrary, it has been and always will be the other way around — to breathe life to the legislative intent even to the extent of ignoring the text. This is because use of language, while a mark of civilization, remains susceptible to error as the Court knows all too well after having reviewed in the past imprecisely drafted legislation. To give effect to the legislative intent behind Section 5, as amended, the automated election system under the Contract should be limited to partial automation only, covering at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the COMELEC. Afterwards, with the COMELEC having tested its capabilities and manpower and after learning all the valuable lessons from the initial exercise, the automated system the COMELEC selects for the succeeding elections of 12 May 2013 can be fully deployed nationwide.

5. ID.; ID.; ID.; PROCUREMENT STANDARDS UNDER SECTION 12 OF RA 8436, AS AMENDED, MEANT TO ASSURE EFFICIENCY OF SYSTEM AND PROOF OF SYSTEM PROVIDER'S CAPABILITY, SUPPLEMENTING MINIMUM STANDARDS PROVIDED UNDER SECTION 6 AND NOT TO DISPENSE WITH THE PRIOR PILOT OR PARTIAL AUTOMATION REQUIREMENT IN SECTION 5 OF THE SAME LAW. — The phrase "[p]articipation in the 2007 pilot exercise" appears in Section 12 of RA 8436, as amended by RA 9369, under the sub-heading "**Procurement**

of Equipment and Materials." The phrase refers to the participation of a bidder in the 2007 elections, which participation is not conclusive that the bidder's system of equipment and materials is fit and suitable for the 2010 nationwide electoral exercise. **This phrase does not mean that the pilot or partial automation in Section 5, as amended, can be dispensed with prior to a nationwide automated electoral exercise**. The requirement of a pilot or partial automation in Section 5, as amended, is a totally different requirement from the requirement of fitness of a bidder's system in the procurement of equipment and materials under Section 12, as amended. Consequently, Section 12, as amended, is no authority to support respondents' proposition that the phased automation mandated under Section 5, as amended, may be dispensed with. Indeed, Section 12 has nothing to do with the issue. Section 5 and Section 12, as amended, are separate mechanisms of the law, governing different aspects of the automation project, but commonly intended to ensure the conduct of secure, accurate, and reliable automated elections.

6. ID.; ID.; ID.; RA 9525 (SPECIAL APPROPRIATION ACT FOR 2010 FULL AUTOMATION ELECTIONS); THE LAW MERELY FUNDED THE 10 MAY 2010 ELECTIONS AND DID NOT REPEAL SECTION 5 OF RA 8436, AS AMENDED. — Neither the text nor purpose of RA 9525 supports respondents' submission that RA 9525 has repealed Section 5 of RA 8436, as amended. On the contrary, the proviso in Section 2 of RA 9525 states that "the disbursement of the amounts herein appropriated or any part thereof shall be authorized only in **strict compliance with** the Constitution [and] **the provisions of Republic Act No. 9369** x x x." **Thus, the COMELEC is authorized to spend the appropriated amount only in strict compliance with RA 9369, which mandates a partial automation**. The statement in Section 2 that "such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used in the May 10, 2010 automated national and local election" shall be adopted should be read with the rest of Section 2. At any rate, RA 9525 funds the ***implementation*** of RA 8436, as amended by RA 9369. An implementing statute cannot repeal what it intends to enforce.

7. ID.; ID.; ID.; THE AUTONOMOUS REGION IN MUSLIM MINDANAO (ARMM) ELECTIONS IN 2008 DID NOT MEET THE PARAMETERS OF A LIMITED INITIAL USE OF THE AUTOMATED ELECTION SYSTEM IN RA 8436, AS AMENDED. — The parameters for the initial limited use of an automated election system under Section 5 of RA 8436, as amended, are (1) the AES is used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, (2) as selected by the COMELEC. The automated elections in the ARMM held last 11 August 2008 did not satisfy these parameters because (1) they were held in southern Mindanao only, involving six provinces and two cities, (2) as mandated by law. In practical terms, this means that the COMELEC, in the 2008 ARMM elections, did not use the tri-level transmission of election results from voter-dense areas from north to south of the archipelago, the transmission scheme to be used in the 10 May 2010 elections. This fact and the comparatively narrow scope of the 2008 ARMM elections in terms of voter population (1.6M in the 2008 ARMM elections as against 40M in the 10 May 2009 elections), number of machines provided by Smartmatic (2,558 DRE machines in the 2008 ARMM elections as against 82,200 precinct-based scanners in the 10 May 2009 elections), and positions involved (26 in the 2008 ARMM elections as against roughly 300 in the 10 May 2010 elections), put into serious doubt the validity of the Provider's claim that the 2008 ARMM elections constitute "substantial compliance" with the mandate for an initial limited use of the automated system under Section 5 of RA 8436, as amended. On the other hand, the initial implementation under Section 5, as amended, because of its dispersed geographic scope, puts to use all the system's components.

8. ID.; ID.; ID.; THE POSITION OF THE SENATE, WHILE ENTITLED TO RESPECTABLE CONSIDERATION, IS NOT CONTROLLING. — The Senate's position that the COMELEC is authorized to use an automated election system nationwide in the 10 May 2010 elections, as reflected in its Resolution Nos. 96 and 567, represents its contemporaneous interpretation of Section 5 of RA 8436, as amended. As the upper half of our legislature, the Senate is certainly entitled to construe legislation. By tradition and for comity, this branch of the government has always accorded interpretive attempts

by the other branches with respectful consideration. But it is timely to reiterate that in the distribution of powers ordained in the Constitution, the final word on what the law is lies with this branch.

9. ID.; ID.; ID.; THE STIPULATIONS IN THE CONTRACT RELINQUISHING TO *SMARTMATIC-TIM* CONTROL OF THE "TECHNICAL ASPECT" OF THE ELECTIONS SYSTEM VIOLATES SECTION 26 OF RA 8436. — Whoever controls the access keys controls the elections. Control of the access keys means the capacity to instantaneously change the election results in any precinct in the country. Giving to the Provider the access keys — both the private and public access keys — is like giving to the system administrator of Yahoo or Hotmail one's private password to his or her email account. The private key is supposed to be private to the Chair of the Board of Election Inspectors, generated by him and unknown to the Provider. Otherwise, the Provider will have the capacity to alter the election results at the precinct level. **Worse, even the private keys at the canvassing level are generated by the Provider, allowing the Provider to change the election results at the canvassing level**. Clearly, the COMELEC has abdicated control over the elections to the Provider, putting the integrity and outcome of the 10 May 2010 elections solely in the hands of the Provider. Moreover, the polling places and canvassing centers, which are the critical operational areas during the elections, must be under the full control of the COMELEC. What Section 26 confines to the COMELEC's "exclusive control and supervision," the COMELEC in the Contract relinquishes to Smartmatic. By designating Smartmatic as the entity "in charge" of the crucial "technical aspects" of the automated system's operation — equipment security and installation and results canvassing and transmission — the COMELEC contented itself with taking charge over the system's "non-technical," that is, manual aspects. However, RA 8436 does not bifurcate control and supervision along technical and non-technical lines. On the contrary, Section 26 treated the entire automated system wholistically by mandating that "**[t]he System** shall be under the exclusive supervision and control of the Commission." Section 26 requires no less than **complete** and exclusive control and supervision by the COMELEC over the automated system. The regime of partial, non-exclusive COMELEC control over

the automated system under the Contract falls short of Section 26's stringent standard.

10. ID.; ID.; ID.; BY SURRENDERING TO *SMARTMATIC-TIM* CONTROL OVER THE AUTOMATED SYSTEM'S "TECHNICAL ASPECTS," THE COMELEC CLOSED THE DOOR ON MANUAL FRAUD BUT OPENED WIDE THE WINDOW TO ITS AUTOMATED COUNTERPART. — A vital policy consideration lies behind the blanket mandate of Section 26. Under our constitutional scheme, the COMELEC is the state organ tasked to "[e]nforce and administer all laws and regulations relative to the conduct of an election" and of "ensuring x x x credible elections." By exercising exclusive control and supervision over the automated system, the COMELEC can harness its manpower and resources to efficiently prevent or correct fraud. By surrendering to Smartmatic control over the automated system's "technical aspects," the COMELEC closed the door on manual fraud but opened wide the window to its automated counterpart.

11. ID.; ID.; ID.; USING THE AUTOMATED SYSTEM NATIONWIDE IN THE 10 MAY 2010 ELECTIONS PLACES OUR FRAGILE DEMOCRACY AT NEEDLESS RISK. — The COMELEC's lack of experience in nationwide automation, its non-familiarity with its chosen technology, the gaps in security features of the system, the scale of its operation, Smartmatic's control over the automation aspects of the system, and the not more than 75% network coverage currently available in this archipelago of more than 7,000 islands all combine to create a gaping black hole of unknown risks which can crash the untested system come 10 May 2010. Undoubtedly, no automated election system is perfect. But we also cannot take chances with our fragile democracy. After all, what these machines count are not the day's earnings of a general merchandise store. They tabulate the rawest expression of the sovereign will of every voter in this polity. This is why Congress saw fit to use technology's benefits gingerly. Lost in the headlong rush to switch this country's electoral system from fully manual to fully automated overnight is the sobering thought that if, for any reason relating to the implementation of the Contract, there is a failure of elections and no President and Vice-President are proclaimed, and no Senate President and Speaker of the House are chosen, by noon of 30 June 2010,

a power vacuum is certain to emerge. This is the surest way to defeat the purpose of the entire electoral exercise, and put at unnecessary risk our hard-earned democracy.

BRION, *J., dissenting opinion:*

1. POLITICAL LAW; ELECTION LAWS; COMMISSION ON ELECTIONS (COMELEC); 2010 ELECTIONS AUTOMATION PROJECT; RA 8436 (ELECTION MODERNIZATION ACT): SECTION 5 THEREOF DOES NOT CATEGORICALLY AND EXPRESSLY DEMAND A "PILOT TEST" BUT THE PROVISION IS ESSENTIALLY A GRANT OF AUTHORITY TO AUTOMATE, WITH THE AUTOMATION BEING A LIMITED ONE IN THE ELECTION IMMEDIATELY FOLLOWING THE LAW'S PASSAGE AND ONLY GOING NATIONWIDE IN THE "SUCCEEDING REGULAR NATIONAL OR LOCAL ELECTIONS." — I do not question the COMELEC's present automation moves for lack of prior pilot testing — a point that has generated a lot of comment from both the *ponencia* and the separate opinions. I believe that raising a question on this point is misplaced because the disputed provision — Section 5 of RA No. 8436 as amended — does not *categorically and expressly* demand a pilot test and, in fact, does not even mention the term "pilot test". As worded, this provision should be read in the context of its title "*Authority to Use an Automated Election System.*" Thus, the provision is essentially a grant of authority to automate, with the automation being a limited one in the election immediately following the law's passage and only going nationwide in the "succeeding regular national or local elections." A pilot test is not an absolute necessity because it was never imposed as a condition *sine qua non* to a nationwide automation; Section 5 merely expressed a limit on the extent of automation that could take place in the election following the passage of RA No. 9369; the automated election must be partial and local. The COMELEC first exercised its authority to partially automate in the ARMM election held on August 11, 2008, so that this automated electoral exercise was effectively the "pilot exercise" the country embarked on in electoral automation. It can very well be, as the COMELEC posits, the pilot test that Section 5, RA No. 8436, as amended, mentioned.

2. ID.; ID.; ID.; ID.; ID.; "PILOT TESTING" IS AN ISSUE THAT DOES NOT NEED TO TRIGGER THE COURT'S *CERTIORARI* POWERS. — Strictly speaking, the use of automation for the first time in the ARMM election was not a violation of the limitation that Section 5 imposed, because the automation was properly local and partial. If there had been a violation at all, the violation was in the failure to use automation in the next following election after the passage of RA No. 9369 (in the 2007 national and local elections) and in the failure to strictly follow the terms of Section 5 in the first automated election, because the automated election took place only in portions of Mindanao. These violations, however, pertained to that first use of automation in the ARMM election, or, if at all, to the failure to use automation in the 2007 elections. They need not affect the automation for the May 10, 2010 election, whose budget for a nationally-implemented automated election Congress specifically provided for despite knowledge that no automation took place in the 2007 election as originally envisioned. From this perspective, pilot testing is an issue that does not need to trigger the Court's *certiorari* powers invoked in the present petition.

3. ID.; ID.; ID.; ID.; ID.; COMELEC'S SHARING OF AUTOMATION RESPONSIBILITIES WITH *SMARTMATIC-TIM* UNDER THE AUTOMATION CONTRACT IS A VIOLATION THAT TRANSGRESSES THE CONSTITUTION, AT THE SAME TIME IT IS AN ACTION PLAINLY OUTSIDE THE CONTEMPLATION OF THE LAW. — Despite the above conclusion, I still take exception to the present implementation of election automation, as it involves another more fundamental violation: the COMELEC, contrary to the Constitution and the law, now shares automation responsibilities with SMARTMATIC-TIM under their Automation Contract. In my view, this is a violation that transgresses the Constitution, at the same time that it is an action plainly outside the contemplation of the law. Based on this characterization, this sharing of responsibility over automation is a grave abuse of discretion on the part of the COMELEC that calls for the active intervention of this Court, pursuant to the second paragraph of Section 1, Article VIII of the Constitution.

4. ID.; ID.; ID.; ID.; ID.; SECTION 26 OF RA NO. 8436 CATEGORICALLY REQUIRED THAT THE AUTOMATION

ELECTRONIC SYSTEM (AES) TO BE INSTALLED SHALL BE UNDER THE COMELEC'S EXCLUSIVE SUPERVISION AND CONTROL. — What the *ponencia* did not sufficiently explain is the COMELEC's intent to introduce a new way of voting that affects not only on the act of casting votes, but also the whole manner by which the counting and canvassing of votes, the transmission and collation of results, and the proclamation of winners are to be undertaken. All these are reflected in detail in the RFP, heretofore mentioned, whose call was for a "*complete systems provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information, campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, etc.) under COMELEC supervision and control . . .*" All these automation activities are intrusions into the traditional COMELEC domain and cannot be simply glossed over. The *ponencia* likewise failed to mention that Section 26 of RA No. 8436 categorically required that the AES to be installed shall be under COMELEC's **exclusive supervision and control**; for this purpose, the law created an **Information Technology Department** (*ITD*) within the COMELEC to carry out the **full administration and implementation of the system**. Underlying the COMELEC's mandate of exclusive supervision and control over the AES in Section 26 is the adoption of measures for the "acquisition, **installation, administration, storage** and **maintenance** of equipment and devices and the promulgation of the necessary rules and regulations for the effective implementation of RA No. 8436".

5. ID.; ID.; ID.; ID.; ID.; THE OPERATIVE WORD USED IN SECTION 26 IS "EXCLUSIVE" WHICH MEANS THAT THE AUTOMATION RESPONSIBILITY GIVEN TO COMELEC CANNOT BE SHARED WITH ANY OTHER ENTITY. — Under Section 26, the mandate of the law is clear — the operative word used is "**exclusive**," which means that the automation responsibility given to the COMELEC cannot be shared with any other entity. Specifically, it means that the COMELEC, through its ITD, shall have full and exclusive control over the entire process of voting, counting, transmission, consolidation and canvassing of votes, including their

performance and completion and the final results. No special interpretative skill is necessary to appreciate the meaning of "exclusive." "Supervision and control," on the other hand, are terms that have practically attained technical legal meaning from jurisprudence. "Control" as the established cases signify means to exercise restraining or directing influence over; to dominate, regulate; hence, to hold from action; to curb; to subject; also to overpower. In any interpretation of Section 26, these are key terms and the standards that should predominate in determining whether this Section has been complied with. The *ponencia*, unfortunately does not appear to have considered this Section at all.

6. ID.; ID.; ID.; ID.; ID.; UNDER ARTICLE 6.3.2 OF RA 8436, THE COMELEC ITSELF ONLY PLAYS AN ASSISTING ROLE TO *SMARTMATIC-TIM* RAISING THE DIRECT IMPLICATION THAT THE LATTER HAS THE LEAD ROLE IN ALL TECHNICAL ACTIVITIES THE ARTICLE MENTIONS. — The contract does not even mention the COMELEC's ITD and how it will interact with SMARTMATIC-TIM in the implementation of the project. The Project Management Office (*PMO*) is specifically mentioned, but only for the purpose of overseeing the project's execution and implementation; it is not considered as an office with authority to speak on technical matters. On technical matters, SMARTMATIC-TIM reigns supreme and the ITD is not even mentioned. Under this situation, the PMO cannot but merely be a monitoring or liaison office, rather than an office supervising or controlling the project for COMELEC. It cannot supervise and control if SMARTMATIC-TIM has the last say on technical matters. In fact, the COMELEC itself, under Article 6.3.2, only plays an assisting role to SMARTMATIC-TIM, thus raising the direct implication that the latter has the lead role in all technical activities this Article mentions. Thus viewed, can the PMO raise any higher than the COMELEC?

7. ID.; ID.; ID.; ID.; ID.; THE SHARED RESPONSIBILITY ARRANGEMENTS, VIEWED FROM ALL SIDES DOES NOT INDICATE COMELEC'S EXCLUSIVE SUPERVISION AND CONTROL OVER THE AUTOMATION PROCESS. — Based on all these considerations drawn from the RFP and the Automation Contract, I cannot escape the conclusion that what exists is not the exclusive supervision and control of the

automation process by the COMELEC, but a shared responsibility between the contracting parties to achieve this end. To point out the obvious, SMARTMATIC-TIM takes care of project management, with the PMO relegated to the blurry role of "overseeing the Project's execution and implementation" and with no other clearly defined role in the automation project. ITD does not even exist insofar as the project documents are concerned. Thus, while the COMELEC retains its traditional role with respect to the running of the election itself, a new election process is in place that is substantially affected by automation. Stated otherwise, while the COMELEC truly controls the BEI, the BOC, and the administrative and adjudicative staff attending to the election process, the voters themselves, and even the BEI and the BOC, must yield to the process that automation calls for, which process is essentially technical and is in the hands of SMARTMATIC-TIM, the provider who wholly supplies the hardware and the software that controls the voting, counting, canvassing, consolidation and transmission of results, and who expressly has control and custody over the election equipment to be used in the voting, with no reserve power whatsoever on the part of the COMELEC in this regard. Not to be forgotten is that SMARTMATIC-TIM also provides the necessary services that run across voting, counting, canvassing, consolidation and transmission activities. These arrangements, viewed from all sides, does not indicate an exclusive supervision and control situation over the automation process. To be exact, they involve shared responsibilities that, however practical they may be from the business and technical perspectives, are arrangements that Philippine law does not allow.

8. ID.; ID.; ID.; ID.; ID.; A CLOSE PERUSAL OF THE AUTOMATION CONTRACT'S SUPPORTING DOCUMENTS INDICATE THAT THE COMELEC HAS EFFECTIVELY HANDED OVER TO *SMARTMATIC* CONTROL OVER THE AES PARTICULARLY THE ACCESS KEYS AND DIGITAL SIGNATURES. — Contrary to the *ponencia's* findings, a close perusal of the automation contract's supporting documents indicate that the COMELEC has in fact effectively handed over to SMARTMATIC control over the AES, particularly with respect to the following quoted technical aspects: a. **Generate and distribute the access keys** for the canvassing equipment and 82,200 optical scanners to be used on election

day; b. Deliver the 82,200 optical scanners to their designated precincts and secure them on site; c. **Prepare the polling places and canvassing centers in all levels to make them fully functional**; and d. Maintain 100% electronic transmission capability on election day (SMARTMATIC-TIM to fill the 25% gap of the country's current 75% network coverage) The access keys are significant because control and possession of these keys translate to the capacity to change election results in any precinct in the country.

9. ID.; ID.; ID.; ID.; ID.; SIGNIFICANCE OF THE ACCESS KEYS AND DIGITAL SIGNATURES. — A noted expert in computer science, Professor Pablo Manalastas of the Ateneo de Manila University Computer Science Department and the University of the Philippines Department of Computer Science explains the significance of the private keys in relation to the digital signatures to be provided by SMARTMATIC-TIM thus: The real key to the sanctity of the ballot is the private keys to be issued by the BEI. Unfortunately, the private key is not private at all. **After collation of votes, the BEI seals its tally with a digital signature using private keys before transmitting the results. These digital signatures would be generated and assigned by SMARTMATIC and or groups authorized by it. SMARTMATIC would have possession of the secret and the public keys of all BEI personnel. The person in possession of the secret key can change the vote of the precinct.** The digital signatures are crucial since Section 22 of the RA No. 8436 as amended provides that "*the election returns transmitted electronically and **digitally signed** shall be considered **as official election results** and shall be used as the **basis for the canvassing of votes** and the **proclamation of a candidate***." Thus, by placing solely in the hands of SMARTMATIC-TIM the discretion to assign the "digital signatures," the COMELEC has effectively surrendered control of the May 10, 2010 elections and violated its constitutional mandate to administer the conduct of elections in the country. Significantly, even the counsel for SMARTMATIC-TIM admitted during the oral arguments that the COMELEC should not have given to SMARTMATIC-TIM the possession and control of the public and private keys.

10. ID.; ID.; ID.; ID.; ID.; UNDER THE PRESENT CONTRACT, THE EXCLUSIVE SUPERVISION AND CONTROL OVER

THE AES THAT THE LAW IN ITS WISDOM HAS PUT IN PLACE, HAS SIMPLY BEEN NEGATED. — Section 26 clearly provides that the ITD shall have exclusive supervision and control of the AES and shall carry out the full administration and implementation of the system. To fully implement this statutory requirement, the COMELEC should have stipulated in the automation contract that it is the ITD, and not SMARTMATIC-TIM, that should be made in charge of the technical aspects of the automated May 10, 2010 elections, consistent with its constitutional mandate as well as Section 26 of RA No. 8436. Under the present contract, the exclusive supervision and control over the AES that the law in its wisdom has put in place, has simply been negated.

11. ID.; ID.; ID.; ID.; ID.; BROAD AS THE POWER OF THE COMELEC MAY BE AS THE INDEPENDENT CONSTITUTIONAL BODY TASKED TO ENFORCE AND ADMINISTER LAWS AND REGULATIONS RELATIVE TO THE CONDUCT OF ELECTIONS, IT HAS NO COMPETENCE TO ACT OUTSIDE THE CONSTITUTION AND ITS SUPPORTING STATUTES. — Broad as the power of the COMELEC may be as the independent constitutional body tasked to enforce and administer all laws and regulations relative to the conduct of elections, it has no competence to act outside the Constitution and its supporting statutes; the scope of its activities is circumscribed by our election laws and by the Constitution. Thus, while we accord the greatest respect to the means adopted by the COMELEC to resolve policy questions on the conduct and regulation of elections and give its actions the greatest presumption of regularity, we must not hesitate to declare its actions grossly abusive of its constitutionally-granted discretion when it acts outside the contemplation of the Constitution and of our laws. In saying this, I have to hark back to where I started in this Dissent. I am not against and would welcome automation undertaken within the legal and constitutional limits. Consequently, while I vote to strike down automation contract between COMELEC and SMARTMATIC-TIM as invalid for violating Section 2, Article IX (C) of the Constitution and Section 26 of RA No. 8436, as amended by RA No. 9369, I would not hesitate to accept an automation arrangement without the legally objectionable features if COMELEC can still work this out for partial or even national implementation in the May 10, 2010 elections.

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D E C I S I O N

VELASCO, JR., *J.*:

In a democratic system of government, the people's voice is sovereign. Corollarily, choosing through the ballots the men and women who are to govern the country is perhaps the highest exercise of democracy. It is thus the interest of the state to insure honest, credible and peaceful elections, where the sanctity of the votes and the secrecy of the ballots are safeguarded, where the will of the electorate is not frustrated or undermined. For when the popular will itself is subverted by election irregularities, then the insidious seeds of doubt are sown and the ideal of a peaceful and smooth transition of power is placed in jeopardy. To automate, thus breaking away from a manual system of election, has been viewed as a significant step towards clean and credible elections, unfettered by the travails of the long wait and cheating that have marked many of our electoral exercises.

The Commission on Elections (Comelec), private respondents, the National Computer Center and other computer wizards are confident that nationwide automated elections can be successfully implemented. Petitioners and some skeptics in the information technology (IT) industry have, however, their reservations, which is quite understandable. To them, the automated election system and the untested technology Comelec has chosen and set in motion are pregnant with risks and could lead to a disastrous failure of elections. Comelec, they allege, would not be up to the challenge. Cheating on a massive scale, but this time facilitated by a machine, is perceived to be a real possibility.

In this petition for *certiorari*, prohibition and *mandamus* with prayer for a restraining order and/or preliminary injunction, petitioners H. Harry L. Roque, Jr., *et al.*, suing as taxpayers and concerned citizens, seek to nullify respondent Comelec's award of the 2010 Elections Automation Project (automation project) to the joint venture of Total Information Management Corporation (TIM) and Smartmatic International Corporation (Smartmatic)[1] and to permanently prohibit the Comelec, TIM and Smartmatic from signing and/or implementing the corresponding contract-award.

By Resolution[2] of July 14, 2009, the Court directed the respondents as well as the University of the Philippines (UP) Computer Center, National Computer Center (NCC) and Information Technology Foundation of the Philippines (Infotech, hereinafter) to submit their collective or separate comments to the petition on or before July 24, 2009. Before any of the comments could actually be filed, Atty. Pete Quirino-Quadra sought leave to intervene. In another resolution, the Court allowed the intervention and admitted the corresponding petition-in-intervention.[3]

On July 29, 2009, the Court heard the principal parties in oral arguments which was followed by the submission of their and the resource persons' instructive, albeit clashing, memoranda. The Senate, through the Senate President, would later join the fray *via* a Motion for Leave to Intervene. In a Resolution of August 25, 2009, the Court admitted the Senate's comment-in-intervention.

From the petition, the separate comments thereon, with their respective annexes, and other pleadings, as well as from admissions during the oral arguments, the Court gathers the following facts:

On December 22, 1997, Congress enacted Republic Act No. (RA) 8436 authorizing the adoption of an automated election

[1] Both corporations are also referred to in the petition and other pleadings as Total Information Management, Inc. and Smartmatic International, Inc.

[2] *Rollo*, pp. 87-A and 87-B.

[3] *Id.* at 576-A. Dated July 28, 2009.

system (**AES**) in the May 11, 1998 national and local elections and onwards. The 1998, 2001, and 2004 national and local polls, however, came and went but purely manual elections were still the order of the day. On January 23, 2007, the amendatory RA 9369[4] was passed authorizing anew the Comelec to use an AES. Of particular relevance are Sections 6 and 10 of RA 9369 — originally Secs. 5 and 8, respectively of RA 8436, as amended — each defining Comelec's specific mandates insofar as automated elections are concerned. The AES was not utilized in the May 10, 2000 elections, as funds were not appropriated for that purpose by Congress and due to time constraints.

RA 9369 calls for the creation of the Comelec Advisory Council[5] (CAC). CAC is to recommend, among other functions, the most appropriate, applicable and cost-effective technology to be applied to the AES.[6] To be created by Comelec too is the Technical Evaluation Committee (TEC)[7] which is tasked to certify, through an established international certification committee, not later than three months before the elections, by categorically stating that the AES, inclusive of its hardware and software components, is operating properly and accurately based on defined and documented standards.[8]

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[4] An Act Amending [RA] 8436, entitled "An Act Authorizing the [Comelec] to Use Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National or Local Electoral Exercises, to Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending for the Purpose Batas Pambansa Blg. 881, as Amended, [RA] 7166 and Other Related Election Laws, Providing Funds Therefor and For Other Purposes."

[5] Composed of, among others, the Chairperson of the Commission on Information and Communications Technology (CICT), one member each from the Dept. of Education and the Dept. of Science and Technology and three members representing ICT professional organizations.

[6] Sec. 9.

[7] It shall be composed of a representative each from the Commission, CITC and DOST.

[8] Sec. 11.

In August 2008, Comelec managed to automate the regional polls in the Autonomous Region of Muslim Mindanao[9] (ARMM), using direct recording electronics (DRE) technology[10] in the province of Maguindanao; and the optical mark reader/recording (OMR) system, particularly the Central Count Optical Scan (CCOS),[11] in the rest of ARMM.[12] What scores hailed as successful automated ARMM 2008 elections paved the way for Comelec, with some prodding from senators,[13] to prepare for a nationwide computerized run for the 2010 national/local polls, with the many lessons learned from the ARMM experience influencing, according to the NCC, the technology selection for the 2010 automated elections.[14]

Accordingly, in early March 2009, the Comelec released the *Request for Proposal* **(RFP),** also known as *Terms of Reference* (TOR), for the nationwide automation of the voting, counting, transmission, consolidation and canvassing of votes for the May 10, 2010 Synchronized National and Local Elections. What is referred to also in the RFP and other contract documents as the 2010 Elections Automation Project (Automation Project) consists of three elaborate components, as follows:

Component 1: Paper-Based AES.[15] 1-A. Election Management System (EMS); 1-B Precinct-Count Optic Scan

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[9] Composed of the cities and municipalities in the provinces of Isabela (except Isabela City), Sulu, Tawi-Tawi, Maguindanao (except Cotabato City) and Lanao del Sur.

[10] DRE is a technology wherein a vote is cast directly on a machine by the use of a touch screen, touchpad, keypad or other device and the machine records the individual votes and calculates the total votes electronically.

[11] CCOS means a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted, is located in every voting center.

[12] *Rollo*, p. 874. Public Respondents' Memorandum.

[13] Senate Resolutions 96 and 567, s. of 2008, authored by Senators Gordon and Villar, respectively; *see* Annexes 8 and 9 of private respondents' Memorandum.

[14] Memorandum of the NCC, p. 23.

[15] Sec. 2 of RA 9369 defines "paper-based election system" as a type of automated election system that uses paper ballots; records and counts votes;

(PCOS) [16] System and 1-C. Consolidation/Canvassing System (CCS);

Component 2: Provision for Electronic Transmission of Election Results using Public Telecommunications Network; and

Component 3: Overall Project Management

And obviously to address the possibility of systems failure, the RFP required interested bidders to submit, among other things: a continuity plan[17] and a back-up plan.[18]

Under the two-envelope system designed under the RFP,[19] each participating bidder shall submit, as part of its bid, an *Eligibility Envelope*[20] that should *inter alia* establish the bidder's eligibility to bid. On the other hand, the second envelope, or the *Bid Envelope* itself, shall contain two envelopes that, in turn, shall contain the technical proposal and the financial proposal, respectively.[21]

Subsequently, the Comelec Special Bids and Awards Committee (SBAC), earlier constituted purposely for the aforesaid project,

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and tabulates, consolidates/canvasses and transmits electronically the results of the vote counts.

[16] The Glossary of Terms of the RFP defines PCOS as referring to a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted, is located in every precinct.

[17] Sec. 2 (10) of RA 8436, as amended, defines "continuity plan" as a "list of contingency measures and the policies for activation of such, that are put in place to ensure continuous operation of the AES."

[18] The formulation of a continuity plan is a requirement under Sec. 9 of RA 8436, the activation of which shall be undertaken in the presence of political parties' representatives and the citizens arm of the Comelec.

[19] Terms, Conditions and Instruction to Bidders, pp. 45-50 of the RFP.

[20] Contains what the RFP refers to as Class "A" documents, referring to legal, technical and financial documents; and Class "B" documents, among which is a valid JVA, in case of joint venture.

[21] Item IX, par. 3.3 of the RFP.

caused the publication in different newspapers of the *Invitation to Apply for Eligibility and to Bid*[22] for the procurement of goods and services to be used in the automation project.[23] Meanwhile, Congress enacted RA 9525 appropriating some PhP 11.3 billion as supplemental budget for the May 10, 2010 automated national and local elections.

Of the ten (10) invitation-responding consortia which obtained the bid documents, only seven (7) submitted sealed applications for eligibility and bids[24] which, per Bid Bulletin No. 24, were to be opened on a pre-set date, following the convening of the pre-bid conference. Under the RFP, among those eligible to participate in the bidding are manufacturers, suppliers and/or distributors forming themselves into a joint venture. A *joint venture* is defined *as a group of two or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract*.[25]

Among the submitted bids was that of the joint venture (JV) of TIM and Smartmatic, the former incorporated under the Corporation Code of the Philippines. Smartmatic, on the other hand, was organized under the laws of Barbados.[26] For a stated amount, said JV proposed to undertake the whole automation project, inclusive of the delivery of 82,200 PCOS machines. After the conclusion of the eligibility evaluation process, only three consortia[27] were found and thus declared as eligible. Further on, following the opening of the passing bidders' *Bid Envelope* and evaluating the technical and financial proposals therein contained, the SBAC, per its Res. No. 09-001, s.-2009, declared the above-stated bid of the JV of TIM-Smartmatic as the *single*

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[22] *Rollo*, p. 399. Per Certification of the Director of the Comelec's Education & Information Department, Annex "4" of public respondents' Comment.

[23] Published on March 14-16, 2009.

[24] *Rollo*, p. 295. Public respondents' Comment on the Petition, p. 7.

[25] Par. 2.2.4. of Part IX (B) of the RFP.

[26] Smartmatic is a subsidiary of Smartmatic International Holding, B.V. of Netherlands.

[27] TIM-Smartmatic, Indra Consortium and Gilat Consortium.

complying calculated bid.[28] As required by the RFP, the bid envelope contained an outline of the joint venture's back-up and continuity or contingency plans,[29] in case of a systems breakdown or any such eventuality which shall result in the delay, obstruction or nonperformance of the electoral process.

After declaring TIM-Smartmatic as the best complying bidder, the SBAC then directed the joint venture to undertake post-qualification screening, and its PCOS prototype machines — the Smarmatic Auditable Electronic System (**SAES**) 1800 — to undergo end-to-end[30] testing to determine compliance with the pre-set criteria.

In its Memorandum of June 01, 2009, on the Subject: *Systems Evaluation Consolidated Report and Status Report on the Post-Qualification Evaluation Procedures,* the SBAC Technical Working Group (TWG) stated that it was undertaking a 4-day (May 27 to May 30, 2009) test evaluation of TIM and Smartmatic's proposed PCOS project machines. Its conclusion: "The demo systems presented **PASSED** all tests as required in the 26-item criteria specified in the [RFP]" with 100% accuracy rating.[31] The TWG also validated the eligibility, and technical and financial qualifications of the TIM-Smartmatic joint venture.

On June 9, 2009, Comelec, upon the recommendation of its SBAC, the CAC and other stakeholders, issued Resolution No. (Res.) 8608[32] authorizing the SBAC to issue, subject to well-defined conditions, the notice of award and notice to proceed in favor of the winning joint venture.

Soon after, TIM wrote Comelec expressing its desire to quit the JV partnership. In time, however, the parties were able to

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[28] *Rollo,* pp. 417-431. Omnibus SBAC Res. 09-001, Annex "6", Public respondents' comment.

[29] *Id.* at 844-848. Annex "10" of private respondents' Memorandum.

[30] Testing of the entire system in an actual simulated election.

[31] Annex "3", TIM-Smartmatic Comment.

[32] *Rollo,* p. 468. Annex "10", public respondents' Comment.

patch up what TIM earlier described as irreconcilable differences between partners.

What followed was that TIM and Smartmatic, pursuant to the Joint Venture Agreement (JVA),[33] caused the incorporation of a joint venture corporation (JVC) that would enter into a contract with the Comelec. On July 8, 2009, the Securities and Exchange Commission issued a certificate of incorporation in favor of Smartmatic TIM Corporation. Two days after, or on July 10, 2009, Comelec and Smartmatic TIM Corporation, as provider, executed a contract[34] for the lease of goods and services under the contract for the contract amount of PhP 7,191,484,739.48, payable as the "Goods and Services are delivered and/or progress is made in accordance [with pre-set] Schedule of Payments."[35] On the same date, a *Notice to Proceed*[36] was sent to, and received by, Smartmatic TIM Corporation.

Meanwhile, or on July 9, 2009, petitioners interposed the instant recourse which, for all intents and purposes, impugns the validity and seeks to nullify the July 10, 2009 Comelec-Smartmatic-TIM Corporation automation contract adverted to. Among others, petitioners pray that respondents be permanently enjoined from implementing the automation project on the submission that:

> PUBLIC RESPONDENTS COMELEC AND COMELEC-SBAC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AWARDING THE 2010 ELECTIONS AUTOMATION PROJECT TO PRIVATE RESPONDENTS TIM AND SMARTMATIC FOR THE FOLLOWING REASONS:
>
> > x x x COMELEC DID NOT CONDUCT ANY PILOT TESTING OF THE x x x PCOS MACHINES OFFERED BY PRIVATE RESPONDENTS SMARTMATIC AND TIM, IN VIOLATION OF [RA] 8436 (AS AMENDED BY [RA] 9369).

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[33] *Id.* at 263-281. Annex "2", Smartmatic TIM Corp.'s Comment.

[34] Denominated as the *Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections*.

[35] Par. 4.1.

[36] *Rollo*, p. 548. Annex "14", public respondents' Comment.

THE [PCOS] MACHINES [THUS] OFFERED BY PRIVATE RESPONDENTS x x x DO NOT SATISFY THE *MINIMUM SYSTEM CAPABILITIES* SET BY [RA] NO. 8436 (AS AMENDED BY [RA] 9369).

PRIVATE RESPONDENTS x x x DID NOT SUBMIT THE REQUIRED DOCUMENTS DURING THE BIDDING PROCESS THAT SHOULD ESTABLISH THE DUE EXISTENCE, COMPOSITION, AND SCOPE OF THEIR JOINT VENTURE, IN VIOLATION OF THE SUPREME COURT'S HOLDING IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC (G.R. No. 159139, Jan. 13, 2004*).

THERE WAS NO *VALID* JOINT VENTURE AGREEMENT [JVA] BETWEEN PRIVATE RESPONDENTS SMARTMATIC AND TIM DURING THE BIDDING, IN VIOLATION OF THE SUPREME COURT'S HOLDING IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC* x x x WHICH REQUIRES A JOINT VENTURE TO INCLUDE A COPY OF ITS [JVA] DURING THE BIDDING.

THE ALLEGED JOINT VENTURE COMPOSED OF PRIVATE RESPONDENTS SMARTMATIC AND TIM, DOES NOT SATISFY THE SUPREME COURT'S DEFINITION OF A "JOINT VENTURE" IN *INFORMATION TECHNOLOGY FOUNDATION OF THE PHILIPPINES vs. COMELEC* x x x WHICH "REQUIRES A COMMUNITY OF INTEREST IN THE PERFORMANCE OF THE SUBJECT MATTER."

Filed as it was before contract signing, the petition understandably did not implead Smartmatic TIM Corporation, doubtless an indispensable party to these proceedings, an incident that did not escape Comelec's notice.[37]

As a preliminary counterpoint, either or both public and private respondents question the legal standing or *locus standi* of petitioners, noting in this regard that the petition did not even raise an issue of transcendental importance, let alone a constitutional question.

As an additional point, respondents also urge the dismissal of the petition on the ground of prematurity, petitioners having

[37] *Id.* at 887. Memorandum of public respondents, p. 23.

failed to avail themselves of the otherwise mandatory built-in grievance mechanism under Sec. 55 in relation to Sec. 58 of RA 9184, also known as the *Government Procurement Reform Act*, as shall be discussed shortly.

PROCEDURAL GROUNDS

The Court is not disposed to dismiss the petition on procedural grounds advanced by respondents.

***Locus Standi* and Prematurity**

It is true, as postulated, that to have standing, one must, as a rule, establish having suffered some actual or threatened injury as a result of the alleged illegal government conduct; that the injury is fairly traceable to the challenged action; and that the injury is likely to be redressed by a favorable action.[38] The prescription on standing, however, is a matter of procedure. Hence, it may be relaxed, as the Court has often relaxed the rule for non-traditional plaintiffs, like ordinary citizens and taxpayers, when the public interest so requires, such as when the matter is of transcendental importance, of overarching significance to society, or of paramount public interest.[39] As we wrote in *Chavez v. PCGG*,[40] where issues of public importance are presented, there is no necessity to show that the suitor has experienced or is in actual danger of suffering direct and personal injury as the requisite injury is assumed.

Petitioners' counsel, when queried, hedged on what specific constitutional proscriptions or concepts had been infringed by the award of the subject automation project to Smartmatic TIM Corporation, although he was heard to say that "*our objection to the system is anchored on the Constitution itself a violation*

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[38] *Gonzales v. Narvasa*, G.R. No. 140835, August 14, 2000, 337 SCRA 733, 740.

[39] *Tatad v. Secretary of the Department of Energy*, G.R. Nos. 124360 & 127867, November 5, 1997, 281 SCRA 330, 349; *De Guia v. COMELEC*, G.R. No. 104712, May 6, 1992, 208 SCRA 420, 422.

[40] G.R. No. 130716, December 9, 1998, 299 SCRA 744, cited in *Chavez v. NHA, infra*.

[sic] *of secrecy of voting and the sanctity of the ballot*."[41] Petitioners also depicted the covering automation contract as constituting an abdication by the Comelec of its election-related mandate under the Constitution, which is to enforce and administer all laws relative to the conduct of elections. Worse still, according to the petitioners, the abdication, with its anti-dummy dimension, is in favor of a foreign corporation that will be providing the hardware and software requirements.[42] And when pressed further, petitioners came out with the observation that, owing in part to the sheer length of the ballot, the PCOS would not comply with Art. V, Sec. 2 of the Constitution[43] prescribing secrecy of voting and sanctity of the ballot.[44]

There is no doubt in our mind, however, about the compelling significance and the transcending public importance of the one issue underpinning this petition: the success — and the far-reaching grim implications of the failure — of the nationwide automation project that will be implemented *via* the challenged automation contract.

The doctrinal formulation may vary, but the bottom line is that the Court may except a particular case from the operations of its rules when the demands of justice so require.[45] Put a bit differently, rules of procedure are merely tools designed to facilitate the attainment of justice.[46] Accordingly, technicalities and procedural barriers should not be allowed to stand in the way, if the ends of justice would not be subserved by a rigid

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[41] TSN of the oral arguments, p. 202.

[42] *Id.* at 209.

[43] Sec. 2. The Congress shall provide a system for securing the secrecy and sanctity of the ballot x x x.

[44] TSN of the oral arguments, p. 76.

[45] *Chuidian v. Sandiganbayan*, G.R. Nos. 156383 & 160723, July 31, 2006, 497 SCRA 327; citing *Ginete v. CA*, G.R. No. 127596, September 24, 1998, 296 SCRA 38.

[46] *Redeña v. Court of Appeals*, G.R. No. 146611, February 6, 2007, 514 SCRA 389.

adherence to the rules of procedure.[47] This postulate on procedural technicalities applies to matters of *locus standi* and the presently invoked principle of hierarchy of courts, which discourages direct resort to the Court if the desired redress is within the competence of lower courts to grant. The policy on the hierarchy of courts, which petitioners indeed failed to observe, is not an iron-clad rule. For indeed the Court has full discretionary power to take cognizance and assume jurisdiction of special civil actions for *certiorari* and *mandamus* filed directly with it for exceptionally compelling reasons[48] or if warranted by the nature of the issues clearly and specifically raised in the petition.[49]

The exceptions that justify a deviation from the policy on hierarchy appear to obtain under the premises. The Court will for the nonce thus turn a blind eye to the judicial structure intended, first and foremost, to provide an orderly dispensation of justice.

Hierarchy of Courts

At this stage, we shall dispose of another peripheral issue before plunging into the core substantive issues tendered in this petition.

Respondents contend that petitioners should have availed themselves of the otherwise mandatory protest mechanism set forth in Sections 55 and 58 of the procurement law (RA 9184) and the counterpart provisions found in its Implementing Rules and Regulations (IRR)-A before seeking judicial remedy. Insofar as relevant, Sec. 55 of RA 9184 provides that decisions of the bids and awards committee (BAC) in all stages of procurement may be protested, via a "*verified position paper*," to the head of the procuring agency. On the other hand, the succeeding

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[47] *Marabur v. Comelec*, G.R. No. 169513, February 26, 2007, 516 SCRA 696.

[48] *Chavez v. National Housing Authority*, G.R. No. 164527, August 15, 2007, 530 SCRA 235.

[49] *Cabarles v. Maceda*, G.R. No. 161330, February 20, 2007, 516 SCRA 303.

Sec. 58 states that court action may be resorted to only after the protest contemplated in Sec. 55 shall have been completed. Petitioners except. As argued, the requirement to comply with the protest mechanism, contrary to what may have been suggested in *Infotech*, is imposed on the bidders.[50]

Petitioners' position is correct. As a matter of common sense, only a bidder is entitled to receive a notice of the protested BAC action. Only a losing bidder would be aggrieved by, and *ergo* would have the personality to challenge, such action. This conclusion finds adequate support from the ensuing provisions of the aforesaid IRR-A:

55.2. The verified position paper shall contain the following documents:

a) The name of bidder;

b) The office address of the bidder x x x.

SUBSTANTIVE ISSUES

We now turn to the central issues tendered in the petition which, in terms of subject matter, revolved around two concerns, *viz*: (1) the Joint Venture Agreement (JVA) of Smartmatic and TIM; and (2) the PCOS machines to be used. Petitioners veritably introduced another issue during the oral arguments, as amplified in their memorandum, *i.e*. the constitutionality and statutory flaw of the automation contract itself. The petition-in-intervention confined itself to certain features of the PCOS machines.

The Joint Venture Agreement: Its Existence and Submission

The issue respecting the existence and submission of the TIM-Smartmatic JVA does not require an extended disquisition, as repairing to the records would readily provide a satisfactory answer. We note in fact that the petitioners do not appear to be earnestly pressing the said issue anymore, as demonstrated by their counsel's practically cavalier discussion thereof during the oral argument. When reminded, for instance, of private respondents' insistence on having in fact submitted their JVA

[50] TSN, p. 38.

dated April 23, 2009, petitioners' counsel responded as follows: "*We knew your honor that there was, in fact, a joint venture agreement filed. However, because of the belated discovery that [there] were irreconcilable differences, we then made a view that this joint venture agreement was a sham, at best pro forma because it did not contain all the required stipulations in order to evidence unity of interest* x x x."[51]

Indeed, the records belie petitioners' initial posture that TIM and Smartmatic, as joint venture partners, did not include in their submitted eligibility envelope a copy of their JVA. The SBAC's *Post Qualification Evaluation Report (Eligibility)* on TIM-Smartmatic, on page 10, shows the following entry: "*Valid Joint Venture Agreement, stating among things, that the members are jointly and severally liable for the whole obligation, in case of joint venture — Documents verified compliance*."[52]

Contrary to what the petitioners posit, the duly notarized JVA, as couched, explained the nature and the limited purpose[53] of the joint venture and expressly defined, among other things, the composition, scope, and the 60-40 capital structure of the aggroupment.[54] The JVA also contains provisions on the

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[51] TSN of Oral Arguments,Vol. I, p. 64.

[52] *Rollo*, pp. 436-467. Annex "8", public respondents' Comment.

[53] The 5th and 6th preambulatory clauses of the JVA respectively provide:

WHEREAS, Tim and Smartmatic have agreed to jointly and severally submit, as an incorporated joint venture, a bid to the COMELEC for the automation Project pursuant to the rules and terms set forth in the Request for Proposal;

WHEREAS, in the event that the bid submitted by TIM and SMARTMATIC is declared to be the winning bid, TIM and SMARTMATIC have agreed to cause the incorporation of a joint venture corporation (the "JVC") which will enter into a contract with the COMELEC for the Automation Project.

[54] 2.1 In the event that COMELEC declares the bid tendered by TIM and SMARTMATIC to be the winning bid for the Automation Project, the parties hereto shall incorporate or cause to be incorporated, the JVC which shall be named "TIM SMARTMATIC CORPRATION" (sic) or any other acceptable name . . . which may be allowed by the SEC.

2.2. The JVC shall be the corporate vehicle through which the joint venture . . . shall be carried out x x x. The JVC shall be the entity which shall enter

management[55] and division of profits.[56] Article 3[57] of the JVA delineates the respective participations and responsibilities of the joint venture partners in the automation project.

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into a contract with the COMELEC for the Automation Project of the 2010 National Elections.

2.3 The purpose of the JVC shall be to carry out and perform jointly, severally and solidarily the obligations of TIM and SMARTMATIC arising from being declared the winning bidder in the public bidding for the Automation Project which obligations are spelled out in the [RFP] x x x

2.4 The authorized capital stock of the JVC is initially fixed herein at x x x PHP1,300,000,000.00 divided into Pesos: One Billion and Three Hundred Million shares x x x; Provided that the authorized capital stock of the JVC may be increased when so warranted x x x. 2.5 The capital contributions of the parties hereto to the JVC shall be as follows: a. TIM by itself or thorough its Philippine subsidiary – sixty percent (60%) of the shares to be issued by the JVC; b. SMATMATIC, by itself or through its Philippine subsidiary — forty percent (40%) of the shares to be issued by the JVC. x x x

[55] 4.1 For as long as TIM, either by itself or through its subsidiary, owns and holds 60% of the outstanding capital stock of the JVC and entitled to vote, TIM shall be entitled to nominate and elect 60% of the Board of Directors of the JVC. For as long as SMARTMATIC, (sic) either by itself or through its Philippine subsidiary, owns and holds 40% of the outstanding capital stock of the JVC and entitled to vote, SMARTMATIC shall be entitled to nominate and elect 40% of the Board of Directors of the JVC

[56] 7.1 The JVC will distribute its profits to the Shareholders to the extent determined by the Board of Directors xxx after taking into account the financial requirements of the JVC with respect to the working capital. xxx

[57] 3.1 For purposes of the Automation Project, TIM may contribute to the JVC and shall be responsible for the following: a. the value-added services pertaining or related to canvassing units, systems integration, transmission and such other services as required by the Automation Project and as indicated in the [RFP]; b. services pertaining or related to logistics, deployment and manpower; c. hardware, software, ballot paper, consumables and such other services as may be requested by SMARTMATIC; and d. local support staff as may be required under the circumstances;

3.2 For purposes of the Automation Project, SMARTMATIC shall contribute to the JVC and shall be responsible for the following: a. the development, manufacture and/or supply of EVMs, other machines and equipment, software, technology and systems; b. overall project management as required by the Automation Project and as indicated in the [RFP] and c. any other activity not expressly written in this Agreement or assigned to TIM;

x x x x x x x x x

Given the foregoing perspective, the Court is at a loss to understand how petitioners can assert that the Smartmatic-TIM consortium has failed to prove its joint venture existence and/or to submit evidence as would enable the Comelec to know such items as who it is dealing with, which between the partners has control over the decision-making process, the amount of investment to be contributed by each partner, the parties' shares in the profits and like details. Had petitioners only bothered to undertake the usual due diligence that comes with good judgment and examined the eligibility envelope of the Smartmatic-TIM joint venture, they would have discovered that their challenge to and arguments against the joint venture and its JVA have really no factual basis.

It may be, as petitioners observed, that the TIM-Smartmatic joint venture remained an unincorporated aggroupment during the bid-opening and evaluation stages. It ought to be stressed, however, that the fact of non-incorporation was without a vitiating effect on the validity of the tender offers. For the bidding ground rules, as spelled out primarily in the RFP and the clarificatory bid bulletins, does not require, for bidding purposes, that there be an incorporation of the bidding joint ventures or consortiums. In fact, Bid Bulletin Nos. 19 and 20 recognize the existence and the acceptability of proposals of unincorporated joint ventures. In response to a poser, for example, regarding the 60% Filipino ownership requirement in a joint venture arrangement, the SBAC, in its Bid Bulletin No. 22, stated: "*In an* ***unincorporated joint venture****, determination of the required Filipino participation may be made by examining the terms and conditions of the [JVA] and other supporting financial documents submitted by the joint venture*." (Emphasis ours.) Petitioners, to be sure, have not shown that incorporation is part of the pass/fail criteria used in determining eligibility.

3.4 In the event the [financial and capital contribution] sources mentioned in the preceding Article 3,3 (b) or (c) are insufficient to meet the financial requirements of the JVC, the parties shall bear the responsibility of supporting or securing such financial requirements in proportion to their respective shareholdings x x x.

Petitioners have made much of the Court's ruling in *Information Technology Foundation of the Philippines [Infotech] v. Comelec*,[58] arguing in relation thereto that the partnership of Smartmatic and TIM does not meet the Court's definition of a *joint venture* which requires "*community of interest in the performance of the subject matter.*"

Petitioners' invocation of *Infotech* is utterly misplaced. Albeit *Infotech* and this case are both about modernizing the election process and bidding joint ventures, the relevant parallelism ends there. Cast as they are against dissimilar factual milieu, one cannot plausibly set *Infotech* side with and contextually apply to this case the *ratio* of *Infotech*. Suffice it to delve on the most glaring of differences. In *Infotech*, the winning bid pertained to the consortium of Mega Pacific, a purported joint venture. Extant records, however, do not show the formation of such joint venture, let alone its composition. To borrow from the *ponencia* of then Justice, later Chief Justice, Artemio Panganiban, "*there is no sign whatsoever of any [JVA], consortium agreement [or] memorandum agreement* x x x *executed among the members of the purported consortium*."[59] There was in fine no evidence to show that the alleged joint venture partners agreed to constitute themselves into a single entity solidarily responsible for the entirety of the automation contract. Unlike the purported Mega Pacific consortium in *Infotech*, the existence in this case of the bidding joint venture of Smartmatic and TIM is properly documented and spread all over the bid documents. And to stress, TIM and Smartmatic, in their JVA, unequivocally agreed between themselves to perform their respective undertakings. And over and beyond their commitments to each other, they undertook to incorporate, if called for by the bidding results, a JVC that shall be solidarily liable with them for any actionable breach of the automation contract.

In *Infotech*, the Court chastised the Comelec for dealing with an entity, the full identity of which the poll body knew nothing

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[58] G.R. No. 159139, January 13, 2004, 419 SCRA 146.

[59] *Id.* at 167.

about. Taking a cue from this holding, petitioners tag the TIM-Smartmatic JVA as flawed and as one that would leave the Comelec "hanging" for the non-inclusion, as members of the joint venture, of three IT providers. The three referred to are Jarltech International, Inc. (Jarltech), a subsidiary of Smartmatic that manufactures the Smartmatic voting machines; Dominion Voting Systems (Domino), the inventor of said PCOS machines; and 2GO Transportation System Corporation (2GO), the subcontractor responsible for the distribution of the PCOS machines throughout the country.

Petitioners' beef against the TIM-Smartmatic JVA is untenable. First off, the Comelec knows the very entities whom they are dealing with, which it can hold solidary liable under the automation contract, should there be contract violation. Secondly, there is no requirement under either RA 8436, as amended, or the RFP, that all the suppliers, manufacturers or distributors involved in the transaction should be part of the joint venture. On the contrary, the Instruction to Bidders — as petitioners themselves admit[60] — allows the bidder to subcontract portions of the goods or services under the automation project.[61]

To digress a bit, petitioners have insisted on the non-existence of a *bona fide* JVA between TIM and Smartmatic. Failing to gain traction for their indefensible posture, they would thrust on the Court the notion of an invalid joint venture due to the non-inclusion of more companies in the existing TIM-Smartmatic joint venture. The irony is not lost on the Court.

This brings us to the twin technical issues tendered herein bearing on the PCOS machines of Smartmatic.

At its most basic, the petition ascribes grave abuse of discretion to the Comelec for, among other things, awarding the automation

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[60] TSN of the oral arguments, p. 119.

[61] Sec. 7.1 of the ITB reads: "The bidder shall specify in its Bid all portions of the Goods and Services that will be subcontracted, if any, including the entities to whom each portion will be subcontracted to xxx. Subcontracting of any portion shall not relieve the Bidder from any liability or obligation that may arise from its performance."

project in violation of RA 8436, as amended. Following their line, no pilot test of the PCOS technology Smartmatic-TIM offered has been undertaken; hence, the Comelec cannot conduct a nationwide automation of the 2010 polls using the machines thus offered. Hence, the contract award to Smartmatic-TIM with their untested PCOS machines violated RA 8436, as amended by RA 9369, which mandates that with respect to the May 2010 elections and onwards, the system procured must have been piloted in at least 12 areas referred to in Sec. 6 of RA 8436, as amended. What is more, petitioners assert, private respondents' PCOS machines do not satisfy the minimum system capabilities set by the same law envisaged to ensure transparent and credible voting, counting and canvassing of votes. And as earlier narrated, petitioners would subsequently add the abdication angle in their bid to nullify the automation contract.

Pilot Testing Not Necessary

Disagreeing, as to be expected, private respondents maintain that there is nothing in the applicable law requiring, as a pre-requisite for the 2010 election automation project award, that the prevailing bidder's automation system, the PCOS in this case, be subjected to pilot testing. Comelec echoes its co-respondents' stance on pilot testing, with the added observation that nowhere in the statutory provision relied upon are the words "pilot testing" used.[62] The Senate's position and its supporting arguments match those of private respondents.

The respondents' thesis on pilot testing and the logic holding it together are well taken. There can be no argument about the phrase "pilot test" not being found in the law. But does it necessarily follow that a pilot test is absolutely not contemplated in the law? We repair to the statutory provision petitioners cited as requiring a pilot run, referring to Sec. 6 of RA 8436, as amended by RA 9369, reading as follows:

Sec. 5. *Authority to use an Automated Election System*. — To carry out the above stated-policy, the [Comelec], x x x is hereby

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[62] *Rollo*, p. 310. Public respondents' Comment, p. 22.

authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: *Provided*, **that for the regular national and local elections, which shall be held immediately after the effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas, and Mindanao to be chosen by the [Comelec]**: *Provided, further*, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 elections shall not be chosen. *Provided, finally*, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented. (Emphasis and underscoring added.)

RA 9369, which envisages an AES, be it paper-based or direct-recording electronic, took effect in the second week of February 2007 or thereabout.[63] The "*regular national and local elections"* referred to after the "*effectivity of this Act*" can be no other than the May 2007 regular elections, during which time the AES shall, as the law is worded, be used in at least two highly urbanized cities and provinces in Luzon, Visayas and Mindanao. The Court takes judicial notice that the May 2007 elections did not deploy AES, evidently due to the mix of time and funding constraints.

To the petitioners, the underscored portion of the aforequoted Sec. 6 of RA 8436 is the pilot-testing provision that Comelec failed to observe.

We are not persuaded.

From the practical viewpoint, the pilot testing of the technology in question in an actual, scheduled electoral exercise under harsh

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[63] Approved on January 23, 2007, RA 9369 provides in its Sec. 47 that it shall take effect 15 days after its publication in a newspaper of general circulation.

conditions would have been the ideal norm in computerized system implementation. The underscored proviso of Sec. 6 of RA 8436 is not, however, an authority for the proposition that the pilot testing of the PCOS in the 2007 national elections in the areas thus specified is an absolute must for the machines' use in the 2010 national/local elections. The Court can concede that said proviso, with respect to the May 2007 elections, commands the Comelec to automate in at least 12 defined areas of the country. But the bottom line is that the required 2007 automation, be it viewed in the concept of a pilot test or not, is not a mandatory requirement for the choice of system in, or a prerequisite for, the full automation of the May 2010 elections.

As may be noted, Sec. 6 of RA 8436 may be broken into three essential parts, the first partaking of the nature of a general policy declaration: that Comelec is authorized to automate the entire elections. The second part states that for the regular national and local elections that shall be held in May 2007, Comelec shall use the AES, with an option, however, to undertake automation, regardless of the technology to be selected, in a limited area or, to be more precise, in at least two highly urbanized cities and two provinces each in Luzon, Visayas, and Mindanao to be chosen by the Comelec. On the other hand, the last part, phrased *sans* reference to the May 2007 elections, commands thus: "*[I]n succeeding regular national or local elections, the [automated election system] shall be implemented*." Taken in its proper context, the last part is indicative of the legislative intent for the May 2010 electoral exercise to be fully automated, regardless of whether or not pilot testing was run in the 2007 polls.

To argue that pilot testing is a condition precedent to a full automation in 2010 would doubtless undermine the purpose of RA 9369. For, as aptly observed during the oral arguments, if there was no political exercise in May 2007, the country would theoretically be barred forever from having full automation.

Sec. 6 of the amended RA 8436, as couched, therefore, unmistakably conveys the idea of unconditional full automation in the 2010 elections. A construal making pilot testing of the AES a prerequisite or condition *sine qua non* to putting the

system in operation in the 2010 elections is tantamount to reading into said section something beyond the clear intention of Congress, as expressed in the provision itself. We reproduce with approval the following excerpts from the comment of the Senate itself:

> The plain wordings of RA 9369 (that amended RA 8436) commands that the 2010 elections shall be fully automated, and such full automation is not conditioned on "pilot testing" in the May 2007 elections. Congress merely gave COMELEC the flexibility to partially use the AES in some parts of the country for the May 2007 elections.[64]

Lest it be overlooked, an AES is not synonymous to and ought not to be confused with the PCOS. Sec. 2(a) of RA 8436, as amended, defines an AES as "*a system using appropriate technology which has been demonstrated in the voting, counting, consolidating, canvassing and transmission of election results, and other electoral processes*." On the other hand, PCOS refers to a technology wherein an optical ballot scanner, into which optical scan paper ballots marked by hand by the voter are inserted to be counted.[65] What may reasonably be deduced from these definitions is that PCOS is merely one of several automated voting, counting or canvassing technologies coming within the term AES, implying in turn that the automated election system or technology that the Comelec shall adopt in future elections need not, as a matter of mandatory arrangement, be piloted in the adverted two highly urbanized cities and provinces.

In perspective, what may be taken as mandatory prerequisite for the full automation of the 2010 regular national/ local elections is that the system to be procured for that exercise be a technology tested either here or abroad. The ensuing Section 8 of RA 8436, as amended, says so.

> SEC 12. *Procurement of Equipment and Materials*. — To achieve the purpose of this Act, the Commission is authorized to procure, x x x, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other services, from

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[64] The Senate's Comment-in-Intervention, p. 4.

[65] Annex "A" [Glossary of Terms] of the RFP.

local or foreign sources x x x. **With respect to the May 10, 2010 elections and succeeding electoral exercises**, **the system procured must have demonstrated capability and been successfully used in prior electoral exercise here or abroad**. **Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.** (Emphasis supplied).

While the underscored portion makes reference to a "2007 pilot exercise," what it really exacts is that, for the automation of the May 2010 and subsequent elections, the PCOS or any AES to be procured must have demonstrated its capability and success in either a local or a foreign electoral exercise. And as expressly declared by the provision, participation in the 2007 electoral exercise is not a guarantee nor is it conclusive of the system's fitness. In this regard, the Court is inclined to agree with private respondents' interpretation of the underscored portion in question: "The provision clearly conveys that the [AES] to be used in the 2010 elections need not have been used in the 2007 elections, and that the demonstration of its capability need not be in a previous Philippine election. Demonstration of the success and capability of the PCOS may be in an electoral exercise in a foreign jurisdiction."[66] As determined by the Comelec, the PCOS system had been successfully deployed in previous electoral exercises in foreign countries, such as Ontario, Canada; and New York, USA,[67] albeit Smartmatic was not necessarily the system provider. But then, RA 9369 does not call for the winning bidder of the 2010 automation project and the deploying entity/provider in the foreign electoral exercise to be one and the same entity. Neither does the law incidentally require that the system be first used in an archipelagic country or with a topography or a voting population similar to or approximating that of the Philippines.

At any event, any lingering doubt on the issue of whether or not full automation of the 2010 regular elections can validly proceed without a pilot run of the AES should be put to rest

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[66] *Rollo*, 174-175. Private respondents' Comment on Petition, pp. 27-28.

[67] Memorandum, Report/Recommendation on the 2010 Automation Election Project Procurement, Annex "9", Comment on Petition of Public Respondents.

with the enactment in March 2009 of RA 9525,[68] in which Congress appropriated PhP 11.301 billion to automate the 2010 elections, subject to compliance with the transparency and accuracy requirements in selecting the relevant technology of the machines, thus:

> Sec. 2. *Use of Funds*. — x x x *Provided, however,* That disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution, the provisions of [**RA] No. 9369** and other election laws incorporated in said Act as to ensure the conduct of a free, orderly, clean, honest and credible election and shall adopt such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used on May 10, 2010 automated national and local elections. (Emphasis added.)

It may safely be assumed that Congress approved the bill that eventually became RA 9525, fully aware that the system using the PCOS machines were not piloted in the 2007 electoral exercise. The enactment of RA 9525 is to us a compelling indication that it was never Congress' intent to make the pilot testing of a particular automated election system in the 2007 elections a condition precedent to its use or award of the 2010 Automation Project. The comment-in-intervention of the Senate says as much.

Further, the highly charged issue of whether or not the 2008 ARMM elections—covering, as NCC observed, three conflict-ridden island provinces—may be treated as substantial compliance with the "pilot test" requirement must be answered in the affirmative. No less than Senator Richard J. Gordon himself, the author of the law, said that "the system has been tried and tested in the ARMM elections last year, so we have to proceed with the total implementation of the law."[69]

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[68] Entitled "An Act Appropriating the Sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (₱11,301,790,000.00) as Supplemental Budget for an [AES] and for Other Purposes."

[69] *Rollo*, p. 1341.

We note, though, the conflicting views of the NCC[70] and ITFP[71] on the matter. Suffice it to state at this juncture that the system used in the 2008 ARMM election exercise bears, as petitioners to an extent grudgingly admit,[72] a similarity with the PCOS. The following, lifted from the Comelec's comment, is to us a fair description of how the two systems (PCOS and CCOS) work and where the difference lies:

> x x x the elections in the [ARMM] utilized the Counting Center Optical Scan (CCOS), a system which uses the Optical Mark Reader (OMR), the same technology as the PCOS.
>
> Under the CCOS, the voters cast their votes by shading or marking the circles in the paper ballots which corresponded to the names of their chosen candidates [like in PCOS]. Thereafter, the ballot boxes were brought to the counting centers where they were scanned, counted and canvassed.
>
> x x x Under the PCOS, the counting, consolidation and canvassing of the votes are done at the precinct level. The election results at the precincts are then electronically transmitted to the next level, and so on. x x x PCOS dispenses with the physical transportation of ballot boxes from the precincts to the counting centers.[73]

Moreover, it has been proposed that a partial automation be implemented for the May 2010 elections in accordance with

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[70] On page 3 of its Comment, NCC, thru its Dir. Gen. Angelo Timoteo M. Diaz de Rivera, states: "We believe that the successful deployment of the paper-based election system in 5 of the 6 provinces of ARMM and the concurrent deployment of the direct-recording-electronic election system in Maguindanao province, is substantial compliance of the spirit of this law, given the underlying circumstances."

[71] Mr. Amado A. Malacaman, signing as secretary of the ITFP, states: "The ARMM election in August 2008 was not a valid pilot run for two reasons: (1) It did not cover two highly urbanized cities and two provinces each in Luzon, Visayas, and Mindanao, and (2) PCOS was not used in that electoral exercise."

[72] Atty. Roque said: "The PCOS stage is similar to OMR because they also have to shade the oval for the candidate that they want to vote. The difference is that in the OMR they collate all the ballots x x x where in PCOS you don't put it in a ballot, you feed it into the machines."

[73] Public respondents' Comment, pp. 27-28.

Section 5 of RA 8436, as amended by RA 9369 instead of full automation. The Court cannot agree as such proposition has no basis in law. Section 5, as worded, does not allow for partial automation. In fact, Section 5 clearly states that "the AES **shall** be implemented nationwide."[74] It behooves this Court to follow the letter and intent of the law for full automation in the May 2010 elections.

PCOS Meets Minimum Capabilities Standards

As another ground for the nullification of the automation contract, petitioners posit the view that the PCOS machines do not satisfy the minimum system capabilities prescribed by RA 8436, as amended. To a specific point, they suggest that the PCOS system offered and accepted lacks the features that would assure accuracy in the recording and reading of votes, as well as in the tabulation, consolidation/canvassing, electronic transmission, storage results and accurate ballot counting.[75] In this particular regard, petitioners allege that, based on Smartmatic's website, the PCOS has a margin of error of from 2% to 10%, way beyond that of the required 99.99% accuracy in the counting of votes.[76]

The minimum system capabilities provision cited is Sec. 7 of RA 8436, as amended, and the missing features referred to by petitioners are pars. (b) and (j). In full, Sec. 7 of RA 8436, as amended, reads:

SEC. 6. *Minimum System Capabilities*. — The automated election system must at least have the following functional capabilities:

(a) Adequate security against unauthorized access;

(b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;

(c) Error recovery in case of non-catastrophic failure of device;

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[74] Section 5, RA 8436, as amended.

[75] Petition, p. 30.

[76] *Id.* at 31.

(d) System integrity which ensures physical stability and functioning of the vote recording and counting process;

(e) Provision for voter verified paper audit trail;

(f) System auditability which provides supporting documentation for verifying the correctness of reported election results;

(g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election result in the shortest time possible;

(h) Accessibility to illiterates and disabled voters;

(i) Vote tabulating program for election, referendum or plebiscite;

(j) Accurate ballot counters;

(k) Data retention provision;

(l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;

(m) Utilize or generate official ballots as herein defined;

(n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and

(o) Configure access control for sensitive system data and function.

In the procurement of this system, the Commission shall develop and adopt an evaluation system to ascertain that the above minimum system capabilities are met. The evaluation system shall be developed with the assistance of an advisory council.

From the records before us, the Court is fairly satisfied that the Comelec has adopted a rigid technical evaluation mechanism, a set of 26-item/check list criteria, as will be enumerated shortly, to ensure compliance with the above minimum systems capabilities.

The SBAC Memorandum[77] of June 03, 2009, as approved by Comelec Res. 8608,[78] categorically stated that the SBAC-

[77] Annex "9", public respondents' Comment.

[78] See Note No. 33.

TWG submitted its report that TIM/Smartmatic's proposed systems and machines PASSED all the end-to-end demo tests using the aforementioned 26-item criteria, inclusive of the accuracy rating test of at least 99.955%. As appearing in the SBAC-TWG report, the corresponding answers/remarks to each of the 26 individual items are as herein indicated:[79]

ITEM	REQUIREMENT	REMARK/DESCRIPTION
1	Does the system allow manual feeding of a ballot into the PCOS machine?	Yes. The proposed PCOS machine accepted the test ballots which were manually fed one at a time.
2	Does the system scan a ballot sheet at the speed of at least 2.75 inches per second?	Yes. A 30-inch ballot was used in this test. Scanning the 30-inch ballot took 2.7 seconds, which translated to 11.11inches per second.
3	Is the system able to capture and store in an encrypted format the digital images of the ballot for at least 2,000 ballot sides (1,000 ballots, with back to back printing)?	Yes the system captured the images of the 1,000 ballots in encrypted format. Each of the 1,000 images files contained the images of the front and back sides of the ballot, totaling to 2,000 ballot side. To verify the captured ballot images, decrypted copies of the encrypted files were also provided. The same were found to be digitized representations of the ballots cast.
4	Is the system a fully integrated single device as described in item no. 4 of Component 1-B?	Yes. The proposed PCOS is a fully integrated single device, with built-in printer and built-in data

[79] Annex "8", Comment of public respondents.

		communications ports (Ethernet and USB).
5	Does the system have a scanning resolution of at least 200 dpi?	Yes. A portion of a filled up marked oval was blown up using image editor software to reveal the number of dots per inch. The sample image showed 200 dpi. File properties of the decrypted image file also revealed 200 dpi.
6	Does the system scan in grayscale?	Yes. 30 shades of gray were scanned in the test PCOS machine, 20 of which were required, exceeding the required 4-bit/16 levels of gray as specified in the Bid Bulletin No. 19.
7	Does the system require authorization and authentication of all operators, such as, but not limited to, usernames and passwords, with multiple user access levels?	Yes. The system required the use of a security key with different sets of passwords/ PINs for Administrator and Operator users.
8	Does the system have an electronic display?	Yes. The PCOS machine makes use of an LCD display to show information: • if a ballot may be inserted into the machine;· • if a ballot is being processed; • if a ballot is being rejected;· on other instructions and information to the voter/ operator.
9	Does the system employ error handling procedures, including, but not limited to, the use of	Yes. The PCOS showed error messages on its screen whenever a ballot is

	error prompts and other related instructions?	rejected by the machine and gives instructions to the voter on what to do next, or when there was a ballot jam error.
10	Does the system count the voter's vote as marked on the ballot with an accuracy rating of at least 99.995%?	Yes. The two rounds of tests were conducted for this test using only valid marks/shades on the ballots. 20,000 marks were required to complete this test, with only one (1) allowable reading error. 625 ballots with 32 marks each were used for this test. During the comparison of the PCOS-generated results with the manually prepared/ predetermined results, it was found out that there were seven (7) marks which were inadvertently missed out during ballot preparation by the TWG. Although the PCOS-generated results turned out to be 100% accurate, the 20,000-mark was not met thereby requiring the test to be repeated. To prepare for other possible missed out marks,650 ballots with (20,800 marks) were used for the next round of test, which also yielded 100% accuracy.
11	Does the system detect and reject fake or spurious, and previously scanned ballots?	Yes. This test made use of one (1) photocopied ballot and one (1) "re-created" ballot. Both were rejected by the PCOS.

12	Does the system scan both sides of a ballot and in any orientation in one pass?	Yes. Four (4) ballots with valid marks were fed into the PCOS machine in the four (4) portrait orientations specified in Bid Bulletin No. 4 (either back or front, upside down or right side up), and all were accurately captured.
13	Does the system have necessary safeguards to determine the authenticity of a ballot, such as, but not limited to, the use of bar codes, holograms, color shifting ink, micro printing, to be provided on the ballot, which can be recognized by the system?	Yes. The system was able to recognize if the security features on the ballot are "missing". Aside from the test on the fake or spurious ballots (Item No. 11), three (3) test ballots with tampered bar codes and timing marks were used and were all rejected by the PCOS machine. The photocopied ballot in the test for Item No. 11 was not able to replicate the UV ink pattern on top portion of the ballot causing the rejection of the ballot.
14	Are the names of the candidates pre-printed on the ballot?	Yes. The Two sample test ballots of different lengths were provided: one (1) was 14 inches long while the other was 30 inches long. Both were 8.5 inches wide. The first showed 108 pre-printed candidate names for the fourteen (14) contests/ positions, including two (2) survey questions on gender and age group, and a plebiscite question.

		The other showed 609 pre-printed candidate names, also for fourteen (14) positions including three (3) survey questions.
15	Does each side of the ballot sheet accommodate at least 300 names of candidates with a minimum font size of 10, in addition to other mandatory information required by law?	Yes. The 30-inch ballot, which was used to test Item No. 2, contained 309 names for the national positions and 300 names for local positions. The total pre-printed names on the ballot totaled 609. This type of test ballot was also used for test voting by the public, including members of the media. Arial Narrow, font size 10, was used in the printing of the candidate names.
16	Does the system recognize full shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. The ballots used for the accuracy test (Item No. 10), which made use of full shade marks, were also used in this test and were accurately recognized by the PCOS machine.
17	Does the system recognize partial shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. Four (4) test ballots were used with one (1) mark each per ballot showing the following pencil marks: • top half shade; • bottom half shade; • left half shade; and • right half shade These partial shade marks were all recognized by the PCOS machine

18	Does the system recognize check (Ö)marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. One (1) test ballot with one check (Ö) mark, using a pencil, was used for this test. The mark was recognized successfully.
19	Does the system recognize x marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. One (1) test ballot with one x mark, using a pencil, was used for this test. The mark was recognized successfully.
20	Does the system recognize both pencil and ink marks on the ballot?	Yes. The 1000 ballots used in the accuracy test (Item No. 10) were marked using the proposed marking pen by the bidder. A separate ballot with one (1) pencil mark was also tested. This mark was also recognized by the PCOS machine. Moreover, the tests for Items No. 17, 18 and 19 were made using pencil marks on the ballots.
21	In a simulation of a system shut down, does the system have error recovery features?	Yes. Five (5) ballots were used in this test. The power cord was pulled from the PCOS while the 3rd ballot was in the middle of the scanning procedure, such that it was left "hanging" in the ballot reader. After resumption of regular power supply, the PCOS machine was able to restart successfully with notification to the operator that there were two (2) ballots already cast in the machine. The "hanging" 3rd ballot was returned to the operator and was able to be re-fed into the PCOS machine.

		The marks on all five (5) were all accurately recognized.
22	Does the system have transmission and consolidation/ canvassing capabilities?	Yes. The PCOS was able to transmit to the CCS during the end-to-end demonstration using GLOBE prepaid Internet kit.
23	Does the system generate a backup copy of the generated reports, in a removable data storage device?	Yes. The PCOS saves a backup copy of the ERs, ballot images, statistical report and audit log into a Compact Flash (CF) Card.
24	Does the system have alternative power sources, which will enable it to fully operate for at least 12 hours?	Yes. A 12 bolt 18AH battery lead acid was used in this test. The initial test had to be repeated due to a short circuit, after seven (7) hours from start-up without ballot scanning. This was explained by TIM-Smartmatic to be caused by non-compatible wiring of the battery to the PCOS. A smaller wire than what is required was inadvertently used, likening the situation to incorrect wiring of a car battery. Two (2) COMELEC electricians were called to confirm TIM-Smartmatic's explanation. The PCOS machine was connected to regular power and started successfully. The following day, the "re-test" was completed in 12 hours and 40 minutes x x x 984 ballots were fed into the machine. The ER, as generated by the PCOS was

		compared with predetermined result, showed 100% accuracy.
25	Is the system capable of generating and printing reports?	Yes. The PCOS prints reports via its built-in printer which includes: 1. Initialization Report; 2. Election Returns (ER); 3. PCOS Statistical Report; 4. Audit Log.
26	Did the bidder successfully demonstrate EMS, voting counting, consolidation/ canvassing and transmission?	Yes. An end-to-end demonstration of all proposed systems was presented covering: importing of election data into the EMS; creation of election configuration data for the PCOS and the CCS using EMS; creation of ballot faces using EMS; configuring the PCOS and the CCS using the EMS-generated election configuration file; initialization, operation, generation of reports and backup using the PCOS; electronic transmission of results to the: [1] from the PCOS to city/municipal CCS and the central server. [2] from the city/municipal CCS to the provincial CCS. [3] from the provincial CCS to the national CCS; receipt and canvass of transmitted results: [1] by the city/municipal CCS from the PCOS. [2] by the provincial CCS from the city/municipal CCS. [3] by the national CCS from the provincial CCS; receipt of the transmittal results by the central server from the PCOS.

Given the foregoing and absent empirical evidence to the contrary, the Court, presuming regularity in the performance of regular duties, takes the demo-testing thus conducted by SBAC-TWG as a reflection of the capability of the PCOS machines, although the tests, as Comelec admits,[80] were done literally in the *Palacio del Governador* building, where a room therein simulated a town, the adjoining room a city, *etc*. Perusing the RFP, however, the real worth of the PCOS system and the machines will of course come after they shall have been subjected to the gamut of acceptance tests expressly specified in the RFP, namely, the lab test, field test, mock election test, transmission test and, lastly, the final test and sealing procedure of all PCOS and CCS units using the actual Election Day machine configuration.[81]

Apropos the counting-accuracy feature of the PCOS machines, petitioners no less impliedly admit that the web page they appended to their petition, showing a 2% to 10% failing rate, is no longer current.[82] And if they bothered to examine the current website of Smartmatic specifically dealing with its SAES 1800, the PCOS system it offered, they would have readily seen that the advertised accuracy rating is over "99.99999%."[83] Moreover, a careful scrutiny of the old webpage of Smartmatic reveals that the 2% to 10% failure rate applied to "optical scanners" and not to SAES. Yet the same page discloses that the SAES has "100%" accuracy. Clearly, the alleged 2% to 10% failing rate is now irrelevant and the Court need not belabor this and the equally irrelevant estoppel principle petitioners impose on us.

Intervenor Cuadra's concern relates to the auditability of the election results. In this regard, it may suffice to point out that

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[80] TSN, pp. 315-316.

[81] The final test shall be conducted at least three days before election after which the PCOS and CCS shall be sealed for election day use (Part V, item no. 13, RFP).

[82] TSN, p. 89.

[83] http:// www. com/solutions automated-elections-system-view/article/ voting machine.

PCOS, being a paper-based technology, affords audit since the voter would be able, if need be, to verify if the machine had scanned, recorded and counted his vote properly. Moreover, it should also be noted that the PCOS machine contains an LCD screen, one that can be programmed or configured to display to the voter his votes as read by the machine.[84]

No Abdication of Comelec's Mandate and Responsibility

As a final main point, petitioners would have the Comelec-Smartmatic-TIM Corporation automation contract nullified since, in violation of the Constitution, it constitutes a wholesale abdication of the poll body's constitutional mandate for election law enforcement. On top of this perceived aberration, the mechanism of the PCOS machines would infringe the constitutional right of the people to the secrecy of the ballot which, according to the petitioners, is provided in Sec. 2, Art. V of the Constitution.[85]

The above contention is not well taken.

The first function of the Comelec under the Constitution[86]—and the Omnibus Election Code for that matter—relates to the enforcement and administration of all laws and regulations relating to the conduct of elections to public office to ensure a free, orderly and honest electoral exercise. And how did petitioners come to their conclusion about their abdication theory? By acceding to Art. 3.3 of the automation contract, Comelec relinquished, so petitioners claim, supervision and control of the system to be used for the automated elections. To a more specific point, the loss of control, as may be deduced from the ensuing exchanges, arose from the fact that Comelec would not

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[84] TSN, Oral Arguments, pp. 455-456, 490.

[85] *Rollo*, pp. 1062-1063. Petitioners' Memorandum, pp. 12-13.

[86] Sec. 2, Art. IX-C; SECTION 2. The [Comelec] shall exercise the following powers and functions: (1) Enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall; x x x (4) Deputize x x x law enforcement agencies x x x for the exclusive purpose of ensuring free, orderly, honest, peaceful and credible elections.

be holding possession of what in IT jargon are the public and private keys pair.

CHIEF JUSTICE: Well, more specifically are you saying that the main course of this lost of control is the fact that SMARTMATIC holds the public and private keys to the sanctity of this system?

ATTY. ROQUE: Yes, Your Honor, as well as the fact that they control the program embedded in the key cost that will read their votes by which the electorate may verify that their votes were counted.

CHIEF JUSTICE: You are saying that SMARTMATIC and not its partner TIM who hold these public and private keys?

ATTY. ROQUE: Yes, Your Honor.

The Court is not convinced. There is to us nothing in Art 3.3 of the automation contract, even if read separately from other stipulations and the provisions of the bid documents and the Constitution itself, to support the simplistic conclusion of abdication of control pressed on the Court. Insofar as pertinent, Art 3.3 reads:

3.3 The PROVIDER shall be liable for all its obligations under this Project and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the elections. (Emphasis added.)

The proviso designating Smartmatic as the joint venture partner in charge of the technical aspect of the counting and canvassing wares does not to us translate, without more, to ceding control of the electoral process to Smartmatic. It bears to stress that the aforesaid designation of Smartmatic was not plucked from thin air, as it was in fact an eligibility requirement imposed, should the bidder be a joint venture. Part 5, par. 5.4 (e) of the

Instruction to Bidders on the subject **Eligible Bidders**, whence the second paragraph of aforequoted Art. 3.3 came from, reads:

> 5.4 A JV of two or more firms as partners shall comply with the following requirements.
>
> x x x x x x x x x
>
> (e) The JV member with a greater track record in automated elections, shall be in-charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration

And lest it be overlooked, the RFP, which forms an integral part of the automation contract,[87] has put all prospective bidders on notice of Comelec's intent to automate and to accept bids that would meet several needs, among which is "a complete solutions provider . . . which can provide . . . effective overall nationwide project management service . . . **under COMELEC supervision and control**, to ensure effective and successful implementation of the [automation] Project."[88] Complementing this RFP advisory as to control of the election process is Art. 6.7 of the automation contract, providing:

> 6.7 Subject to the provisions of the General Instructions to be issued by the Commission *En Banc*, **the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials**, and their performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of COMELEC and the PROVIDER. (Emphasis added.)

But not one to let an opportunity to score points pass by, petitioners rhetorically ask: "Where does Public Respondent Comelec intend to get this large number of professionals, many of whom are already gainfully employed abroad?"[89] The Comelec,

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[87] 21.1. "Contract documents" refers to the following documents and they are hereby incorporated and made an integral part of this Contract: x x x Annex "O" Request for Proposal/Terms of Reference.

[88] Part II, RFP.

[89] *Rollo*, p. 1094. Petitioners' Memorandum, p. 44.

citing Sec. 3[90] and Sec. 5 of RA 8436,[91] as amended, aptly answered this poser in the following wise:

> x x x [P]ublic respondent COMELEC, in the implementation of the automated project, will forge partnerships with various entities in different fields to bring about the success of the 2010 automated elections.
>
> Public respondent COMELEC will partner with Smartmatic TIM Corporation for the training and hiring of the IT personnel as well as for the massive voter-education campaign. There is in fact a budget allocation x x x for these undertakings. x x x
>
> As regards the requirement of RA 9369 that IT-capable personnel shall be deputized as a member of the BEI and that another IT-capable person shall assist the BOC, public respondent COMELEC shall partner with DOST and other agencies and instrumentalities of the government.

In not so many words during the oral arguments and in their respective Memoranda, public and private respondents categorically rejected outright allegations of abdication by the Comelec of its constitutional duty. The petitioners, to stress, are strangers to the automation contract. Not one participated in the bidding conference or the bidding proper or even perhaps examined the bidding documents and, therefore, none really knows the real intention of the parties. As case law tells us, the court has to ferret out the real intent of the parties. What is fairly clear in this case, however, is that petitioners who are

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[90] SECTION 3. Section 3 of [RA] 8436 is hereby amended to read as follows: "SEC. 3 Board of *Election of Inspectors*. — Where AES shall be adopted, at least one member of the Board of Election Inspectors shall be an [IT]-capable person, who is trained or certified by the DOST to use such AES. Such certification shall be issued by the DOST, free of charge."

[91] SECTION 5. Section 5 of [RA] 8436 is hereby amended to read as follows: "SEC. 4 *Information Technology Support for the Board of Canvassers*. — To implement the AES, each board of canvasser shall be assisted by an [IT]-capable person authorized to operate the equipment adopted for the elections. The Commission shall deputize [IT] personnel from among agencies and instrumentalities of the government, including government-owned and controlled corporations. x x x"

not even privy to the bidding process foist upon the Court their own view on the stipulations of the automation contract and present to the Court what they think are the parties' true intention. It is a study of outsiders appearing to know more than the parties do, but actually speculating what the parties intended. The following is self-explanatory:

CHIEF JUSTICE: Why did you say that it did not, did you talk with the Chairman and Commissioners of COMELEC that they failed to perform this duty, they did not exercise this power of control?

ATTY. ROQUE : Your Honor, I based it on the fact that it was the COMELEC in fact that entered into this contract . . .

CHIEF JUSTICE : Yes, but my question is — did you confront the COMELEC officials that they forfeited their power of control in over our election process?

ATTY. ROQUE : We did not confront, your Honor. We impugned their acts, Your Honor.[92]

Just as they do on the issue of control over the electoral process, petitioners also anchor on speculative reasoning their claim that Smartmatic has possession and control over the public and private keys pair that will operate the PCOS machines. Consider: Petitioners' counsel was at the start cocksure about Smartmatic's control of these keys and, with its control, of the electoral process.[93]

Several questions later, his answers had a qualifying tone:

JUSTICE NACHURA: And can COMELEC under the contract not demand that it have access, that it be given access to and in fact generate its own keys independently with SMARTMATIC so that it would be COMELEC and not SMARTMATIC that would have full control of the technology insofar as the keys are concerned x x x?

ATTY. ROQUE: I do not know if COMELEC will be in a position to generate these keys, x x x.[94]

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[92] TSN, Oral Arguments, pp. 203-206.

[93] *Id.* at 50-51.

[94] *Id.* at 158-59.

And subsequently, the speculative nature of petitioners' position as to who would have possession and control of the keys became apparent.

CHIEF JUSTICE: Yes, but did you check with the COMELEC who will be holding these two keys x x x did you check with COMELEC whether this system is correct?

ATTY.ROQUE: We have not had occasion to do so, x x x Your Honor.

x x x x x x x x x

CHIEF JUSTICE: Why do you make that poor conclusion against the COMELEC x x x May not the COMELEC hire the services of experts in order for the institution to be able to discharge its constitutional functions?

ATTY. ROQUE: That is true, but x x x there is too much reliance on individuals who do not have the same kind of accountability as public officers x x x

CHIEF JUSTICE: Are you saying that the COMELEC did not consult with available I.T. experts in the country before it made the bidding rules before it conducted the bidding and make the other policy judgments?

ATTY. ROQUE: Your Honor, what I am sure is that they did not confer with the I.T. Foundation x x x.

CHIEF JUSTICE: But is that foundation the only expert, does it have a monopoly of knowledge?[95]

The Court, to be sure, recognizes the importance of the vote-security issue revolving around the issuance of the public and private keys pair to the Board of Election Inspectors, including the digital signatures. The NCC comment on the matter deserves mention, appearing to hew as it does to what appear on the records. The NCC wrote:

The RFP/TOR used in the recent bidding for the AES to be used in the 2010 elections specifically mandated the use of public key cryptography. However, it was left to the discretion of the bidder to propose an acceptable manner of utilization for approval/acceptance

[95] *Id.* at 195-200.

of the Comelec. Nowhere in the RFP/TOR was it indicated that COMELEC would delegate to the winning bidder the full discretion, supervision and control over the manner of PKI [Public Key Infrastructure] utilization.

With the view we take of the automation contract, the role of Smartmatic TIM Corporation is basically to supply the goods necessary for the automation project, such as but not limited to the PCOS machines, PCs, electronic transmission devices and related equipment, both hardware and software, and the technical services pertaining to their operation. As lessees of the goods and the back-up equipment, the corporation and its operators would provide assistance with respect to the machines to be used by the Comelec which, at the end of the day, will be conducting the election thru its personnel and whoever it deputizes.

And if only to emphasize a point, Comelec's contract is with Smartmatic TIM Corporation of which Smartmatic is a 40% minority owner, per the JVA of TIM and Smartmatic and the Articles of Incorporation of Smartmatic TIM Corporation. Accordingly, any decision on the part or on behalf of Smartmatic will not be binding on Comelec. As a necessary corollary, the board room voting arrangement that Smartmatic and TIM may have agreed upon as joint venture partners, inclusive of the veto vote that one may have power over the other, should really be the least concern of the Comelec.

Parenthetically, the contention that the PCOS would infringe on the secrecy and sanctity of the ballot because, as petitioners would put it, the voter would be confronted with a "three feet" long ballot,[96] does not commend itself for concurrence. Surely, the Comelec can put up such infrastructure as to insure that the voter can write his preference in relative privacy. And as demonstrated during the oral arguments, the voter himself will personally feed the ballot into the machine. A voter, if so minded to preserve the secrecy of his ballot, will always devise a way to do so. By the same token, one with least regard for secrecy will likewise have a way to make his vote known.

[96] *Id.* at 17.

During the oral arguments, the notion of a possible violation of the Anti-Dummy Law cropped up, given the RFP requirement of a joint venture bidder to be at least be 60% Filipino. On the other hand, the winning bidder, TIM-Smartmatic joint venture, has Smartmatic, a foreign corporation, owning 40% of the equity in, first, the joint venture partnership, and then in Smartmatic TIM Corporation.

The Anti-Dummy Law[97] pertinently states:

Section 1. *Penalty.* **In all cases in which any constitutional or legal provision requires Philippine or any other specific citizenship as a requisite for the exercise or enjoyment of a right, franchise or privilege,** any citizen of the Philippines or of any other specific country who allows his name or citizenship to be used for the purpose of evading such provision, and any alien or foreigner profiting thereby, shall be punished by imprisonment xxx and by a fine x x x.

SECTION 2. *Simulation of minimum capital stock* — **In all cases in which a constitutional or legal provision requires that** a corporation or association may exercise or enjoy a right, franchise or privilege**, not** less than a certain per centum of its capital must be owned by citizens of the Philippines or any other specific country, **it shall be unlawful to falsely simulate the existence of such minimum stock or capital as owned by such citizen for the purpose of evading such provision**. x x x

SECTION 2-A. *Unlawful use, Exploitation or Enjoyment*. Any person, corporation, or association which, having in its name or under its control, **a right, franchise, privilege, property or business, the exercise or enjoyment of which is expressly reserved by the Constitution or the laws to citizens of the Philippines or of any other specific country, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens**, permits or allows the use, exploitation or enjoyment thereof by a person, corporation, or association not possessing the requisites prescribed by the Constitution or the laws of the Philippines; or leases, or in any other way, transfers or conveys said right, franchise, privilege, property or business to a person, corporation or association not otherwise qualified under the

[97] CA 108, as amended by PD 715.

Constitution x x x shall be punished by imprisonment x x x (Emphasis added.)

The Anti-Dummy Law has been enacted to limit the enjoyment of certain economic activities to Filipino citizens or corporations. For liability for violation of the law to attach, it must be established that there is a law limiting or reserving the enjoyment or exercise of a right, franchise, privilege, or business to citizens of the Philippines or to corporations or associations at least 60 per centum of the capital of which is owned by such citizens. In the case at bench, the Court is not aware of any constitutional or statutory provision classifying as a nationalized activity the lease or provision of goods and technical services for the automation of an election. In fact, Sec. 8 of RA 8436, as amended, vests the Comelec with specific authority to acquire AES from foreign sources, thus:

SEC 12. *Procurement of Equipment and Materials*. — To achieve the purpose of this Act, the Commission is authorized **to** procure, xxx, by **purchase, lease**, rent or other forms of acquisition, supplies, equipment, materials, **software, facilities**, and other services, from local or **foreign sources** x x x. (Emphasis added.)

Petitioners cite Executive Order No. (EO) 584,[98] Series of 2006, purportedly limiting "contracts for the supply of materials, goods and commodities to government-owned or controlled corporation, company, agency or municipal corporation" to corporations that are 60% Filipino. We do not quite see the governing relevance of EO 584. For let alone the fact that RA 9369 is, in relation to EO 584, a subsequent enactment and, therefore, enjoys primacy over the executive issuance, the Comelec does fall under the category of a government-owned and controlled corporation, an agency or a municipal corporation contemplated in the executive order.

A view has been advanced regarding the susceptibility of the AES to hacking, just like the voting machines used in certain precincts in Florida, USA in the Gore-Bush presidential contests.

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[98] Promulgating the 7th Regular Foreign Investment Negative List.

However, an analysis of post-election reports on the voting system thus used in the US during the period material and the AES to be utilized in the 2010 automation project seems to suggest stark differences between the two systems. The first relates to the Source Code, defined in RA 9369 as "human readable instructions that define what the computer equipment will do."[99] The Source Code for the 2010 AES shall be available and opened for review by political parties, candidates and the citizens' arms or their representatives;[100] whereas in the US precincts aforementioned, the Source Code was alleged to have been kept secret by the machine manufacture company, thus keeping the American public in the dark as to how exactly the machines counted their votes. And secondly, in the AES, the PCOS machines found in the precincts will also be the same device that would tabulate and canvass the votes; whereas in the US, the machines in the precincts did not count the votes. Instead the votes cast appeared to have been stored in a memory card that was brought to a counting center at the end of the day. As a result, the hacking and cheating may have possibly occurred at the counting center.

Additionally, with the AES, the possibility of system hacking is very slim. The PCOS machines are only online when they transmit the results, which would only take around one to two minutes. In order to hack the system during this tiny span of vulnerability, a super computer would be required. Noteworthy also is the fact that the memory card to be used during the elections is encrypted and read-only — meaning no illicit program can be executed or introduced into the memory card.

Therefore, even though the AES has its flaws, Comelec and Smartmatic have seen to it that the system is well-protected with sufficient security measures in order to ensure honest elections.

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[99] Sec. 2. of RA 9369.

[100] Sec. 10 of RA 8436, as amended, states that "once an AES technology is selected for implementation, the Commission shall promptly make the source code available and open to any interested party or groups which may conduct their own review thereof."

And as indicated earlier, the joint venture provider has formulated and put in place a continuity and back-up plans that would address the understandable apprehension of a failure of elections in case the machines falter during the actual election. This over-all fall-back strategy includes the provisions for 2,000 spare PCOS machines on top of the 80,000 units assigned to an equal number precincts throughout the country. The continuity and back-up plans seek to address the following eventualities: **(1)** The PCOS fails to scan ballots; **(2)** The PCOS scans the ballots, but fails to print election returns (ERs); and/or **(3)** The PCOS prints but fails to transmit the ERs. In the event item #1 occurs, a spare PCOS, if available, will be brought in or, if not available, the PCOS of another precinct (PCOS 2 for clarity), after observing certain defined requirements,[101] shall be used. Should all the PCOS machines in the entire municipality/city fail, **manual counting** of the paper ballots and the **manual accomplishment** of ERs shall be resorted to in accordance with Comelec promulgated rules on appreciation of automated ballots.[102] In the event item #2 occurs where the PCOS machines fail to print ERs, the use of spare PCOS and the transfer of PCOS-2 shall be effected. **Manual counting** of ERs shall be resorted to also if all PCOS fails in the entire municipality. And should eventuality #3 transpire, the following back-up options, among others, may be availed of: bringing PCOS-1 to the nearest precinct or polling center which has a functioning transmission facility; inserting transmission cable of functioning transmission line to PCOS-1 and transmitting stored data from PCOS-1 using functioning transmission facility.

The disruption of the election process due to machine breakdown or malfunction may be limited to a precinct only or could affect an entire municipal/city. The worst case scenario of course would be the wholesale breakdown of the 82,000 PCOS machines. Nonetheless, even in this most extreme case,

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[101] These include bringing PCOS-2 to the precinct assigned to PCOS-1; breaking seal of PCOS-1 to get precinct configuration; and breaking seal of PCOS-2 to remove precinct configuration card.

[102] *Rollo*, p. 845.

failure of all the machines would not necessarily translate into failure of elections. Manual count tabulation and transmission, as earlier stated, can be done, PCOS being a paper-ballot technology. If the machine fails for whatever reason, the paper ballots would still be there for the hand counting of the votes, manual tabulation and transmission of the ERs. Failure of elections consequent to voting machines failure would, in fine, be a very remote possibility.

A final consideration.

The first step is always difficult. Hardly anything works, let alone ends up perfectly the first time around. As has often been said, if one looks hard enough, he will in all likelihood find a glitch in any new system. It is no wonder some IT specialists and practitioners have considered the PCOS as unsafe, not the most appropriate technology for Philippine elections, and "easily hackable," even. And the worst fear expressed is that disaster is just waiting to happen, that PCOS would not work on election day.

Congress has chosen the May 2010 elections to be the maiden run for full automation. And judging from what the Court has heard and read in the course of these proceedings, the choice of PCOS by Comelec was not a spur-of-moment affair, but the product of honest-to-goodness studies, consultations with CAC, and lessons learned from the ARMM 2008 automated elections. With the backing of Congress by way of budgetary support, the poll body has taken this historic, if not ambitious, first step. It started with the preparation of the RFP/TOR, with a list of voluminous annexes embodying in specific detail the bidding rules and expectations from the bidders. And after a hotly contested and, by most accounts, a highly transparent public bidding exercise, the joint venture of a Filipino and foreign corporation won and, after its machine hurdled the end-to-end demonstration test, was eventually awarded the contract to undertake the automation project. Not one of the losing or disqualified bidders questioned, at least not before the courts, the *bona fides* of the bidding procedures and the outcome of the bidding itself.

Assayed against the provisions of the Constitution, the enabling automation law, RA 8436, as amended by RA 9369, the RFP and even the Anti-Dummy Law, which petitioners invoked as an afterthought, the Court finds the project award to have complied with legal prescriptions, and the terms and conditions of the corresponding automation contract in question to be valid. No grave abuse of discretion, therefore, can be laid on the doorsteps of respondent Comelec. And surely, the winning joint venture should not be faulted for having a foreign company as partner.

The Comelec is an independent constitutional body with a distinct and pivotal role in our scheme of government. In the discharge of its awesome functions as overseer of fair elections, administrator and lead implementor of laws relative to the conduct of elections, it should not be stymied with restrictions that would perhaps be justified in the case of an organization of lesser responsibility.[103] It should be afforded ample elbow room and enough wherewithal in devising means and initiatives that would enable it to accomplish the great objective for which it was created — to promote free, orderly, honest, and peaceful elections. This is as it should be for, too often, Comelec has to make decisions under difficult conditions to address unforeseen events to preserve the integrity of the election and in the process the voice of the people. Thus, in the past, the Court has steered away from interfering with the Comelec's exercise of its power which, by law and by the nature of its office properly pertain to it. Absent, therefore, a clear showing of grave abuse of discretion on Comelec's part, as here, the Court should refrain from utilizing the corrective hand of *certiorari* to review, let alone nullify, the acts of that body. This gem, while not on all fours with, is lifted from, the Court's holding in an old but oft-cited case:

> x x x We may not agree fully with [the Comelec's] choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere. Politics is a practical matter, and political questions must be dealt with realistically—not from the standpoint of pure theory [or speculation]. x x x

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[103] *Leyaley v. Comelec*, G.R. No. 160061, October 11, 2006, 504 SCRA 217.

x x x x x x x x x

There are no ready-made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve the ends of good government. In the matter of the administration of the laws relative to the conduct of elections, x x x we must not by any excessive zeal take away from the [Comelec] the initiative which by constitutional and legal mandates properly belongs to it. Due regard to the independent character of the Commission x x x requires that the power of this court to review the acts of that body should, as a general proposition, be used sparingly, but firmly in appropriate cases.[104] x x x

The Court, however, will not indulge in the presumption that nothing would go wrong, that a successful automation election unmarred by fraud, violence, and like irregularities would be the order of the moment on May 10, 2010. Neither will it guarantee, as it cannot guarantee, the effectiveness of the voting machines and the integrity of the counting and consolidation software embedded in them. That task belongs at the first instance to Comelec, as part of its mandate to ensure clean and peaceful elections. This independent constitutional commission, it is true, possesses extraordinary powers and enjoys a considerable latitude in the discharge of its functions. The road, however, towards successful 2010 automation elections would certainly be rough and bumpy. The Comelec is laboring under very tight timelines. It would accordingly need the help of all advocates of orderly and honest elections, of all men and women of goodwill, to smoothen the way and assist Comelec personnel address the fears expressed about the integrity of the system. Like anyone else, the Court would like and wish automated elections to succeed, credibly.

WHEREFORE, the instant petition is hereby *DENIED.*

SO ORDERED.

Ynares-Santiago, Chico-Nazario, Nachura, Leonardo-de Castro, Peralta, Bersamin, Del Castillo, and *Abad, JJ.*, concur.

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[104] *Sumulong v. Comelec*, 73 Phil. 288, 294-296 (1941).

Puno, C.J., see separate concurring opinion.

Carpio, J., see dissenting opinion.

Corona, J., see separate opinion.

Carpio Morales, J., joins the dissent of *J.* Carpio.

Brion, J., joins the dissent of *J.* Carpio — with separate dissenting opinion.

Quisumbing, J., on official leave.

SEPARATE CONCURRING OPINION

PUNO, *C.J.*:

Prefatory Statement

The broad power to determine whether there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the government[1] is exercised with full appreciation by the judiciary of the proper limits of its role in our tripartite form of government. We should take care that this expanded power is not used as a license for courts to intervene in cases involving matters of policy woven with constitutional and legal questions. Since time immemorial, courts have deferred to the wisdom or logic of legislative choices and technical determinations. It is as it should be.

By this paradigm, we do not abdicate our fundamental responsibility in annulling an act of grave abuse of discretion in the guise of judicial restraint, but neither do we permit the overarching use of judicial power as to amount to judicial tyranny.

A. The Case

The petitioners brought this case for *Certiorari*, Prohibition and *Mandamus* to declare that public respondents Commission on Elections (COMELEC), and the COMELEC-Special Bids and Awards Committee (COMELEC-SBAC), committed grave

[1] CONSTITUTION, Art. VIII, Sec. 1.

abuse of discretion amounting to lack or excess of jurisdiction when it awarded the 2010 Automated Elections Project to private respondents Total Information Management, Inc. (TIM) and Smartmatic International, Inc. (Smartmatic). Petitioners ask the Court to strike down as null and void the July 10, 2009 contract between public respondent COMELEC and private respondents for being contrary to the Constitution, statutes, and established jurisprudence.

On June 7, 1995, Congress passed **Republic Act No. 8046** adopting an Automated Election System (AES) in the Philippines. RA 8046 authorized COMELEC to conduct a nationwide demonstration of a computerized election system and allowed the poll body to pilot-test the system in the March 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM).

On December 22, 1997, Congress enacted **Republic Act No. 8436**[2] (RA 8436), otherwise known as the "Election Modernization Act" authorizing COMELEC to use an AES for the process of voting, counting votes and canvassing or consolidating the results of the national and local elections. It also mandated the poll body to acquire automated counting machines (ACMs), computer equipment, devices and materials, and adopt new electoral forms and printing materials.

The COMELEC, however, was not able to implement the AES for the positions of President, Vice President, senators and parties, organizations or coalitions participating under the party-list system throughout the entire country, as provided in RA 8436. The automation was limited to the provinces of Lanao del Sur, Maguindanao, Sulu, and Tawi-tawi due to lack of material time and funding.

The COMELEC was not also able to implement an AES in the May 2001 elections due to time constraints. But on October 29, 2002, the COMELEC adopted **Resolution 02-0170**,

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[2] An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, providing funds therefor and for other purposes.

which resolved to conduct biddings for the three phases of the AES: **Phase I**, voter registration and validation system; **Phase II**, automated counting and canvassing system; and **Phase III**, electronic transmission. The COMELEC awarded Phase II for the provision of the ACMs to the Mega Pacific Consortium (MP Consortium). The Information Technology Foundation of the Philippines (ITFP), among others, petitioned this Court to declare null and void the award of the contract to the MP Consortium. In ***Information Technology Foundation of the Philippines v. COMELEC***,[3] this Court held that the contract was void for failure to establish the identity, existence and eligibility of the alleged consortium as a bidder; the ACM's failure to pass the tests of the Department of Science and Technology (DOST); and the ACM's failure to meet the required accuracy rating as well as safeguards for the prevention of double counting of precinct results.

On January 23, 2007, Congress passed **Republic Act No. 9369** (RA 9369), amending RA 8436. It specified the modes of implementing the AES, *i.e.*, either paper-based or a direct recording electronic (DRE) system, for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises. It also provided that for the next election, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao.[4] In addition, it provided that with respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. However, participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.[5]

Again, the AES was not implemented in the May 2007 elections due to lack of funds and time constraints. But the

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[3] G.R. No. 159139, January 13, 2004, 419 SCRA 141.

[4] Republic Act No. 9369 (2007), Sec. 6, amending Republic Act No. 8436 (1997), Sec. 5.

[5] Republic Act No. 9369 (2007), Sec. 12.

AES was used in the **August 11, 2008 ARMM elections**, where both DRE and the paper-based Central Count Optical Scan (CCOS) machines were used.

On March 5, 2009, **Republic Act No. 9525** (RA 9525)[6] was passed by the House of Representatives and the Senate, appropriating the sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (₱11,301,790,000.00) for an AES to be used in the May 10, 2010 automated national and local elections.

From March 13 to 16, 2009, the COMELEC published and posted an invitation for vendors to apply for eligibility and to bid for the procurement of counting machines, including the supply of ballot paper; electronic transmission services using public telecommunications networks; training; technical support; warehousing; deployment; installation; pull-out; systems integration; and overall project management to be used in the automation of the counting, transmission and canvassing of the votes for the May 10, 2010 synchronized national and local elections.

On March 18, 2009, the COMELEC issued the Terms of Reference/Request for Proposal for Solutions, Terms & Conditions for the Automation of the May 10, 2010 Synchronized National and Local Elections (TOR/RFP), as promulgated in COMELEC Resolution 8591, dated March 11, 2009, with the following components:

a. Component 1: Paper-Based Automated Election System

   1-A. Election Management System (EMS)
   1-B. Precinct-Count Optical Scan (PCOS) System
   1-C. Consolidated/Canvassing System (CCS)

b. Component 2: Provision for Electronic Transmission of Electronic Results using Public Telecommunications Networks

c. Component 3: Overall Project Management

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[6] An Act Appropriating the Sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (₱11,301,790,000.00) As Supplemental Appropriations for an Automated Election System and for Other Purposes.

On March 19, 2009, eleven prospective bidders obtained bid documents from the COMELEC for the automation of the 2010 elections.

On March 23, 2009, RA 9525 was signed by President Gloria Macapagal-Arroyo appropriating ₱11,301,790,000.00 as supplemental appropriation for an automated elections system and other purposes.

On March 27, 2009, the COMELEC conducted a Pre-Bid Conference for the automation of the counting, transmission and canvassing of votes for the May 10, 2010 elections.

On April 23, 2009, TIM and Smartmatic entered into a Joint Venture Agreement (JVA) to form the joint venture known as Smartmatic TIM Corporation.

On May 4, 2009, seven suppliers submitted their formal bids. The COMELEC-SBAC declared all the seven bidders ineligible for failure to comply with the pass/fail criteria of the COMELEC. Upon motion for reconsideration of the suppliers, three consortiums were reconsidered by the COMELEC-SBAC, namely Indra Consortium, Smartmatic-TIM, AMA-ESS and the Gilat Consortium. After evaluation of their technical proposals, the COMELEC-SBAC declared Indra Consortium and Smartmatic-TIM to have passed.

The COMELEC-SBAC then proceeded with the opening of the financial proposals. The Technical Working Group (TWG) evaluated and reviewed the financial proposals of Indra Consortium and Smartmatic-TIM. On June 3, 2009, the COMELEC-SBAC recommended to the COMELEC *en banc* the award of the Contract for the Provision of an Automated Election System for the May 10, 2010 Synchronized National and Local Elections (Automation Contract) to the joint venture of Smartmatic-TIM. Smartmatic-TIM was found to have the lowest calculated responsive bid (LCRB); and to have passed all the eligibility, technical, and financial requirements. The COMELEC-SBAC noted that Smartmatic-TIM's machines passed all the tests and systems evaluation with an accuracy rating of 100%. This finding was verified and validated in the post-qualification proceedings. The

total bid of Smartmatic-TIM amounting to Seven Billion One Hundred Ninety-one Million Four Hundred Eighty-four Thousand Seven Hundred Thirty-nine and 48/100 Philippine pesos (₱7,191,484,739.48) was found by the COMELEC to be within the approved budget for the contract of Eleven Billion Two Hundred Twenty-three Million Six Hundred Eighteen Thousand Four Hundred and 0/100 Philippine pesos (₱11,223,618,400.00).[7]

On June 8, 2009, the COMELEC Advisory Council[8] submitted its observations on the procurement proceedings of the SBAC, with the conclusion that these were transparent and in conformity with the law and the TOR/RFP. It noted that Smartmatic-TIM had a 100% accuracy rating. The Advisory Council has the mandate to participate as non-voting members of the COMELEC-SBAC in the conduct of the bidding process for the AES.

On the same date, June 8, 2009, the Office of the Ombudsman, which had previously created Task Force "Poll Automation,"[9] submitted its "Process Audit Observation Report." The Ombudsman Task Force also found the above proceedings and systems to be consonant with the Constitution, procurement laws, and RA 9369.

The Parish Pastoral Council for Responsible Voting (PPCRV) representative likewise submitted a report, which concurred with the final report of the COMELEC-SBAC.

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[7] COMELEC Resolution No. 8608, In The Matter Of The Report/ Recommendation Of The Special Bids And Awards Committee Relative To The Award Of The Contract For The May 10, 2010 Automated Elections, 09 June 2009.

[8] The COMELEC Advisory Council is chaired by Ray Anthony Roxas-Chua III (from the Commission on Information and Communications Technology) and its members are Geronimo L. Sy (from the Department of Education), Fortunato De La Pena (from the Department of Science and Technology), Manuel C. Ramos, Jr. (from the University of the Philippines), Renato B. Garcia (from the Philippine Electronics and Telecommunications Federation, Inc.), Lilia C. Guillermo (from the Chief Information Officers Forum, Inc.), Ivan John E. Uy (from the Philippine Computer Society), Henrietta T. De Villa (from the Parish Pastoral Council for Responsible Voting) and Andie C. Lasala (from the Commission on Electoral Reforms).

[9] The Task Force is composed of Orlando C. Casimiro, Evelyn Baliton, Rafael Rodriguez Hipolito, Gina Lyn Lucas, Mary Rawnsle Lopez, Judy Anne Doctor-Escalona, Manolette Eugenio, Mary Antonette Yalao, Marina Demetrio, Hilario Fabila, Jr. and Marian Candelaria.

On June 9, 2009, the COMELEC *en banc* promulgated Resolution No. 8608, confirming Smartmatic-TIM as the bidder with the LCRB and awarding the contract for the automation of the elections on May 10, 2010 to the joint venture.

On June 10, 2009, the COMELEC awarded the contract to Smartmatic-TIM to supply 82,000 Precinct Count Optical Scan (PCOS) machines to be used in the 2010 elections. Subsequently, Jose Mari Antuñez, the President of TIM, informed COMELEC Chairperson Jose Melo that TIM was withdrawing from the partnership with Smartmatic, due to irreconcilable differences and loss of confidence. The scheduled signing on June 30, 2009 of the Automation Contract between COMELEC, Smartmatic and TIM did not take place. Following a series of discussions, Smartmatic and TIM were able to settle their internal dispute.

Smartmatic and TIM then caused the incorporation of their joint venture, pursuant to the JVA. On July 8, 2009, the Securities and Exchange Commission (SEC) issued a Certificate of Incorporation to Smartmatic TIM Corporation.

On July 10, 2009, the Smartmatic TIM Corporation entered into the Automation Contract with the COMELEC. The contract price was ₱7,191,484,739.48.

The petition at bar raises the following —

B. Issues

1. Whether RA 8436, as amended by RA 9369, requires the conduct of a pilot exercise as a condition precedent to the full nationwide automation of the election.
2. Whether RA 9525 has impliedly repealed the pilot testing requirement.
3. Whether Smartmatic and TIM entered into a valid joint venture agreement.
4. Whether any nationality requirement is applicable.
5. Whether the AES chosen by the COMELEC complies with the "prior successful use" qualification set forth in Section 12 of RA 8436, as amended.

6. Whether the PCOS machines offered by the Smartmatic-TIM Consortium satisfy the minimum system capabilities mandated by Section 6 of RA 8436, as amended.

C. Discussion

A touchstone of our Constitution is that critical public policy judgments belong to the legislative branch, and the Court must not unduly intrude into this exclusive domain.

In enacting RA 8436 (Election Modernization Act) on December 22, 1997, the legislature has clearly chosen the policy that an AES shall be used by the COMELEC for the process of voting, counting of votes and canvassing/consolidation of results of the national and local elections.[10] It decided to put an end to the manual conduct of our elections that has frustrated the honest casting of votes by our sovereign people.

In the pursuit of its objective, the legislature defined what it considered an AES and provided the standards for its implementation. It further determined the minimum functional capabilities of the system and delegated to the COMELEC the development and adoption of a system of evaluation to ascertain that the minimum system capabilities would be met.

The policy decision of Congress to adopt an AES is not under question. It is the manner the COMELEC is implementing the AES that is assailed by the petitioners. The **first issue** is whether the conduct of an AES in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao is a condition precedent to the nationwide implementation of the AES.

c.1 The conduct of the pilot exercise of the AES is a condition precedent to its nationwide implementation

Whether the conduct of the pilot exercise of the AES is a condition precedent to its nationwide implementation involves the correct interpretation of Section 5 of RA 8436. The

[10] Republic Act No. 8436 (1997), Sec. 6.

interpretation of Section 5, RA 8436, as amended, is nothing less than a brain twister. It appears like a Rorschach inkblot test, in which petitioners and respondents assign meaning to certain words as though they were deciphering images formed by inkblots. Using the same word of the law, they arrive at different conclusions.

Thus, the petitioners interpret the word **shall** in the first proviso of Section 5, RA 8436, as amended, to support their thesis that the pilot exercise of the AES is a condition precedent prior to its full implementation. The proviso states that "the [automated election system] **shall** be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao."[11]

Similarly, the respondents interpret the word **shall** in the last sentence of the provision, which states that "in succeeding regular national or local elections, the [automated election system] **shall** be implemented nationwide,"[12] and submit that the pilot exercise of the AES is not a condition precedent. Further, they contend that the use of the AES in at least two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao **refers only** to the national and local elections immediately following the passage of RA 9369, *i.e.*, the May 2007 national and local elections. They argue that this was just an acknowledgment by Congress that there was not enough time or funds to conduct a full nationwide automation of the May 2007 election.

The respondents' reading of Section 5 disregards the tenor of the entire provision. A rational reading of the entire provision will show that the different parts isolated and then interpreted by the respondents are connected by the conjunctions **provided, that** and **provided, further that** and **provided, finally that.** These conjunctions signify that the clauses that follow the conjunction are a pre-requisite or a condition to the fulfillment of the previous clause. The words **provided, that** mean the

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[11] Republic Act No. 8436 (1997), Sec. 5.

[12] *Id*.

same as "as long as," "in order that," and "if only." Thus, the provision should be read and understood as follows:

Part 1: To carry out the above-stated policy, **the Commission on Elections**, herein referred to as the Commission, **is hereby authorized to use an automated election system** or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises:[13]

Provided, That

Part 2: for the regular national and local elections, which shall be held immediately after the effectivity of this Act, **the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao**, to be chosen by the Commission:

Provided, further,

Part 3: That **local government units** whose **officials have been the subject of administrative charges** within sixteen (16) months prior to the May 14, 2007 elections shall **not be chosen**:

Provided finally,

Part 4: That **no area** shall be **chosen without the consent of the Sanggunian** of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province.

Part 5: In succeeding regular national or local elections, the AES shall be implemented nationwide.[14]

In this light, Section 5 should be interpreted to mean that the COMELEC is authorized to use an AES as long as the following requisites are complied with: (1) for the regular national and local elections, which shall be held immediately after the effectivity of the Act, the AES shall be used in at least two highly urbanized

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[13] *Id.*

[14] *Id.*

cities and two provinces each in Luzon, Visayas and Mindanao; (2) that local government units whose officials have been the subject of administrative charges within sixteen months prior to the May 14, 2007 elections shall not be chosen; and (3) that no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. And, when the above conditions are complied with, the AES shall be implemented nationwide in succeeding regular national and local elections.

The last sentence of the provision which provides that "[i]n succeeding regular national or local elections, the AES shall be implemented nationwide" may appear as not connected to the enumeration of requirements for the use of an AES. But this does not mean that it can be read in isolation and independently from the rest of the provision. Section 5 expressly declares that the COMELEC's authority to use the AES on a nationwide scale is contingent on the prior conduct of partial automation in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao.

Likewise, the word "pilot testing" may not have been used in the provision, but the intent to test the use of an AES is evident in its text. The mandatory nature of the initial conduct of an automated election in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao is highlighted by the use of the word **shall**. That this is a condition precedent before a full nationwide automated election can be used in the succeeding elections is buttressed by the use of the words **provided, that**. Thus, the COMELEC is authorized to use an AES, provided that the AES is first used in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao, after which, in the following regular national and local elections, the AES shall be implemented nationwide.

Pushing to the limit their argument that pilot testing is not a condition precedent to the conduct of an AES, the respondents rely on Section 12 of RA 8436, as amended, which provides thus:

SEC. 12. Procurement of Equipment and Materials. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other

forms of acquisition, supplies, equipment, materials, software, facilities and other services, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. **With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.** (Emphasis supplied)

The respondents press the point that Section 12, *supra*, indicates that pilot testing in the May 2007 elections is not a mandatory requirement for the choice of an AES to be used in the May 2010 elections, nor is it a prerequisite for the full automation of the May 2010 elections, since the system's capability may have been used in an electoral exercise abroad. Respondents also contend that since participation in the 2007 pilot exercise is expressly declared as inconclusive of the system's fitness, then the non-use of the PCOS machines in the 2007 electoral exercise is not a bar to the implementation of a full nationwide automation in the 2010 elections.

With due respect, the respondents have a murky understanding of the last sentence of Section 12. It merely states that "[p]articipation in the 2007 pilot exercise shall not be conclusive of the system's fitness." It does not say that participation of the procured system in the 2007 pilot exercise is not a condition precedent to the full nationwide implementation of the AES. The section says in unadorned language that as long as the system procured — presumably for the May 2007 elections — has been shown to have demonstrated capability and has been successfully used in a prior electoral exercise here in the Philippines or abroad, the system may also be used in the May 2010 and succeeding elections. In fine, the subject of the section is the fitness of the system procured for the May 2007 automated pilot exercise; it has no relation to the issue of whether the pilot exercise is a condition precedent to the implementation of full nationwide automated elections.

The deliberations of the Joint Congressional Oversight Committee on [the] Automated Election System (Joint Committee

on AES)[15] should further enlighten us on the purpose of the last sentence in Section 12 of RA 8436, as amended: that "[p]articipation in the 2007 pilot exercise shall not be conclusive of the system's fitness." **They reveal that the purpose is simply to avoid a situation in which the choices of machines and the kind of AES to be used in the 2010 elections would be limited to those that were piloted in the 2007 elections.**

Thus, Senator **Richard Gordon** explained that the purpose behind the statement that participation in the 2007 pilot exercises was not conclusive of the system's fitness was **to ensure that newly developed technology may still be considered for the 2010 elections, even though it was not tested in the 2007 pilot exercise.** Representative **Teodoro Locsin** concurred in the same view. Thus:

THE CHAIRMAN (SEN. GORDON). Precisely **that was placed there so that you can get newly discovered machines or newly invented machines that can be utilized so that in the 2010 elections** it would have been tried in an example here in our country.

THE CHAIRMAN (REP. LOCSIN). I think **the purpose of this was any bidder who can prove and who has already carried out an electoral exercise- sure, of course, he has a leg up of all other but that's not conclusive** which assumes that others who have not the same experience will be allowed to also bid. (Emphasis supplied.)[16]

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[15] The Joint Congressional Oversight Committee on Automated Election System was created pursuant to Section 27 of RA 8436, as amended. It was formerly chaired by Senator Richard Gordon, and now by Senator Francis Escudero. The former Senate Members are: Senator Juan Ponce Enrile, Senator Edgardo Angara, Senator Lito Lapid, Senator Loren Legarda, Senator Manuel Roxas II, and Senator M.A. Consuelo Madrigal. The present Senate members are: Senator Loren Legarda, Senator M.A. Consuelo Madrigal, Senator Manuel Roxas II, Senator Francis Pangilinan, Senator Alan Cayetano, and Senator Aquilino Pimentel. The House Panel is composed of: Representative Teodoro Locsin, Representative Edcel Lagman, Representative Rufus Rodriguez, Representative Abdullah Dimaporo, Representative Martin Romualdez, Representative Abigail Binay, and Representative Roman Gabriel Tecson Romulo.

[16] TSN, Joint Congressional Oversight Committee on Automated Election System, March 11, 2008, I-2, p. 30.

Representative Locsin elucidated that participation in the pilot-exercise was not conclusive of the system's fitness, because pilots were easier to do than national exercises. This was also to emphasize that those who participated in the pilot exercise were not to be preferred over those who were not able to participate in the pilot exercise. Thus:

> THE CHAIRMAN (REP. LOCSIN). Although this is a detail, if I may 'no, I think you are just doing your best that you just read what it says. It simply says that, I think, everyone is entitled to put their bid. Your *(sic)* have the discretion to decide whether or not they have the capability. A company may have had many exercises in Latin America but for this particular exercise they may not be prepared to deploy the best then we just forget it. But **when it says "participation in 2007 pilot exercise shall not be conclusive," that does not mean to exclude anyone who did not participate in 2007. It was only meant to say our fear is that somebody may be so good in the pilot but then he'll say, "Hey, I won the pilot therefore you have to give me the national election."** That's all it meant because **pilots are always easier to do than national exercises.** (Emphasis supplied.)[17]

The respondents also have an erroneous reading of the use of the word "pilot exercise" instead of "pilot testing." They claim that the use of the word "pilot exercise" instead of "pilot testing" is indicative of the intention to only initially use or employ the AES in the 2007 elections rather than make it a condition precedent. Again, this submission is not sustained by the deliberations of the Senate. "Pilot-exercise" was used in the law instead of "pilot-test" to avoid the notion that a test must first be passed in the 2007 elections in order to continue with the use of the AES as a mode of conducting the succeeding elections. The lawmakers wanted to avoid the use of the word "test," so that in case the AES to be used in the 2007 elections did not well perform as planned, still, the automation of the elections in the next elections would proceed. This intent is reflected in the debate between Senator Richard J. Gordon (Senator

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[17] TSN, Joint Congressional Oversight Committee on Automated Election System, March 11, 2008, pp. 34-35.

Gordon) and Senator Manuel A. Roxas II (Senator Roxas) over an amendment to Section 5 of RA 8436, proposed by the latter. Senator Roxas proposed to add the words "on a test basis" to refer to the use of an AES. The amendment is as follows:

> Section 5. Authority to Use an Automated Election System. – To carry out the above-stated policy, the Commission on Elections, herein referred to as the COMELEC is hereby authorized to use ON A TEST BASIS AN automated election system x x x.[18] (capitalization in the original.)

Senator Roxas wanted to use the word "test," so that after a "test" of the AES in the 2007 elections, Congress would know whether the implementation of the 2007 national and local AES was successful. Thereafter, Congress would decide whether the AES — as a mode of conducting elections — should still be used for the successive elections. This is clear from the following exchange of remarks between Senator Roxas and Senator Gordon:

> SENATOR ROXAS. In any event, Mr. President, I would like now to go to line 18 and read into the *Record* the proposed amendment. Again, as I said earlier, so as not to confuse those who are following the language, I will deliberately not read the word "test" subject to whatever happens to that word in subsequent debate and dialogue.
>
> The proposed amendment reads:
>
> THE FURTHER IMPLEMENTATION OF AN AES OR AES TECHNOLOGY SHALL BE DECIDED UPON BY CONGRESS, THROUGH A JOINT RESOLOUTION, (sic) UPON RECOMMENDATION OF THE OVERSIGHT COMMITTEE. FOR THIS PURPOSE, THE OVERSIGHT COMMITTEE SHALL CONDUCT COMPREHENSIVE EVALUATION PERFORMANCE OF SAID AES OR AES TECHNOLOGY DURING INITIAL IMPLEMENTATION OF RESULTS WITH MANUAL TABULATION. IT SHALL THEN MAKE APPROPRIATE RECOMMENDATIONS TO CONGRESS ON WHETHER ANY FURTHER IMPLEMENTATION SHALL BE CONDUCTED OR OTHERWISE. IN CASE OF FURTHER IMPLEMENTATION AND THE INCREMENTAL COVERAGE BY

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[18] Record of the Senate, Vol. 3, Session No. 23, September 13, 2006, pp. 133-134.

ALL AES SHALL NOT BE MORE THAN TEN PERCENT (10%) OF THE TOTAL COVERAGE IN TERMS OF NUMBER OF DISTRICTS.

That is the proposed amendment, Mr. President. The proposed amendment, first, from a comprehensive perspective seeks to revert back to Congress the judgment whether the implementation of the AES in 2007 national and local elections was successful or not.

As envisaged in the bill, Mr. President, we are leaving to the Comelec the decision to choose the appropriate technology that will be implemented. There will be a series of advisory or a number of advisory and TAHEC bodies that will hopefully inform that decision.

x x x x x x x x x

SENATOR GORDON. I thank the distinguished gentleman from Capiz, Mr. President. I know he tried to amend this with sincerity, but I also would like to maintain that this is not a test, first and foremost, because he speaks of a test, and I know he has already stated what word to use. As I pointed out, the words to be used should be: The Automated Election System will be implemented in the province he has already spoken about.

But, upon the other hand, I am concerned about "shall be decided upon by Congress through a joint resolution," referring to line 18,— before the implementation of an AES. I am removing the word "test," — "before the implementation of AES technology shall be decided upon by Congress."

Mr. President, that line speaks volumes. The mother bill that we are amending which is enacted in 1987 decided a policy that we are going to go on an automated election. In other words, if we follow the logic here, we are practically saying: "Well, we may be changing our mind. Maybe we are not in automation mode again." This very line suggests and clearly states that: "Hey, it is going to go back to Congress." And, in fact, through a joint resolution, which I think cannot even be done because Congress amends even without this suggestion. It can amend even without these lines. It can amend the law if it chooses to do so. Which means that after the Automated Election System, if we feel that we no longer want to have an automated election system, Congress cannot at anytime say: "No, we are no longer in that mode."

What our bill provides is that we are already on this heuristic notion, if I may use a word I learned in school a long time ago, which is a trajectory that is headed towards a particular direction aimed at modernizing the election by way of AES. And we have put in the safeguards the minimum requirements and by so doing, after the election has been conducted, the Comelec which is the agency, whether we like it or not, that has been mandated by the Constitution to run our elections simply goes on and says: "All right, we will expand upon the recommendation of the AES, along with the oversight committee."

Now, if that is the case, Mr. President, there is no need to go back to Congress. But if Congress sees it fit, as I pointed out, we are not obviating that possibility. If Congress sees it fit, they can amend it.

But as far as I am concerned, I think the rule should be that we are on an automated rule should be that we are on an automated election mode and we should not say continue on with it.

But as far as I am concerned, **I think the rule should be that we are on an automated election mode and we are on an automated election more and we should continue on with it. But we should not say after the exercise, *parang lumalabas na test,* we will now go back and decide whether we are still on an automated election mode and say we might be going back to manual.** x x x We have debated on the automated, we passed this on the past period of debate and we have already decided that we are continuing with the trajectory of automated election. I would not want to go back again to a situation where Congress will say, "We are changing his *(sic)* mind." Although, it is within its prerogative anyway at any time. (Emphasis supplied; capitalization in the original.)[19]

Senator Roxas' amendment which contained the word "test," was rejected. The reason is not because the partial use of the AES in the 2007 election was not considered as a condition precedent to its full implementation in the 2010 elections. Rather, it was because the use of the word "test" would have implied that Congress would still have to decide whether the conduct of the AES had passed its requirements; whether an AES should

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[19] *Id.* at pp. 181-184.

still be continued in the succeeding elections; or whether, based on the "test," the conduct of the elections should revert to manual.

Senator Gordon further made it clear that the reason why the AES should first be implemented in certain parts of the country – and not immediately throughout the entire country — was that "a big bite must not be taken right away."[20] The implementation of the system must be done in phases: first, it must be piloted in parts of the Philippines, and only then can it be implemented nationwide. This is reflected in the following statement of Senator Gordon:

SENATOR GORDON. x x x x

Mr. President**, this is precisely why we are starting the automation in two provinces and two cities so that we do not take a big bite right away.** And I accepted the amendment of the Minority Leader precisely because **we want to make sure that the bite is sufficiently enough for us to be able to run the automation**. x x x We trust the Comelec but we verify the system because we are hamstrung by the constitutional provision that the Comelec is the one that is principally in charge of running the elections, but at the same time, we have an Advisory Council, composed of our experts, to guide them. (Emphasis supplied) [21]

x x x x x x x x x

Now, **the sample is only two provinces and two cities, Mr. President, so that we would be able to get a gauge.** x x x (Emphasis supplied)[22]

x x x So, **it is really an automated system that we advocate and, obviously, the two provinces and two cities for Luzon, Visayas and Mindanao will be the initial approach towards this effort.** So that when we go and expand in the next elections in 2010, based on the Oversight Committee and based on the Congress itself, if we want to amend it again, we can do so. (Emphasis supplied)[23]

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[20] *Id.* at p. 136.

[21] *Id.* at pp. 136-137.

[22] *Id.* at p. 137.

[23] *Id.*

In sum, both from the words of RA 8436, as amended by RA 9369, and its legislative intent, it is clear that an AES shall be conducted; and that the COMELEC is authorized to implement the AES, provided that it is initially piloted in two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao.

c.2 Be that as it may, the enactment of RA 9525 has Impliedly repealed the Pilot Exercise Requirement

In a shift in stance, it is argued by the respondents that RA 8436, which requires that a piloting of the AES be used in at least two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao before a full nationwide automation of the elections can be conducted, has been impliedly repealed by the enactment of a later law, RA 9525. They proffer the view that RA 9525,[24] appropriating ₱11,301,790,000.00 for the conduct of an AES in the May 10, 2010, is for the **full** implementation of automated elections in 2010. They argue that when RA 9525 was enacted on March 5, 2009, Congress was aware that there was no pilot exercise conducted in two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao; and despite this failure, Congress still appropriated the entire amount of ₱11,301,790,000.00 for the full nationwide implementation of the AES in the May 2010 elections. By the enactment of the ₱11,301,790,000.00 supplemental appropriation, the respondents claim that Congress conveyed the intention to proceed with full nationwide automation and do away with the requirement of conducting a pilot exercise. The respondents also rely on the deliberations of the Senate and the House of Representatives to support their thesis.

On the other hand, the petitioners counter that there was no implied repeal of the requirement of pilot testing of the AES in two provinces and two highly urbanized cities each in Luzon, Visayas and Mindanao. They cite Section 2 of RA 9525, *viz.*:

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[24] An Act Appropriating the Sum of Eleven Billion Three Hundred One Million, Seven Hundred Ninety Thousand Pesos, March 5, 2009.

Section 2. *Use of Funds*. — **The amounts herein appropriated shall be used for the purposes indicated and subject to**: (i) the relevant special and general provisions of Republic Act No. 9498, or the FY 2008 General Appropriations Act, as reenacted, and subsequent General Appropriations Acts, and (ii) the **applicable provisions of Republic Act No. 8436,** entitled: "An Act Authorizing the Commission on Elections to Use an Automated Election System in the May 11, 1998 National or Local Elections and in subsequent National and Local Electoral Exercises, Providing Funds Therefor and for Other Purposes," **as amended by Republic Act No. 9369:** *Provided, however*, That **disbursement of the amounts herein appropriated or any part thereof shall be authorized only in strict compliance with the Constitution, the provisions of Republic Act No. 9369 and other election laws incorporated in said Act** so as to ensure the conduct of a free, orderly, clean, honest and credible election and shall adopt such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used on May 10, 2010 automated national and local election. (Emphasis supplied.)

The petitioners stress that Section 2 provides that the amount appropriated shall be used for the implementation of the May 2010 automated elections, **subject** to the applicable provisions of RA 8436, as amended. They further emphasize that Section 2 states that the disbursement of the amount appropriated or any part thereof shall be done only in **strict compliance** with the Constitution, and the provisions of RA 9369 and other election laws. Thus, the petitioners conclude that the mandatory requirement of pilot testing was not repealed but reiterated by Congress in said section.

The petitioners further argue that implied repeals are not favored, and two laws must be absolutely incompatible before an inference of implied repeal may be drawn. They contend that RA 9525 is not totally inconsistent with the requirement of pilot testing in Section 5 of RA 8436, as amended, such that the provisions of RA 9525 must be interpreted and brought into accord with the old law.

To resolve this issue of implied repeal, the Court must first determine whether it was the intent of Congress to push through with full nationwide automation of the elections in May 2010.

RA 9525 is unclear whether Congress appropriated ₱11,301,790,000.00 for the conduct of full or partial automated elections, or whether it intended the automated elections to be conducted nationwide or only in the pilot areas. To clear this uncertainty, the Court should resort to the deliberations of the Senate and the House of Representatives, as well as the hearings of the Joint Committee on AES.

Let us first look at the deliberations of the **House of Representatives** when it considered House Bill 5715 (HB 5715), entitled "An Act Appropriating the Sum of Eleven Billion, Three Hundred One Million, Seven Hundred Ninety Thousand Pesos as Supplemental Appropriations for an Automated Election System and for Other Purposes. From the deliberations, the assumption of the members of the House of Representatives who engaged in the debate was that the appropriation was for a full nationwide implementation of the AES in the May 2010 elections.

Thus, in the sponsorship speech of Representative **Junie Cua** of the Lone District of Quirino, he stated that the appropriation was for the full nationwide automation of the May 2010 elections, *viz.*:

REP. CUA. x x x

For your consideration, my dear esteemed colleagues, I have the privilege of submitting the budget of the Commission on Elections **for the automation of the 2010 national and local elections.**

Out of the budget proposal of ₱11.3B, the COMELEC is proposing to spend about ₱8.2B for the lease of election automation equipment. This will cover the cost of 80,000 Precinct Count Optical Scanners or PCOS that will be **deployed throughout the country**. These devices will count hand-marked ballots that will be printed on ballot paper costing a total of ₱1B. We will be spending about ₱78B on ballot boxes. Once the ballots are so counted, the results will then be electronically transmitted to the public quicker than any quick count in our election history and for this, we need ₱400M.

And finally ₱1.7B, more or less, will then be spent to ensure that everything goes smoothly through the strong project management

and associated services that the COMELEC will put in place. (Emphasis supplied.)[25]

x x x x x x x x x

As AKBAYAN Party-list Representative **Risa Hontiveros-Baraquel** (Representative Hontiveros-Baraquel) was asking clarificatory questions to Representative Junie Cua, she also stated that the appropriation was for the conduct of the automated elections of the entire country and not merely a region therein, *viz.*:

REP. HONTIVEROS-BARAQUEL. x x x x

In the budget breakdown presented by the COMELEC in our committee hearing, the amount for operating expenses was ₱50 million, which is only equal to the operating expenses for the ARMM elections. And, **since this would be a national elections, not just in one region of our country,** I asked then, "Shouldn't the amount be more in the vicinity of one or one-and-a-half billion pesos?" There is — part of the response was in the remarks column of the COMELEC, where they noted that some of the operating expenses, the transmission costs, would be carried by public TELCOS. (Emphasis supplied.) x x x

x x x x x x x x x

REP. CUA. Yes, Mr. Speaker, after consulting with the technical people of the commission, I understand that the Lady is correct that what was originally allocated for operating cost or transmission cost was 50 million. But after reevaluating the cost breakdown, they have increased this to 200 million, Mr. Speaker, Your Honor. Yes, 200 million, Mr. Speaker.[26] (Emphasis supplied)

HB 5715 was approved on the third reading, with 193 members of the House of Representatives voting in the affirmative, one voting in the negative, and one abstention.

We have also examined the deliberations of the **Senate** which constituted itself into a Committee of the Whole to consider

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[25] Deliberations of the House of Representatives, February 4, 2009, pp. 21-22.

[26] *Id.* at pp. 69-71.

HB 5715. The debates confirmed that the senators were also of the understanding that the appropriation of ₱11.3 billion was for the full nationwide automation of the May 2010 elections.

In the same vein, the members of the **Joint Committee on AES** took it as a given that the May 2010 elections would be implemented throughout the entire country. The September 1, 2008 hearing of the Joint Committee on AES took up the COMELEC evaluation report on the automated elections held in the ARMM. Senator **Loren Legarda** asked the Chairperson of the COMELEC Advisory Council, Mr. Ray Anthony Roxas-Chua III, regarding the cleansing of the list of voters; in the process of doing so, she assumed that the 2010 elections were to be full automated. Thus:

SEN. LEGARDA. x x x

So therefore, if I understand correctly, the cleansing of the voters list through the enactment of a new law and the funding from Congress is essential because it is a partner towards the automation, **complete automation**, by 2010. Is that correct? (Emphasis supplied.)[27]

Representative **Edcel Lagman** held the same assumption, as he asked the following question:

REP. LAGMAN. Mr. Chairman, how many machines and allied equipment do you need for the **nationwide implementation** of the automation by 2010? (Emphasis supplied.)[28]

During the September 9, 2008 hearing of the Joint Committee on AES, Senator **Edgardo Angara** had an exchange with **Chairman Melo**. It was unmistakable from the exchange that not only did the Congress contemplate a full nationwide automation of the May 2010 elections, but also that the approval of a budget of ₱11.3 billion was meant for the conduct of a full nationwide automation of the 2010 elections, and not a partial or a pilot of the AES in selected areas.

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[27] TSN, Joint Congressional Oversight Committee on Automated Election System Hearing on September 1, 2008, Part II-2, p. 74.

[28] *Id.* at Part V-2, p. 104.

SEN. ANGARA. Mr. Chairman, yesterday the Finance Committee of the Senate started the budget hearing. So, in the Senate we are already beginning to do that.

Now let me just ask before I say something more. Has the budget of the Comelec been heard in the House?

MR. MELO. Not yet.

SEN. ANGARA. Good! Good, good, because that is your window of opportunity. You've got to catch the House hearing on the budget because it's better that your proposed budget for the elections of 2010 are incorporated in the House itself. Of course, we can supplement it in the Senate but, as you know, the Senate cannot tap the President's Budget. So it's better that we negotiate it in the House.

The **presentation yesterday by the Budget Secretary is you will have about 3.8B for 2010**. And the 3.8B, billion *(sic)*, also includes registration, *etcetera*, *etcetera* so it does not exclusively . . . And when we asked, **"Is this enough for full automation?"** Secretary Andaya was frank enough. "No, no. This is the figure that they submitted to us four years ago and we are really expecting a submission of a revised cost of computerization."

This is why I think you must seize the opportunity. And I would suggest very strongly that the advisory committee sit down with potential bidders and really go over every single figure in that costing because it's going to be unfortunate that this will not push through. Automation will not push through simply because it's so expensive that there'll be such a huge public outcry against it. Whereas, you and I know that this may be one good way to have clean elections and speedier results announced in our country. That's why I think it's very important that you bargain hard and I hope that the suppliers will see also the public service element in this experiment; that I hope they won't even cut a profit out of this transaction because if you are successful, I think this will be one of the biggest use of their technology at 45 million or 35 million voters. I don't know if there's any other country who has that number of voters using this particular technology.

So, in terms of selling point, this will be one of their strongest selling points. So I urge the representatives of the vendors to consider

that very strongly even if they have to donate a substantial portion of that cost for the sake of democracy, '*di ba*?[29] (Emphasis supplied.)

Indeed, several times during the hearings of the Joint Committee on AES, the members pointed out that full nationwide elections would be conducted on May 10, 2010, *viz.*:

MR. TOLENTINO.[30] Yes, Sir.

The costing here would be the purchased *(sic)* price. And if we base it on the rate that we sued for the ARMM elections, the lease cost would be 70 percent of the total budget.

THE CHAIRMAN (SEN. GORDON). Well, I got thrown off because there is an allegation made by Mr. Dizon that says that they can make it for 14 to ₱18 billion, is that correct?

MR. DIZON. Yes, Mr. Chairman.

THE CHAIRMAN (SEN. GORDON). …DRE machines…

MR. DIZON. Yes, Mr. Chairman.

THE CHAIRMAN (SEN. GORDON). …**for the entire country, right?**

MR. DIZON. Yes, Mr. Chairman. That's approximately 37 million voters.[31] (Emphasis supplied.)

In the March 4, 2009 hearing:

THE CHAIRMAN (SEN. ESCUDERO). The only thing I am raising this *(sic)*, Mr. Chairman, is without violating inter-chamber courtesies, we are talking here of 40, nearly 50 million voters and you are transmitting a vote located thousands of kilometers away in an area we are not even sure if there is signal, *dahil kung wala ibababa ho physically iyong balota mula duon sa presinto para dalhin o maglalagay kayo ng satellite, hindi ko ho alam kung ano ang gagawin ninyo, wala pa ho tayo doon*. x x x So, please, bear with us as your Oversight Committee attempts to sift through all of these

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[29] TSN, Joint Congressional Oversight Committee on Automated Election System Hearing on September 9, 2008, Part II-1, pp. 21-23.

[30] Mr. Jose Tolentino is the Executive Director of COMELEC.

[31] *Id.* at part IV-1, p. 31.

various inputs and information and try to find some rhyme or reason into it and **justify perhaps our action of the proposed full automation for the 2010 elections.** x x x (Emphasis supplied.)

x x x x x x x x x

THE CHAIRMAN (SEN. ESCUDERO). And as final point, Mr. Chair, I would like to make of record what we discussed. Kindly also look into the possibility, Mr. Chairman, **fully automated *tayo***, OMR *kayo*, as you proposed, but in addition to electronic transmission, can't we have an OMR at the provincial level to count the ERs to be produced by our OMRs at the precinct or collapsed precinct level either OMR that can count ER or OMR that can count an encrypted CD from the PCOS located in the collapsed precinct so that you will have a hard copy of the ER at the provincial level which you can easily adopt once you go to the site? x x x[32] (Emphasis supplied.)

So it was during the February 2, 2009 hearing of the **Senate Committee on Finance** for the appropriation of ₱11.3 Billion for the May 10, 2010 AES, *viz.*:

MR. ROXAS-CHUA. Your Honor, Your Honor, the basis for this is really the ARMM election because we used similar structure. It was also a lease with an option to purchase and this is where we came up with the 70 percent price for the lease with the option to purchase. That is the structure that we used and there was successful bidder so we used that as a basis, as the cost structure **for this next election**.

THE CHAIRMAN.[33] *Hindi. Siyempre doon sa ARMM, kinocompartmentalized* (compartmentalize) *ninyo* per province. O, Maguindanao, you will use DRE. The rest we will use COS. *Oo*. So, localized. ***Ito nationwide ito*.**[34]

The **Comment-in-Intervention of the Senate of the Philippines** also affirmed the congressional intention to implement a full nationwide automation of the elections this May 10, 2010.

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[32] TSN, Joint Congressional Oversight Committee on Automated Election System Hearing on March 4, 2009, Part V-2, pp. 117-118.

[33] Senator Edgardo Angara.

[34] TSN, Hearing of the Senate Committee on Finance, February 2, 2009, Part IV-1, p. 4.

It categorically stated that the approval of the supplemental budget of ₱11.3 billion for the upcoming May 10, 2010 elections was not merely for a pilot test, but for a full nationwide implementation of the AES.

In the case at bar therefore, there is unmistakable evidence of the legislative intent to implement a full nationwide automation of the May 2010 elections. It is impossible to give effect to this intent and at the same time comply with the condition precedent of conducting pilot exercises in selected areas. The irreconcilability between Section 5 of RA 8436, as amended, and Section 2 of RA 9525 is apparent for Congress could not have maintained the requirement of a pilot exercise as a condition precedent to full automation when it had made it absolutely clear that it wanted to push through with a full nationwide AES this May 2010.

Laws of Congress have equal intrinsic dignity and effect; and the implied repeal of a prior by a subsequent law of that body must depend upon its intention and purpose in enacting the subsequent law.[35] What is necessary is a manifest indication of a legislative purpose to repeal. Repeal by implication proceeds from the premise that where a statute of a later date clearly reveals an intention on the part of the legislature to abrogate a prior act on the subject, that intention must be given effect.

c.3 COMELEC's Award of the Automation Contract to the Smartmatic-TIM Consortium Not Attended by Grave Abuse of Discretion

The petitioners attribute grave abuse of discretion amounting to lack or excess of jurisdiction to the COMELEC for awarding the 2010 Elections Automation Project to Smartmatic TIM Corporation, on four grounds, *viz.*:

1. Private Respondents Smartmatic and TIM allegedly did not execute and submit a valid joint venture agreement evidencing the existence, composition and scope of their joint venture, in violation of the COMELEC's own bidding requirements

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[35] *Te v. Bell*, G.R. No. 8866, November 19, 1914.

and this Court's ruling in ***Information Technology of the Philippines, et al. v. COMELEC, et al.***;[36]

2. Even granting that such an agreement was submitted, the joint venture is nevertheless illegal for having been constituted in violation of the nationality requirement, *i.e.*, 60%-40% Filipino-foreign equity ceiling;

3. The AES chosen by the COMELEC does not comply with the "prior successful use" qualification set forth in Section 12 of RA 8436, as amended; and

4. The PCOS machines offered by the Smartmatic-TIM Consortium do not satisfy the minimum system capabilities mandated by Section 7 of RA 8436, as amended.

Preliminarily, it should be underscored that RA 8436, as amended by RA 9369, does not mandate the use of any specific voting equipment. Instead, the law gave COMELEC the sole power to prescribe the adoption of the most suitable technology of demonstrated capability[37] as it may deem appropriate and practical,[38] taking into account the situation prevailing in the

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[36] *Supra* note 3.

[37] RA 9369, Section 1 states:

"Section 1. Section 1 of Republic Act No. 8436 is hereby amended to read as follows:

"Section 1. Declaration of Policy —

x x x x x x x x x

The State recognizes the mandate and authority of the Commission to prescribe the adoption and use of the **most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose**." (Emphasis supplied)

[38] *Id.,* Section 6 provides:

"Sec. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

"Sec. 5. Authority to Use an Automated Election System. — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system **as it may**

area and the funds available for the purpose.[39] Absent any capricious and whimsical exercise of judgment on the part of the COMELEC, its determination of the appropriate election technology, as well as the procedure for its procurement, should be respected. Our judicial function is merely to check and not to supplant the judgment of the COMELEC; to ascertain merely whether it has gone beyond the limits prescribed by law, and not to exercise the power vested in it or to determine the wisdom of its act.[40]

c.4 Valid JVA was duly submitted

The petitioners claim that private respondents Smartmatic and TIM submitted a "sham" joint venture agreement during the bidding process. The claim is premised on the following allegations: (i) that although Smartmatic and TIM were awarded the Automation Contract by the COMELEC on June 9, 2009, it was only on July 6, 2009 (or twenty-seven days later) that they were able to "thresh out their serious differences," sign and thereafter submit their incorporation papers to the Securities and Exchange Commission; and (ii) that the provisions of the JVA do not sufficiently establish the due existence, composition and scope of the Smartmatic-TIM joint venture.

As to the first allegation, it should be noted that the TOR/RFP made by the COMELEC does *not* require that a joint venture bidder be incorporated **upon the submission of its bid**. Section 2.2.4 of Part IX (B) of the TOR/RFP declares "[m]anufacturers, suppliers and/or distributors forming themselves into a joint venture [...]" as eligible to participate in the bidding for the 2010 Automation Project, without any incorporated *vs.* unincorporated dichotomy. That the TOR/RFP does not

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deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises: x x x" (Emphasis supplied)

[39] *Supra* note 37.

[40] Mr. Justice Kapunan's Concurring Opinion, *AKBAYAN – Youth, et al. v. Commission on Elections*, G.R. No. 147066, March 26, 2001, citing *Lansang vs. Garcia*, 42 SCRA 448 (1971).

specifically call for incorporation at the time of the bidding is significant, because Philippine law admits of a distinction between simple joint ventures and ordinary corporations.[41] In ***Aurbach, et al. v. Sanitary Wares Manufacturing Corporation, et al.***,[42] a joint venture was likened by this Court to a partnership, thus:

> The legal concept of a joint venture is of common law origin. It has no precise legal definition, but it has been generally understood to mean an organization formed for some temporary purpose. It is hardly distinguishable from the partnership, since their elements are similar — community of interest in the business, sharing of profits and losses, and a mutual right of control. The main distinction cited by most opinions in common law jurisdiction is that the partnership contemplates a general business with some degree of continuity, while the joint venture is formed for the execution of a single transaction, and is thus of a temporary nature. This observation is not entirely accurate in this jurisdiction, since under the Civil Code, a partnership may be particular or universal, and a particular partnership may have for its object a specific undertaking. It would seem therefore that under Philippine law, a joint venture is a form of partnership and should thus be governed by the law of partnerships. The Supreme Court has however recognized a distinction between these two business forms, and has held that although a corporation cannot enter into a partnership contract, it may however engage in a joint venture with others. (Citations omitted.)

But any remaining doubt as to the need for incorporation is dispelled by Bid Bulletin No. 19[43] and Bid Bulletin No. 22,[44] issued by the COMELEC-SBAC to provide clarifications to prospective bidders. Both documents acknowledge that a bid by a joint venture may be made either through a joint venture corporation (JVC) or an **unincorporated joint venture** (UJV). Bid Bulletin No. 19 provides, in relevant part:

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[41] *JG Summit Holdings, Inc. v. Court of Appeals, et al.*, G.R. No. 124293, September 24, 2003.

[42] G.R. No. 75875, 15 December 1989, 180 SCRA 130.

[43] Issued on April 18, 2009.

[44] Issued on April 20, 2009.

[Question/Issue:] **If the bidding will be made through an unincorporated joint venture (UJV), and the UJV wins the bid**, can the UJV partners subsequently assign the contract, after its award, to a newly-formed joint venture corporation (JVC) registered with the Securities and Exchange Commission? The registered JVC will assume all rights and obligations of the UJV. Does Comelec have any requirements for allowing such assignment to the JVC?

[Answer/Clarification:] Under the General Conditions of Contract, Sec. 26.1, "The supplier shall not assign his rights or obligations under this contract in whole or in part except with the Procuring entity's prior written consent." x x x

x x x x x x x x x

[Question/Issue:] If the bid will be made through a joint venture (JV) **(either a UJV or a JVC)**, is the JV required also to submit a Tax Identification No. and Value Added Tax (VAT) registration?

[Answer/Clarification:] Please see Bid Bulletin No. 13. (Emphasis supplied.)

Likewise, Bid Bulletin No. 22 states as follows:

[Question/Issue:] How does Joint Venture apply to our group in order to follow the requirement that Filipino ownership thereof shall be at least sixty percent (60%)?

[Answer/Clarification:] The 60% Filipino participation refers to capital ownership or the Filipino contribution in the pool of financial resources required to undertake a government project. **In an unincorporated joint venture, determination of the required Filipino participation may be made by examining the terms and conditions of the joint venture agreement and other supporting financial documents submitted by the joint venture**. (Emphasis supplied.)

The only restriction imposed on a UJV bidder (*vis-à-vis* a JVC bidder) by the TOR/RFP and the Bid Bulletins is that the COMELEC should consent before the UJV could assign its rights to the Automation Contract to the newly formed JVC. The records show that Smartmatic and TIM complied with the consent requirement. After emerging as the winning bidder, they incorporated the Smartmatic TIM Corporation, the corporate

vehicle through which the joint venture is to be carried out.[45] COMELEC acquiesced to this arrangement, for it subsequently entered into a contract with this JVC for the Automation Project.

The petitioners next assert that the JVA does not sufficiently establish the due existence, composition and scope of the Smartmatic-TIM joint venture, in violation of our ruling in ***Information Technology of the Philippines, et al. v. COMELEC, et al.***:[46] that "in the absence of definite indicators as to the amount of investments to be contributed by each party, disbursements for expenses, the parties' respective shares in the profits and the like, it seems to the Court that this situation could readily give rise to all kinds of misunderstandings and disagreements over money matters"; and that "[u]nder such a scenario, it will be extremely difficult for Comelec to enforce the supposed joint and several liabilities of the members of the 'consortium.'" According to the petitioners, Smartmatic and TIM did not submit documents to show "the full identity of the entity it is dealing with," and "who controls the money, how much did each of these entities invest to *(sic)* the alleged joint venture, and who has control over the decision[-]making process of the alleged joint venture."

A cursory glance at the JVA belies the petitioners' posture. The agreement indicates in a thorough and comprehensive manner

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[45] The incorporation of a JVC was done pursuant to Article 2 of the Joint Venture Agreement which provides, in relevant part:

"2.1. In the event that COMELEC declares the bid tendered by TIM and SMARTMATIC to be the winning bid for the Automation Project, the parties hereto shall incorporate, or cause to be incorporated, the JVC which shall be names "TIM SMARTMATIC CORPORATION", or any other name acceptable to the parties which may be allowed by the SEC.

2.2. The JVC shall be the corporate vehicle through which the joint venture of TIM and SMARTMATIC shall be carried out for the purpose set forth in Article 2.3 hereunder. The JVC shall be the entity which shall enter into a contract with the COMELEC for the Automation Project of the 2010 National Elections.

x x x x x x x x x"

[46] *Infra*.

the identity, rights, duties, commitments and covenants of the parties, as well as the purpose, capitalization, and other pertinent details in respect of the joint venture, thus:

1. Smartmatic and TIM are the members of the joint venture.[47]

2. The purpose of the JVC is to carry out and perform jointly, severally and solidarily the obligations of TIM and Smartmatic arising from being declared the winning bidder in the public bidding for the Automation Project, which obligations are spelled out in the [TOR/RFP] released by the COMELEC.[48]

3. The authorized capital stock of the JVC is one billion, three hundred million Philippine pesos (₱1,300,000,000.00), divided into one billion, three hundred million common shares at one peso (₱1.00) par value.[49] The capital contribution of TIM is equivalent to sixty percent (60%) of the shares to be issued by the JVC, with Smartmatic contributing the residual forty percent (40%).[50]

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[47] Joint Venture Agreement, Chapeau states:

"This Joint Venture Agreement ("the Agreement") is made and entered into this 23rd day of April 2009 at Makati City, Metro Manila by and between:

TOTAL INFORMATION MANAGEMENT CORPORATION, a corporation duly organized under the laws of the Republic of the Philippines, with address at 5600 South Superhighway corner Arellano Street, Makati City, Philippines, represented herein by its President and Chairman of the Board, Mr. Jose Mari M. Antunez ("**TIM**");

–and –

SMARTMATIC INTERNATIONAL CORPORATION, a corporation organized and existing under the laws of Barbados, with address at N° 4 Stafford House, Garrison Savannah, St. Michael, Barbados W.I. BB 14038, and a fully-owned subsidiary of SMARTMATIC INTERNATIONAL HOLDING, B.V., a corporation duly organized and existing under the laws of [the] Netherlands, represented herein by its authorized representative, Mr. Juan C. Villa, Jr. ("**SMARTMATIC**")

x x x x x x x x x"

(emphasis in the original)

[48] *Id.,* Article 2.3.

[49] *Id.,* Article 2.4.

[50] *Id.,* Article 2.5.

4. The contributions[51] of the parties are as follows:

   a. TIM — (i) the value-added services pertaining or related to canvassing units, systems integration, transmission and such other services as required by the Automation Project and as indicated in the [TOR/RFP]; (ii) services pertaining or related to logistics, deployment, and manpower; (iii) hardware, software, ballot paper, consumables and such other services as may be requested by Smartmatic; and (iv) local support staff as may be required under the circumstances.

   b. Smartmatic — (i) the development, manufacture and/or supply of [electronic voting machines], other machines and equipment, software, technology and systems; (ii) overall project management as required by the Automation Project and as indicated in the [TOR/RFP][52]; and (iii) any other activity not expressly written in the JVA or assigned to TIM.

   c. Both parties — (i) technical services and/or assistance to carry out the purpose of the JVC; (ii) financial assistance to the JVC; and (iii) additional

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[51] *Id.,* Article 3.

[52] The TOR/RFP specifies, in relevant part:

"COMPONENT 3
OVERALL PROJECT MANAGEMENT

x x x x x x x x x

The scope of the work is to assist the COMELEC in ensuring the successful implementation of the Project.

The project management services component of the 2010 National and Local Elections Project shall include:

1. Project management, including team organization and implementation schedule
2. Physical site design, preparation and operationalization
3. Quality control and assurance
4. Change management, including voter education and training
5. Risk management and contingency planning
6. Configuration management

x x x x x x x x x

capital contributions, as may be requested by the Board of Directors.

5. TIM shall be entitled to nominate and elect 60%, and Smartmatic shall be entitled to nominate and elect 40%, of the Board of Directors of the JVC.[53]

6. The EXCOM shall consist of at least three (3) Directors, two of whom must be Directors nominated by TIM, with the other nominated by Smartmatic.[54]

7. Profits are to be distributed to TIM and Smartmatic as may be determined by the Board of Directors under Article 4.5 or by the Shareholders under Article 5.3 of the JVA, taking into account the financial requirements of the JVC with respect to working capital.[55]

8. Any dispute or disagreement that may arise between the parties in connection with the JVA shall first be settled through mutual cooperation and consultation in good faith. Any dispute or disagreement that cannot be amicably settled between the parties shall be submitted to arbitration in Singapore, in accordance with the commercial arbitration rules of the Singapore Chamber of Commerce, the accompanying expenses in either case to be equally shared by both parties.[56]

9. TIM and Smartmatic are jointly and severally liable to the COMELEC for the obligations of each of TIM and Smartmatic under the TOR/RFP, should they be awarded the contract for the Automation Project.[57]

Trapped in their own "Catch-22," petitioners' invocation of **Information Technology** is misplaced. The facts of that case are entirely different. In the main, no JVA or document of similar import was submitted **during the bidding process** to

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[53] Joint Venture Agreement, *supra* note 47, Article 4.1.

[54] *Id.*, Article 4.7.

[55] *Id.*, Article 7.1.

[56] *Id.*, Article 11.1.

[57] *Id.*, Article 13.1.

the COMELEC in **Information Technology**. The only "evidence" as to the existence of the alleged joint venture was a self-serving letter expressing that Mega Pacific eSolutions, Inc., Election.com, Ltd., WeSolv Open Computing, Inc., SK C&C, and ePLDT and Oracle System (Philippines), Inc. had agreed to form a consortium to bid for the Automation Project. This notwithstanding, the COMELEC awarded the contract to the "consortium." And the Court pointedly ruled:

> The March 7, 2003 letter, signed by only one signatory — "Willy U. Yu, President, Mega Pacific eSolutions, Inc., (Lead Company/ Proponent) For: Mega Pacific Consortium" — and without any further proof, does not by itself prove the existence of the consortium. It does not show that MPEI or its president have been duly pre-authorized by the other members of the putative consortium to represent them, to bid on their collective behalf and, more important, to commit them jointly and severally to the bid undertakings. The letter is purely self-serving and uncorroborated.
>
> To assure itself properly of the due existence (as well as eligibility and qualification) of the putative consortium, Comelec's BAC should have examined the bidding documents submitted on behalf of MPC. They would have easily discovered the following fatal flaws.
>
> x x x x x x x x x
>
> In the case of a consortium or joint venture desirous of participating in the bidding, it goes without saying that the Eligibility Envelope would necessarily have to include a copy of the joint venture agreement, the consortium agreement or memorandum of agreement — or a business plan or some other instrument of similar import — establishing the due existence, composition and scope of such aggrupation. Otherwise, how would Comelec know who it was dealing with, and whether these parties are qualified and capable of delivering the products and services being offered for bidding?
>
> **In the instant case, no such instrument was submitted to Comelec during the bidding process**. This fact can be conclusively ascertained by scrutinizing the two-inch thick "Eligibility Requirements" file submitted by Comelec last October 9, 2003, in partial compliance with this Court's instructions given during the Oral Argument. This file purports to replicate the eligibility documents originally submitted to Comelec by MPEI allegedly on behalf of

MPC, in connection with the bidding conducted in March 2003. Included in the file are the incorporation papers and financial statements of the members of the supposed consortium and certain certificates, licenses and permits issued to them.

However, there is no sign whatsoever of any joint venture agreement, consortium agreement, memorandum of agreement, or business plan executed among the members of the purported consortium.

The only logical conclusion is that no such agreement was ever submitted to the Comelec for its consideration, as part of the bidding process.

It thus follows that, prior the award of the Contract, there was no documentary or other basis for Comelec to conclude that a consortium had actually been formed amongst MPEI, SK C&C and WeSolv, along with Election.com and ePLDT. Neither was there anything to indicate the exact relationships between and among these firms; their diverse roles, undertakings and prestations, if any, relative to the prosecution of the project, the extent of their respective investments (if any) in the supposed consortium or in the project; and the precise nature and extent of their respective liabilities with respect to the contract being offered for bidding. And apart from the self-serving letter of March 7, 2003, there was not even any indication that MPEI was the lead company duly authorized to act on behalf of the others.

So, it necessarily follows that, during the bidding process, Comelec had no basis at all for determining that the alleged consortium really existed and was eligible and qualified; and that the arrangements among the members were satisfactory and sufficient to ensure delivery on the Contract and to protect the government's interest.

x x x x x x x x x

At this juncture, one might ask: What, then, if there are four MOAs instead of one or none at all? Isn't it enough that there are these corporations coming together to carry out the automation project? Isn't it true, as respondent aver, that nowhere in the RFP issued by Comelec is it required that the members of the joint venture execute a single written agreement to prove the existence of a joint venture. Indeed, the intention to be jointly and severally liable may be evidenced not only by a single joint venture agreement, but also by supplementary

documents executed by the parties signifying such intention. What then is the big deal?

The problem is not that there are four agreements instead of only one. The problem is that Comelec never bothered to check. It never based its decision on documents or other proof that would concretely establish the existence of the claimed consortium or joint venture or agglomeration. It relied merely on the self-serving representation in an uncorroborated letter signed by only one individual, claiming that his company represented a "consortium" of several different corporations. It concluded forthwith that a consortium indeed existed, composed of such and such members, and thereafter declared that the entity was eligible to bid.

x x x x x x x x x

In brief, despite the absence of competent proof as to the existence and eligibility of the alleged consortium (MPC), its capacity to deliver on the Contract, and the members' joint and several liability therefor, **Comelec nevertheless assumed that such consortium existed and was eligible. It then went ahead and considered the bid of MPC, to which the Contract was eventually awarded, in gross violation of the former's own bidding rules and procedures contained in its RFP. Therein lies Comelec's grave abuse of discretion**. (Emphasis and underscoring supplied.)[58]

To make matters worse, the COMELEC in **Information Technology** awarded the bid to the "consortium" despite some failed marks during the technical evaluation.[59] In the case at bar, the Smartmatic-TIM Consortium passed the technical evaluation.

It is thus readily apparent that the joint venture of Smartmatic and TIM is not attended by any of the deficiencies of the MP "consortium," as the agreement in the instant case states with precision the "exact nature and scope of the parties' respective undertakings, commitments, deliverables and covenants."[60] The

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[58] *Information Technology of the Philippines, et al. v. COMELEC, et al., infra.*

[59] *Id.*

[60] *Id.*

petitioners' repeated recourse to **Information Technology** betrays a highly myopic and constricted view.

c.5 No nationality requirement is violated

Petitioners also contend that the joint venture agreement of TIM and Smartmatic violates the Filipino-foreign equity ceiling, the Anti-Dummy Law and COMELEC's own bidding requirements.

I concur fully with the *ponencia* of Mr. Justice Velasco on this point. There is no constitutional or statutory provision classifying the lease or provision of goods and technical services for the automation of an election as a nationalized activity. To be sure, Section 12 of RA 8436, as amended by RA 9369, explicitly authorizes the COMELEC to procure supplies, equipment, materials, software, facilities, and other services from foreign sources, as follows:

> SEC. 12. Procurement of Equipment and Materials. — To achieve the purpose of this Act, the Commission is **authorized to procure**, in accordance with existing laws, by **purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services**, from local or **foreign sources** free from taxes and import duties, subject to accounting and auditing rules and regulations. With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness. (Emphasis supplied.)

Petitioners cannot rely on Executive Order No. 584 (EO 584), containing the Seventh Regular Foreign Investment Negative List, which cites "contracts for the supply of materials, goods and commodities to [a] government-owned or controlled corporation, company, agency or municipal corporation" as limited to forty percent (40%) foreign equity. The reliance cannot be countenanced in light of two basic principles of statutory construction.

First, *leges posteriores priores contrarias abrogant*. In case of an irreconcilable conflict between two laws of different vintages,

the later enactment prevails.[61] The rationale is simple: a later law repeals an earlier one because it is the later legislative will.[62] RA 9369, which allows the COMELEC to procure AES supplies and equipment from foreign sources, became law in 2007, whereas EO 584 is an executive issuance in 2006.

Second, *lex specialis derogat generali.* General legislation must give way to special legislation on the same subject, and generally is so interpreted as to embrace only cases in which the special provisions are not applicable.[63] In other words, where two statutes are of equal theoretical application to a particular case, the one specially designed therefor should prevail.[64] RA 9369 specifically covers a well-defined subject (*i.e.*, procurement for election automation), whereas EO 584 has a more universal scope.

In sum, there is no constitutional or statutory Filipino-foreign equity ceiling to speak of, and the Anti-Dummy Law does not find application to the case at bar.

Nonetheless, I wish to clarify certain matters.

It appears that in preparing the bidder eligibility requirements, the COMELEC, exercising the discretion granted by Section 12 of RA 8436, as amended by RA 9369, adopted the guidelines that were set forth in the Implementing Rules and Regulations of RA 9184 (The Government Procurement Reform Act). Thus, in Sections 2.2.1 to 2.2.4 of Part IX (B) of the TOR/RFP, the COMELEC invited the following to bid for the Automation Project:

(1) Duly licensed Filipino citizens/proprietorships;

(2) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;

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[61] *David v. Commission on Elections, et al.*, G.R. No. 127116, April 8, 1997, 271 SCRA 90.

[62] *Id.*

[63] *Leveriza v. Intermediate Appellate Court*, 157 SCRA 282 (1988), citing *Sto. Domingo v. de los Angeles*, 96 SCRA 139.

[64] *Id.*, citing *Wil Wilhensen, Inc. v. Baluyot*, 83 SCRA 38.

(3) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;

(4) Manufacturers, suppliers and/or distributors forming themselves into a joint venture, *i.e.*, a group of two (2) or more manufacturers, suppliers and/or distributors, that intend to be jointly and severally responsible or liable for a particular contract, provided that Filipino ownership thereof shall be at least sixty percent (60%); and

(5) Cooperatives duly registered with the Cooperatives Development Authority.

But for a few innocuous stylistic changes, this enumeration is an exact reproduction of Section 23.11.1[65] of the Implementing Rules and Regulations of RA 9184.

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[65] Under Section 23.11.1 of the Implementing Rules and Regulations of RA 9184, the following are qualified to bid in the procurement of goods:

(1) Duly licensed Filipino citizens/proprietorships;

(2) Partnerships duly organized under the laws of the Philippines and of which at least sixty percent (60%) of the interest belongs to citizens of the Philippines;

(3) Corporations duly organized under the laws of the Philippines, and of which at least sixty percent (60%) of the outstanding capital stock belongs to citizens of the Philippines;

(4) Manufacturers, suppliers and/or distributors forming themselves into a joint venture, *i.e.*, a group of two (2) or more manufacturers, suppliers and/or distributors that intend to be jointly and severally responsible or liable for a particular contract, provided that Filipino ownership or interest of the joint venture concerned thereof shall be at least sixty percent (60%); and

(5) Cooperatives duly registered with the Cooperatives Development Authority (CDA).

It must be noted that this enumeration *does not* appear in the text of RA 9184 itself. However, I will desist from inquiring into whether the Implementing Rules and Regulations unduly enlarged the scope of the law, for this case is not the proper avenue to rule on this issue. **It suffices to say that (i) RA 9184 does not impose a mandatory Filipino-Foreign equity ceiling for the procurement of goods, as to bring into application the Anti-Dummy Law in this case, and (ii) the eventual adoption into the TOR/RFP of the text of the IRR was made by COMELEC in the free exercise of its discretion.**

Per Smartmatic TIM Corporation's Articles of Incorporation, there is no question that the JVC complied with the 60-40 equity ceiling provided under the TOR/RFP. Out of a total paid-up capital of ₱1,130,000,000.00, TIM contributed sixty percent (60%) thereof (equivalent to ₱678,000,000.00), while Smartmatic paid the remaining forty percent (40%) (equivalent to ₱452,000,000.00).

The petitioners, however, allege that the sixty percent (60%) interest of TIM in the JVC was merely simulated. They point to certain provisions in the JVA as denoting that effective control over Smartmatic TIM Corporation was given to Smartmatic. Specifically, petitioners assail the following:

(1) The mandatory presence of at least one of the nominated Directors of Smartmatic to establish a quorum of the Board of Directors, pursuant to Article 4.3[66] of the JVA;

(2) The veto power in the Board of Directors granted by TIM to Smartmatic to authorize certain important financial and technical actions, pursuant to Article 4.5[67] of the JVA;

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[66] Article 4.3 provides:

"4.3 A quorum for a meeting of the Board of Directors shall require the presence of at least three (3) Directors, *Provided*, that at least one (1) Director nominated by each of TIM and SMARTMATIC are present."

[67] Article 4.5 provides:

"The following acts of the Board of Directors of the JVC shall require the authorization and approval by the affirmative vote of at least three (3) Directors, one (1) of whom must be a Director nominated by TIM and one (1) of whom must be a Director nominated by Smartmatic:

a) Approval of the operating and capital expenditures budgets for each fiscal year, including the setting of relevant policies and guidelines for implementation of the capex program, as well as any expenditures in excess of the approved capex budget and any deviation from the policies and guidelines pertinent thereto;

b) Approval of the audited financial statements;

c) Election or removal of the corporate officers, and senior officers with a rank of Vice-President or higher, the terms and conditions of their employment, and the adoption of, or change in, their compensation package, including *per diems* and bonuses;

(3) The mandatory presence of the Director representing Smartmatic to establish a quorum of the Executive Committee (EXECOM), pursuant to Article 4.7[68] of the JVA; and

(4) The sole right of Smartmatic to nominate the (a) Chairman of the Board, (b) the Treasurer, and (c) the Corporate

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d) Approval of the financial plan for each fiscal year, embodying the approved borrowing limits of the Corporation, as well as any borrowings in excess of said limits;

e) Entering or terminating any agreement involving technology transfer;

f) Delegation of powers and duties to individual directors or officers, and delegation of powers to committees;

g) Approval of any contract between the JVC and TIM or SMARTMATIC, involving more than Philippine Pesos: Ten Million Pesos (PHP10,000,000.00), with the exception of (i) those contracts contemplated under this Agreement; (ii) those contracts for the purchase, supply, lease or other kind of contract with respect to equipments *(sic)* or services to be provided by SMARTMATIC reflected in the budget approved by the Board of Directors; and (iii) those contracts for the purchase of raw materials, supplies and spare parts required by the JVC in the ordinary course of business, *Provided always,* that the terms and conditions of such contracts shall be competitive with those being offered by other suppliers; and

h) Any matter not specified in the agenda set forth in the notices of the Board meetings."

[68] Article 4.7 provides:

"4.7 The Board of Directors may create an EXCOM which shall consist of at least three (3) Directors, two must be Directors nominated by TIM and another must be a Director nominated by SMARTMATIC.

A quorum at any meeting of the EXCOM shall require the presence of a majority of the entire membership of the EXCOM, *Provided,* that at least one (1) Director representing TIM and one (1) [D]irector representing SMARTMATIC are present.

The EXCOM will have the authority to pass upon and decide any matter, which may be delegated to it by the Board of Directors, except the important matters and actions provided in Article 4.5 above and Article 5.3 of this Agreement.

Every decision of at least a majority of the members of the EXCOM at which there is a quorum present shall be valid as a corporate act."

> Secretary, and TIM's corresponding duty to elect said nominees, pursuant to Articles 4.10[69] and 4.11[70] of the JVA.

But far from establishing the tyranny of the minority, these provisions may be viewed as **legitimate minority protection devices**. Through them, Smartmatic sought to protect its huge investment in the Automation Project. Without these protective provisions, Smartmatic would be helplessly exposed to the risk of being outvoted on significant corporate activities and decisions — including decisions on technical matters falling within its field of expertise, for which it is primarily responsible (as against TIM) under the express terms of the COMELEC's bidding rules[71] and the Automation Contract[72] itself. If that would come to

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[69] Article 4.10 provides:

"4.10 At all times while this Agreement is in effect, SMARTMATIC shall have the right to nominate the following officers:

a. Chairman of the Board;
b. Treasurer; and
c. Corporate Secretary."

[70] Article 4.11 provides:

"4.11 The parties shall cause their respective Directors to vote the individuals nominated by TIM and SMARTMATIC in accordance with Articles 4.9 and 4.10 hereof. In case of resignation, retirement, death or disability of any officer, the party that nominated the officer whose resignation, retirement, death or disability occasioned the vacancy shall nominate the individual to fill such vacancy, and the parties agree to cause its nominee Directors to vote to elect to the position vacated the individual nominated by the party which nominated the officer who resigned, retired, died or was disabled from office."

[71] The relevant portion of the Instructions to Bidders of SBAC Bid Bulletin No. 21 provides:

"(e) The JV member with a greater track record in automated elections shall be in-charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and systems integration; x x x"

[72] Section 3.3 of the Automation Contract provides in relevant part:

"x x x x x x x x x

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the

pass, Smartmatic could not perform its part of the Contract and the end result would be the ruin of its investment.

To be sure, our lawmakers wanted the foreign joint venture to be autonomous in carrying out its technical functions, and intended to protect it from the whims and caprices of the non-expert majority. This can be gleaned from the April 20, 2009 hearing of the Joint Committee on AES, during which the following exchanges were made:

MR. MELO. Here is a scenario, Your Honor. Scantron, for instance and a Philippine Company, they have an agreement, an agreement, joint venture agreement.

THE CHAIRMAN (REP. LOCSIN). And the one who carries it out will [be] Scantron even if it's 40 percent?

MR. MELO. Scantron, let us say, wins. After they win, after Scantron wins, now, the two, they form a company.

THE CHAIRMAN (REP. LOCSIN). Yes. **But do you — will you check that the ones who will carry out the project will be, in the case of Smartmatic, the guys who actually conduct elections in Venezuela and not some local boys who are just, you know, dreaming that they can do it?**

MR. MELO. But the contract will now be awarded in favor of the new company?

THE CHAIRMAN (REP. LOCSIN). Yes. But who will implement it?

MR. MELO. Yes, we will make them jointly and severally liable.

THE CHAIRMAN (REP. LOCSIN). I'm not really worried nor do *(sic)* am I concerned about punishing them up after the failure of elections. **I would just really want to make sure that the guys who will run this will not be the local boys but the foreign boys who have actually done it abroad.** I don't want amateurs, you know, trying to prove yes, the Filipino can.

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counting and canvassing software and hardware, including transmission configuration and systems integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

x x x x x x x x x x x x"

MR. MELO. Yes, Your Honor, precisely. This is speaking my mind alound *(sic).* Let us say, a foreign company goes into a partnership who *(sic)* are co-venture *(sic)* in system with a Philippine company. **The Philippine company is usually taken for its expertise in the dispersal of the machines because [the foreign company] does not need another technical company expert in computers**.

THE CHAIRMAN (REP. LOCSIN). It's the deployment of the machines.

MR. MELO. Deployment. x x x (Emphasis supplied)[73]

*** *** ***

THE CHAIRMAN (SEN. ESCUDERO). x x x **What legal methodology, memorandum or agreement will you be requiring to make sure that it's the foreigner who knows how to run it, who will actually run the [show] and not be outvoted each time within the company, 60-40?** I mean [the Filipino company] can promise that, "*Hindi ho, sila ang nakakaintindi, sila bahala, kami roll-out lang.*" But what assurance do we have and what legal document do you intend to require insofar as this is concerned? (Emphasis supplied)[74]

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THE CHAIRMAN (REP. LOCSIN). x x x As I said, one of the most compelling arguments for the big guys to win, the foreigners, is that they have a reputation to defend. No Filipino has a reputation to defend in IT. In IT, there's none. The problem here is, as Senator Escudero said, a 60 percent joint venture partner. **Are there any provisions you have made that would prevent them from interfering in the technical aspects of the electronic elections? What if you have the majority partners dictating how it will be done?**

x x x x x x x x x

THE CHAIRMAN (REP. LOCSIN). **You will have to put really strict sanctions on any interference by the majority partner in the judgment of the minority partner in implementing the**

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[73] TSN, Joint Congressional Oversight Committee on Automated Election System, April 20, 2009, pp. 61-63.

[74] *Id.,* p. 67.

majority project. I don't know how that's done though. (Emphasis supplied)[75]

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THE CHAIRMAN (REP. LOCSIN). The question we were asking — Our apprehension here, Senator Escudero and myself, is that, will the 60 percent which has no track record and is Filipino and may have political affiliations, would they be in a position to influence the 40 percent minority that is the expert in electronic elections? Would the 60 percent be able to compromise the integrity of the 40 percent?

MR. RAFANAN.[76] Do you say, sir, bidder with political connections?

THE CHAIRMAN (REP. LOCSIN). That's just an example. **What we're saying is that a 40 percent track record — the track record of the 40 percent partner, say, Sequoia or whatever. I mean, no question. They're qualified but they're always in a minority position in the joint venture company. What if the majority Filipino tells them to compromise the integrity? What measures do you take?** (Emphasis supplied)[77]

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THE CHAIRMAN (SEN. ESCUDERO). x x x *So, ang tanong ko[,] you're awarding [the contract to] a company with a track record although may minority, minority lang siya.* ***How sure are you na hindi siya didiktahan nung 60 percent na walang track record, walang experience, so useless yung requirement natin na may track record ka hindi naman siya ang masusunod, ang masusunod yung may-ari ng 60 percent na Filipino na walang track record at walang kaalam-alam presumably***.

x x x x x x x x x

THE CHAIRMAN (REP. LOCSIN). Senator Enrile, our worry is that the 60 percent may dictate on the expert 40 percent. **Would a joint venture contract be able to provide some autonomy to the 40 percent expert so that they cannot be interfered with?**

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[75] *Id.,* p. 71.

[76] Atty. Ferdinand Rafanan is the Director of the Law Department of the COMELEC. He is also the Chairman of the COMELEC SBAC.

[77] *Supra* note 73, p. 71.

THE SENATE PRESIDENT. x x x [A] joint venture is a matter of contract. You have to — apart from the legal requirement, you have to embed into the joint venture contract the obligation of each of the joint venturer.

THE CHAIRMAN (SEN. ESCUDERO). So, essentially . . .

THE SENATE PRESIDENT. **Including their voice in the joint venture**.

THE CHAIRMAN (SEN. ESCUDERO). So, essentially *nga ho*[,] we are bound and doomed to award this contract to a company majority of which will be owned by individuals or another company that has no track record to speak of? *Kasi yung obligasyon na nating i-award iyang 60/40 sa* Filipino company, we are obligated by law, that's what you're saying, to award it to a company majority of which will be owned by a company or individuals without any track record whatsoever?

THE CHAIRMAN (REP. LOCSIN). **But Senator Enrile, can the Comelec require a particular joint venture contract that would specify the particular obligations of the parties and in some cases that obligation would be — would protect the minority's integrity in conducting the election?**

x x x x x x x x x

THE CHAIRMAN (SEN. ESCUDERO). x x x [F]or you to require or impose a requirement saying that the 40 will control the 60 is a circumvention, if at all, of the 60/40 rule as well.

THE CHAIRMAN (REP. LOCSIN). **But would it not be a circumvention, say, for voting purposes for control of the corporation but not for the purely technical aspect of conducting an electronic election to protect the integrity of that undertaking?**

THE CHAIRMAN (SEN. ESCUDERO). Without arguing that point, I may tend to agree with that point but the fact is, legally the question is how will you be able to overcome it?

THE CHAIRMAN (REP. LOCSIN). Can you require that in your terms of reference?

MR. MELO. **I suppose, Your Honor. You're the expert here, Manong Johnny. But in the joint venture, can it not be provided**

that the foreign company shall have exclusive say on the technical aspect?

THE SENATE PRESIDENT. ***Puwede iyon*.**

MR. MELO. *Iyon*.

THE SENATE PRESIDENT. You can insist [on] that.

MR. MELO. Yes.

THE SENATE PRESIDENT. **The Comelec can impose that.**

MR. MELO. **Yes, insofar as the technical aspect is concerned, it's only — it's the foreign company, the supplier of the computers, of the machines which will have exclusive say. And so the dispersal or the deployment of the machines will be another matter**. (Emphasis supplied.)[78]

The petitioners find particularly repugnant Smartmatic's veto power in the Board of Directors in respect of certain key financial and technical actions. In my view, however, this is but a fair and reasonable check against possible abuses by the majority stockholder. As Smartmatic is the joint venture partner having the greater experience in automated elections, it deemed it necessary to reserve to itself the veto power on these important financial matters so as not to compromise the technical aspects of the Automation Project. As far as matters **other than those** provided in Article 4.5 are concerned, Smartmatic does **not** have any veto right. This is clear from Article 4.4, which provides as follows:

4.4 Resolution on matters other than those set forth in Article 4.5 below shall be adopted by the vote of the majority of the Directors present and constituting a quorum, except as otherwise provided by law.

The same conclusion may be obtained from the deliberations of the Senate Committee on Constitutional Amendments, Revision of Codes and Laws. The following exchanges from their June 23, 2009 hearing[79] are illuminating on this point:

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[78] *Id.,* pp. 80-85.

[79] This was supposed to be a hearing of the Joint Committee on AES, but Representative Locsin (Chair of the House Panel) was indisposed and was

THE CHAIRMAN. I went through your JVA and I found some provisions peculiar and interesting. In your JVA[, it] states that no board resolution shall be passed — in the first place, three members of the board will belong to TIM, local, two members of the board will belong to Smartmatic, foreign, so 60-40 *naman talaga iyon*. My question is, under your JVA[,] it says no resolution shall be passed unless TIM with three votes, presumably majority already, can secure the vote of Smartmatic, *vice versa*. But *vice versa* is expected because you only have two votes. If TIM needs to secure one more vote from you before they can do anything, number one, there is a potential for a deadlock. Number two, is that not effective control or veto power over the company that essentially overrides or circumvents the 60-40 requirement?

MR. FLORES. **No, sir. That's a standard practice to protect minority investors and it only relates to certain key decisions not to the whole development of the project.**

THE CHAIRMAN. Major decisions?

MR. FLORES. Yes, sir.

THE CHAIRMAN. We discussed this before[,] Chairman Melo, remember?

MR. MELO. Yes, Your Honor. Precisely at that time it was the suggestion of the committee, the Oversight Committee that major decisions or decisions concerning technical matters, concerning the machines will have to be made by Smartmatic. They cannot be controlled by the local partner because, otherwise, *baka ho hindi naman expert 'yung local partner sa ano* — so we follow that.

x x x x x x x x x

THE CHAIRMAN. But my question is, still there is a 60-40 requirement. What if *ayaw pumayag ng* Smartmatic? So does the local company have effective control over the joint venture company?
x x x

MR. RAFANAN.[80] Sir, concerning decisions that will pertain to technical problems or trouble-shooting problems in the election,

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not able to attend. As such, only the Senate Committee on Constitutional Amendments, Revision of Codes and Laws was convened, with the understanding that the records of the hearing were to be reproduced in the Joint Committee on AES.

[80] Mr. Ferdinand Rafanan is the Head of the COMELEC Legal Department.

we are providing in the contract that these matters will be entrusted to the foreign corporation which is Smartmatic International.

THE SENATE PRESIDENT. **I assume that this provision in their agreement, between the joint venturers[,] is a function of trust between them. I suppose they have just met in this particular venture and so they do not know each other very well, so the foreign company will naturally protect — want to protect itself that it will not be ousted from the venture in case of — You know, you are dealing here with a certain magnitude of financial benefits. So I suppose that is intended to protect themselves.**

x x x x x x x x x

THE CHAIRMAN. Sir, I'll give you an example.

THE SENATE PRESIDENT. As collectivity *ha*.

THE CHAIRMAN. This is what they will on requiring [Smartmatic's] one vote even if TIM, the local company, already has three votes. Approval of operating capital expenditures and budgets for the year; approval of financial statements; election or removal of corporate officers – [We are] not talking technical here yet. x x x Approval of financial plans; borrowing, *etcetera*. Entering into or terminating an agreement involving technology transfer; delegation of powers to directors, officers and delegation of powers to committees. x x x

x x x x x x x x x

THE CHAIRMAN. **Financial, appointing of officials.**

THE SENATE PRESIDENT. **Yes, if they can be removed, if they do not have that veto power, the 60 percent can kick them out after they get the contract.**

x x x x x x x x x

THE CHAIRMAN. But wherever it is coming from...

THE SENATE PRESIDENT. **As a lawyer, from my experience, we have done that before in many cases in order to protect, to be fair, to be equitable to the people who are coming here for the first time or who are dealing with people that they do not know very well.**[81] (Emphasis supplied.)

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[81] TSN, Senate Committee on Constitutional Amendments, Revision of Codes and Laws, June 23, 2009, pp. 40-45.

Petitioners also find objectionable Smartmatic's sole right to nominate the Treasurer, Corporate Secretary and the Chairman of the Board, and TIM's corresponding duty to elect said nominees. However, the objection conveniently disregards the fact that, to maintain the balance of power, TIM in turn has the sole right to nominate the President and Chief Executive Officer and the Assistant Corporate Secretary of the joint venture corporation.[82] Pursuant to Article 4.11 of the JVA, Smartmatic is in fact obliged to cause its Directors to vote for the officers chosen by TIM. Moreover, as an added means to protect their respective interests in the joint venture, Smartmatic and TIM further agreed that for the validity of the resolutions contained therein, all certifications to be issued must bear the signatures of both the Corporate Secretary and the Assistant Corporate Secretary.[83]

In fine, the provisions assailed by Petitioners are reasonable under the circumstances and should be upheld as legitimate minority protection devices.

c.6 "Prior Successful Use" qualification has been complied with

The petitioners postulate that the PCOS machines offered by the Smartmatic TIM Corporation have not been successfully used in an electoral exercise in the Philippines or abroad, as required by Section 12 of RA 8436, as amended.[84] A quick overview of the optical scan technology is in order.

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[82] Article 4.9 provides:

"4.9 At all times while this Agreement is in effect, TIM shall have the right to nominate the following officers:

a. President and Chief Executive Officer; and

b. Assistant Corporate Secretary."

[83] Joint Venture Agreement, Article 4.12.

[84] Section 12 of RA 8436, as amended, sets forth the prior successful use qualification as follows:

"SEC. 12. Procurement of Equipment and Materials. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities and other services, from

Optical scan or "Marksense" technology has been used for decades for standardized tests such as the Scholastic Aptitude Test (SAT).[85] The optical scan ballot is a paper-based technology that relies on computers in the counting and canvassing process. Voters make their choices by using a pencil or a pen to mark the ballot, typically by filling in an oval or by drawing a straight line to connect two parts of an arrow.[86] The ballots are counted by scanners, which may be located either at the precinct (in "precinct-count" systems) or at some central location ("central-count" systems).[87] If ballots are counted at the polling place, voters put the ballots into the tabulation equipment, which scans and tallies the votes.[88] These tallies can be captured in removable storage media, which are transported to a central tally location or are electronically transmitted from the polling place to the central tally location.[89] If ballots are centrally counted, voters drop ballots into sealed boxes; and, after the polls close, election officials transfer the sealed boxes to the central location where they run the ballots through the tabulation equipment.[90]

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local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations. **With respect to the May 10, 2010 elections and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad.** Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness." (Emphasis supplied)

[85] Daniel P. Tokaji, The Paperless Chase: Electronic Voting and Democratic Values, 73 Fordham L. Rev. 1711 (2005), *citing* Eric A. Fischer, Voting Technologies in the United States: Overview and Issues for Congress 2 (2001).

[86] *Id.*, *citing* also R. Michael Alvarez, *et al.*, Counting Ballots and the 2000 Election: What Went Wrong?, in Rethinking the Vote: The Politics and Prospects of American Electoral Reform 34, 39 (Ann N. Crigler *et al.* eds., 2004).

[87] *Id.*, *citing* Caltech/MIT Voting Tech. Project, Voting: What Is, What Could Be 18 (2001).

[88] U.S. General Accounting Office, Elections: Elections Voting Offers Opportunities and Presents Challenges (GAO Report No. GAO-04-766T) (2004). Note that the AES procured by COMELEC from Smartmatic TIM Corporation entails the electronic transmission of the tally results from the polling place to the central tally location.

[89] *Id*.

[90] *Id*.

The central-count system (via the CCOS machines) was used during the 2008 elections in all the provinces of the ARMM except in Maguindanao. The COMELEC Advisory Council — created by RA 9369 to recommend to the COMELEC the "appropriate, secure, applicable, and cost-effective technology" to be used in the automation of elections — deployed various monitors from the DOST, PPCRV and Consortium on Electoral Reforms to observe the usability of the technologies used in the ARMM elections as well as to observe the electoral process in general.[91] The CCOS machines were assessed before and during the actual elections, and the COMELEC Advisory Council eventually determined that these machines sufficiently complied with the minimum systems configuration specified in Section 6 of RA 9369.[92]

In light of this background, the **question** is whether the central-count system used in 2008 may be considered as substantial compliance with the "prior successful use" qualification set forth in Section 12 of RA 8436, as amended.

With due respect, I answer in the affirmative. It is obvious that the PCOS and CCOS machines are based on the same optical scan technology. The sole difference is that the PCOS machines dispense with the physical transportation of the ballots to the designated counting centers, since the votes will be counted in the precinct itself and the results electronically transmitted to the municipal, provincial and national Board of Canvassers. Tellingly, but for their sweeping and convenient conclusion that "[e]ven if a PCOS [machine] is an OMR [Optical Mark Reader] [machine], nevertheless[,] it is totally different from a CCOS [machine]," the petitioners were silent on this point.[93]

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[91] COMELEC Advisory Council Post-election Report on the Use of Automated Election System (AES) in the 2008 ARMM Elections Submitted to the Joint Congressional Oversight Committee on Automated Election System and the Commission on Elections (October 2008), at 4.

[92] *Id.* at 16.

[93] As a point of clarification, the CCOS machines used during the 2008 ARMM elections, as well as the PCOS machines offered by the Smartmatic TIM Corporation for the 2010 elections, do *not* use the Optical Mark Reader

In any event, the AES procured by COMELEC for the 2010 elections has been successfully used in prior electoral exercises in (i) New Brunswick, Canada; (ii) Ontario, Canada; and (iii) New York; the United States of America. The petitioners nevertheless question the certifications submitted to this effect, arguing that these were issued not to the Smartmatic-TIM joint venture, but to a third party — Dominion Voting Systems.

I find this argument meritless, for it foists unto the law an imaginary requirement. As the COMELEC correctly observed, what the law requires is that the **system** must have been successfully utilized in a prior electoral exercise, not that the

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(OMR) technology. This is evident from the statements of COMELEC Executive Director Jose M. Tolentino during the February 2, 2009 hearing of the Senate Committee on Finance, as follows:

"MR. TOLENTINO. So there are three technologies recommended by the Advisory Council [for the 2010 elections]. We have the Direct Recording Electronic or the DRE wherein all that the voter has to do is to press a touchpad or a touchscreen. In the ARMM, with — the voters pressed the photograph of the candidate of his choice.

The two other technologies would be the Precinct Count Optical Scan and Central Count Optical Scan. You'll note that the last two are both optical scans, meaning they scan the ballot and they actually take photographs of the ballot. **The only difference being the precinct count would be at the precinct level while the central count would be installed or machines installed at the voting center.**

x x x x x x x x x

MR. TOLENTINO. x x x

And we also included a small slide on the difference between the optical scan and the OMR. Everybody thinks that OMR and optical scan are one and the same and they are the same only with respect to the use of a paper ballot. However, the optical scan scans the entire ballot while OMR reads marks only. [An] important feature there would be, in an optical scan, the system can take the photograph of the ballot which is actually a second paper trail of the ballot.

THE CHAIRMAN [SEN. ANGARA]. Which one did you test during the…

MR. TOLENTINO. **We called it OMR, but actually in the ARMM, it was already an optical scan.**

THE CHAIRMAN. OMR?

MR. TOLENTINO. Yeah, we called it the OMR but actually the system is already an optical scan." (Emphasis supplied.)

provider (*i.e.*, Smartmatic TIM Corporation) should have been the one that previously used or employed the system. Considering that the system subject of the certifications is the same one procured by the COMELEC for the 2010 elections, the prior successful use requirement has been adequately met. At any rate, the clear terms of the Licensing Agreement between Smartmatic and Dominion Voting Systems indicate that the former is the entity licensed exclusively by the latter to use the system in the Philippines.

c.7 COMELEC's determination as to minimum systems capabilities of the PCOS machines must be respected

This Court is neither constitutionally permitted nor institutionally outfitted to conduct a cost-benefit analysis of the system or of the nuances of the available technology. It is ill-equipped to deal with the complex and difficult problems of election administration. This inordinately difficult undertaking requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and the executive branches of government.

The petitioners contend that the PCOS machines do not comply with the minimum system capabilities[94] set forth by Section 6

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[94] The law specifically requires that the AES to be procured by COMELEC must at least have the following functional capabilities:

(a) Adequate security against unauthorized access;

(b) Accuracy in recording and reading of votes as well as in the tabulation, consolidation/canvassing, electronic transmission, and storage of results;

(c) Error recovery in case of non-catastrophic failure of device;

(d) System integrity which ensures physical stability and functioning of the vote recording and counting process;

(e) Provision for voter verified paper audit trail;

(f) System auditability which provides supporting documentation for verifying the correctness of reported election results;

(g) An election management system for preparing ballots and programs for use in the casting and counting of votes and to consolidate, report and display election results in the shortest time possible;

(h) Accessibility to illiterates and disabled voters;

of RA 8436, as amended. Then, in an entirely speculative exercise, they conjure a perturbing series of doomsday scenarios that would allegedly result from using this particular technology: 'unaddressed logistical nightmares,' 'failure of elections,' and 'massive disenfranchisement.'

Let me preface my discussion of this issue by accentuating once more the core of RA 8346, as amended: the COMELEC, an independent Constitutional Commission armed with specialized knowledge born of years of experience in the conduct of elections, has the sole prerogative to choose which AES to utilize.[95] In carrying out this mandate, Section 6 of the same law directs the COMELEC to develop and adopt, with the assistance of the COMELEC Advisory Council, an evaluation system to ascertain that the minimum system capabilities are met.

The COMELEC did in fact adopt a rigid technical evaluation system composed of twenty-six criteria, against which the procured AES was benchmarked by the TWG to determine its viability and concomitant security.[96] In this regard, the TWG ascertained that the PCOS machines "**PASSED** all tests as required in the 26-item criteria,"[97] as follows:

(i) Vote tabulating program for election, referendum or plebiscite;
(j) Accurate ballot counters;
(k) Data retention provision;
(l) Provide for the safekeeping, storing and archiving of physical or paper resource used in the election process;
(m) Utilize or generate official ballots as herein defined;
(n) Provide the voter a system of verification to find out whether or not the machine has registered his choice; and
(o) Configure access control for sensitive system data and functions.

[95] *See* Sections 1 and 5 of RA 8436, as amended.

[96] The TWG was composed of twenty-two (22) representatives from the COMELEC — Information Technology Department, COMELEC — Internal Audit Office, the offices of each of the COMELEC Commissioners, the National Computer Center and the Department of Science and Technology.

[97] Systems Evaluation Consolidated Report and Status Report on the Post-Qualification Evaluation Procedures, June 1, 2009, p. 1.

ITEM[98]	REQUIREMENT	REMARK/DESCRIPTION
1	Does the system allow manual feeding of a ballot into the PCOS machine?	Yes. The proposed PCOS machine accepted the test ballots which were manually fed one at a time.
2	Does the system scan a ballot sheet at the speed of at least 2.75 inches per second?	Yes. A 30-inch ballot was used in this test. Scanning the 30-inch ballot took 2.7 seconds, which translated to 11.11 inches per second.
3	Is the system able to capture and store in an encrypted format the digital images of the ballot for at least 2,000 ballot sides (1,000 ballots, with back to back printing)?	Yes. The system captured the images of 1,000 test ballots in encrypted format. Each of the 1,000 image files contained the images of the front and back sides of the ballot, totaling 2,000 ballot sides. To verify the captured ballot images, decrypted copies of the encrypted files were also provided. The same were found to be digitalized representations of the ballots cast.
4	Is the system a fully integrated single device as described in item no. 4 of Component 1-B?	Yes. The proposed PCOS is a fully integrated single device, with built-in printer and built-in data communication ports (Ethernet and USB).
5	Does the system have a scanning resolution of at least 200 dpi?	Yes. A portion of a filled[-] up marked oval was blown up using image editor software to reveal the number of dots per inch. The sample image showed 200 dpi.

[98] *Id.,* pp. 2-6.

		File properties of the decrypted image file also revealed 200 dpi.
6	Does the system scan in grayscale?	Yes. 30 shades of gray were scanned in the test PCOS machine, 20 of which were recognized, exceeding the required 4-bit/16 levels of gray as specified in Bid Bulletin No. 19.
7	Does the system require authorization and authentication of all operators, such as, but not limited to, usernames and passwords, with multiple user access levels?	Yes. The system required the use of a security key with different sets of passwords/ PINs for Administrator and Operator users.
8	Does the system have an electronic display?	Yes. The PCOS machine makes use of an LCD display to show information: • if a ballot may be inserted into the machine;· • if a ballot is being processed; • if a ballot is being rejected; • on other instructions and information to the voter/ operator.
9	Does the system employ error handling procedures, including, but not limited to, the use of error prompts and other related instructions?	Yes. The PCOS showed error messages on its screen whenever a ballot is rejected by the machine and gives instructions to the voter on what to do next, or when there was a ballot jam error.
10	Does the system count the voter's vote as marked on the ballot with an accuracy rating of at least 99.995 %?	Yes. Two rounds of tests were conducted for this test using only valid marks/shades on the ballots. 20,000 marks were required to complete this test, with only one (1) allowable reading error.

		625 ballots with 32 marks each were used for this test. During the comparison of the PCOS-generated results with the manually prepared/ predetermined results, it was found out that there were seven (7) marks which were inadvertently missed out during ballot preparation by the TWG. Although the PCOS-generated results turned out to be 100% accurate, the 20,000-mark [requirement] was not met thereby requiring the test to be repeated. To prepare for other possible missed out marks, 650 ballots (with 20,800 marks) were used for the next round of test, which also yielded 100% accuracy.
11	Does the system detect and reject fake or spurious, and previously–scanned ballots?	Yes. This test made use of one (1) photocopied ballot and one (1) "re-created" ballot. Both were rejected by the PCOS. The test for the rejection of previously-scanned *(sic)* ballots was done during the end-to-end demonstration.
12	Does the system scan both sides of a ballot and in any orientation in one pass?	Yes. Four (4) ballots with valid marks were fed into the PCOS machine in the four (4) portrait orientations specified in Bid Bulletin No. 4 (either back or front, upside down or right side

		up), and all were accurately captured.
13	Does the system have necessary safeguards to determine the authenticity of a ballot, such as, but not limited to, the use of bar codes, holograms, color shifting ink, micro printing, to be provided on the ballot, which can be recognized by the system?	Yes. The system was able to recognize if the security features on the ballot are "missing". Aside from the test on the fake or spurious ballots (Item No. 11), three (3) test ballots with tampered bar codes and timing marks were used and were all rejected by the PCOS machine. The photocopied ballot in the test for Item No. 11 was not able to replicate the UV ink pattern on the top portion of the ballot[,] causing the rejection of the ballot.
14	Are the names of the candidates pre-printed on the ballot?	Yes. Two sample test ballots of different lengths were provided: one (1) was 14 inches long while the other was 30 inches long. Both were 8.5 inches wide. The first showed 108 pre-printed candidate names for fourteen (14) contests/ positions, including two (2) survey questions on gender and age group, and a plebiscite question. The other showed 609 pre-printed candidate names, also for fourteen (14) positions, including three (3) survey questions.

15	Does each side of the ballot sheet accommodate at least 300 names of candidates with a minimum font size of 10, in addition to other mandatory information required by law?	Yes. The 30-inch ballot, which was used to test Item No. 2, contained 309 names for the national positions and 300 names for local positions. The total pre-printed names on the ballot totaled 609. This type of test ballot was also used for test voting by the public, including members of the media. Arial Narrow, font size 10, was used in the printing of the candidate names.
16	Does the system recognize full shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. The ballots used for the accuracy test (Item No. 10), which made use of full shade marks, were also used in this test and were accurately recognized by the PCOS machine.
17	Does the system recognize partial shade marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. Four (4) test ballots were used with one (1) mark each per ballot showing the following pencil marks: • top half shade; • bottom half shade; • left half shade; and • right half shade[.] These partial shade marks were all recognized by the PCOS machine.
18	Does the system recognize check marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. One (1) test ballot with one check mark, using a pencil, was used for this test. The mark was recognized successfully.

19	Does the system recognize x marks on the appropriate space on the ballot opposite the name of the candidate to be voted for?	Yes. One (1) yes ballot with one x mark, using a pencil, was used for this test. The mark was recognized successfully.
20	Does the system recognize both pencil and ink marks on the ballot?	Yes. The 1000 ballots used in the accuracy test (Item No. 10) were marked using the proposed marking pen by the bidder. A separate ballot with one (1) pencil mark was also tested. This mark was also recognized by the PCOS machine. Moreover, the tests for Items No. 17, 18 and 19 were made using pencil marks on the ballots.
21	In a simulation of a system shut down, does the system have error recovery features?	Yes. Five (5) ballots were used in this test. The power cord was pulled from the PCOS while the 3rd ballot was in the middle of the scanning procedure, such that it was left "hanging" in the ballot reader. After resumption of the regular power supply, the PCOS machine was able to restart successfully with notification to the operator that there were two (2) ballots already cast in the machine. The "hanging" 3rd ballot was returned to the operator and was able to be re-fed into the PCOS machine. The marks on all five (5) were all accurately recognized.

22	Does the system have transmission and consolidation/canvassing capabilities?	Yes. The PCOS was able to transmit to the CCS during the end-to-end demonstration using [a] Globe prepaid [i]nternet kit.
23	Does the system generate a backup copy of the generated reports, in a removable data storage device?	Yes. The PCOS saves a backup copy of the ERs, ballot images, statistical report and audit log into a Compact Flash (CF) card.
24	Does the system have alternative power sources, which will enable it to fully operate for at least 12 hours?	Yes. A 12-volt 18AH battery lead acid was used in this test. The initial test had to be repeated due to a short circuit, after seven (7) hours from start-up without ballot scanning. This was explained by TIM-Smartmatic to be *(sic)* caused by non-computable wiring of the battery to the PCOS. A smaller wire than what is required was inadvertently used, likening the situation to incorrect wiring of a car battery. Two (2) COMELEC electricians were called to confirm TIM-Smartmatic's explanation. The PCOS machine was connected to regular power and started up successfully. The following day, the "re-test" was completed in 12 hours and 40 minutes, starting from the initialization to the printing of the reports. 984 ballots

		were fed into the machine. The ER, as generated by the PCOS[,] was compared with the predetermined result, showing 100% accuracy.
25	Is the system capable of generating and printing reports?	Yes. The PCOS prints reports via its built-in printer[,] which [reports] include: 1. Initialization Report 2. Election Returns (ER) 3. PCOS Statistical Report 4. Audit Log
26	Did the bidder successfully demonstrate EMS, voting, counting, consolidation/ canvassing and transmission? (see B. Demo model)	Yes. An end-to-end demonstration of all proposed systems was presented, covering: • importing of election data into the EMS; • creation of election configuration data for the PCOS and the CCS using EMS; • creation of ballot faces using EMS; • configuring the PCOS and the CCS using the EMS-generated election configuration file; • initialization, operation, generation of reports and backup using the PCOS; • electronic transmission of results . . . : o from the PCOS to city/municipal CCS and to the central server;

		o from the city/municipal CCS to the provincial CCS; o from the provincial CCS to the national CCS;· • receipt and canvass of transmitted results: o by the city/municipal CCS from the PCOS; o by the provincial CCS from the city/municipal CCS; o by the national CCS from the provincial CCS; • receipt of transmitted results by the central server from the PCOS

We cannot close our eyes to the fact that the TWG's technical evaluation of the AES was corroborated by knowledgeable and impartial third parties: the law-mandated Official Observers. In their respective reports to the COMELEC, the PPCRV and the Office of the Ombudsman found the system procured and the attendant COMELEC proceedings to be consistent, transparent, and in consonance with the relevant laws, jurisprudence and the terms of reference.[99]

Accordingly, I do not find any grave abuse of discretion on the part of the COMELEC in awarding the Automation Contract to the Smartmatic TIM Corporation. It has approved the PCOS system, and we are bereft of the right to supplant its judgment. Hoary is the principle that the courts will not interfere in matters that are addressed to the sound discretion of government agencies

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[99] Official Observer's Report on the AES Bidding Process by Dr. Arwin A. Serrano of the PPCRV (Annex 10 of Public Respondents' Memorandum); Observation Report of the Ombudsman Task Force: "Poll Automation" (Annex 11 of Public Respondents' Memorandum).

entrusted with the regulation of activities coming under their special technical knowledge and training.[100] Our disquisition in the seminal case ***Sumulong v. COMELEC***[101] again finds cogent application:

> The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. **The Commission may err, so this court may also. It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the greater objective for which it was created — free, orderly and honest elections. We may not fully agree with its choice of means but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere**. Politics is a practical matter, and political questions must be dealt with realistically — not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derive from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions.
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> x x x x x x x x x
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> There are no ready-made formulas for solving public problems. Time and experience are necessary to evolve patterns that will serve

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[100] See *Espinosa v. Makalintal*, 79 Phil. 134 (1947); *Coloso v. Board of Accountancy*, 92 Phil. 938 (1953); *Pajo v. Ago*, 108 Phil. 905 (1960); *Suarez v. Reyes*, G.R. No. L-19828, February 28, 1963, 7 SCRA 461; *Ganitano v. Secretary of Agriculture and Natural Resources*, G.R. No. L-21167, March 31, 1966, 16 SCRA 543; *Villegas v. Auditor General*, G.R. No. L-21352, November 29, 1966, 18 SCRA 877; *Manuel v. Villena*, G.R. No. L-28218, February 27, 1971, 37 SCRA 745; *Lacuesta v. Herrera*, G.R. No. L-33646, January 28, 1975, 62 SCRA 115; *Lianga Bay Logging Co., Inc. v. Enage*, G.R. No. L-30637, July 16, 1987, 152 SCRA 80; *Felipe Ysmael, Jr. & Co., Inc. v. The Deputy Executive Secretary, et al.*, G.R. No. 79538. October 18, 1990; *Concerned Officials of the Metropolitan Waterworks and Sewerage System (MWSS) v. Vasquez, et al.*, G.R. No. 109113, January 25, 1995; *First Lepanto Ceramics, Inc. v. Court of Appeals, et al.*, G.R. No. 117680, February 9, 1996.

[101] G.R. No. L-48609, October 10, 1941, 73 Phil. 288.

the ends of good government. In the matter of the administration of the laws relative to the conduct of elections, . . ., **we must not by any excessive zeal take away from the Commission on Elections the initiative which by constitutional and legal mandates properly belongs to it**. Due regard to the independent character of the Commission, as ordained in the Constitution, requires that **the power of this Court to review the acts of that body should, as a general proposition, be used sparingly, but firmly in appropriate cases. We are not satisfied that the present suit is one of such cases**. (Emphasis supplied.)

As the ultimate guardian of the Constitution, we have the distinguished but delicate duty of determining and defining constitutional meaning, divining constitutional intent, and deciding constitutional disputes.[102] Nonetheless, this power does not spell judicial superiority (for the judiciary is co-equal with the other branches) or judicial tyranny (for it is supposed to be the least dangerous branch).[103] Thus, whenever the Court exercises its function of checking the excesses of any branch of government, it is also duty-bound to check itself.[104] The system of divided and interlocking powers of the branches of government are carefully blended so as to produce a complex system of checks and balances that preserve the autonomy of each branch, without which independence can become supremacy.

Petitioners disparage the technical test and end-to-end demonstration conducted by the COMELEC for having been done merely for media mileage. This baseless accusation is easily dismissed by repairing to the presumption of regularity of official acts. As we ruled in ***The Province of Agusan del Norte v. Commission on Elections, et al.***:

Appropriately, the Constitution invests the COMELEC with broad power to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite and other electoral exercises.

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[102] *Duenas v. House of Representatives Electoral Tribunal, et al.*, G.R. No. 185401, July 21, 2009.

[103] *Id.*

[104] *Id.*

In the discharge of its legal duties, the COMELEC is provided by the law with tools, ample wherewithal, and considerable latitude in adopting means that will ensure the accomplishment of the great objectives for which it was created — to promote free, orderly and honest elections.[105] **Conceived by the charter as the effective instrument to preserve the sanctity of popular suffrage, endowed with independence and all the needed concomitant powers, COMELEC deserves to be accorded by the Court the greatest measure of presumption of regularity in its course of action and choice of means in performing its duties, to the end that it may achieve its designed place in the democratic fabric of our government**.[106] (Emphasis supplied.)

The COMELEC is a constitutional body, mandated to play a distinct and important role in the governmental scheme. In the performance of its constitutional duties, it must be given a range of authority and flexibility, for the art of good government requires cooperation and harmony among the branches. We may not agree fully with the choices and decisions that the COMELEC makes, but absent any constitutional assault, statutory breach or grave abuse of discretion, we should never substitute our judgment for its own.

c.8 No abdication by the COMELEC of its duty to enforce election laws

The petitioners assert that the COMELEC abdicated its constitutional duty to enforce and administer all laws relative to the conduct of elections, and to decide all questions affecting elections when it entered into the Automation Contract with Smartmatic TIM Corporation.

Article 3.3 of the contract for the 2010 Elections Automation Project provides:

Article 3.3 The PROVIDER shall be liable for all its obligations under this Project, and the performance of portions thereof by other

[105] Citing *Cauton v. COMELEC*, G.R. No. L-25467, April 27, 1967, 19 SCRA 911; *Pangandaman v. COMELEC*, G.R. No. 134340, November 25, 1999, 319 SCRA 283.

[106] Citing *Aratuc v. COMELEC*, G.R. Nos. L-49705-09, February 8, 1979, 88 SCRA 251.

persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, **shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration.** SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

The PROVIDER must provide to SMARTMATIC at all times the support required to perform the above responsibilities. (Emphasis supplied.)

Petitioners claim that under this Article 3.3, the COMELEC has surrendered to Smartmatic the supervision and control of the system to be used for the AES in violation of Section 26 of RA 8436.

The petitioners also refer to COMELEC Bid Bulletin No. 10,[107] which was made an integral part of the Automation Contract by virtue of Articles 21.1 and 21.4 of the contract.[108] Bid Bulletin No. 10 provides that the "digital signature shall be assigned by the winning bidder to all members of the Board of Election Inspectors (BOI) and the city, municipal, provincial or district Board of Canvassers (BOC)." Since Smartmatic would have access to the **digital signatures** and would have the authority to assign the access keys to the BEI and BOC, the petitioners readily conclude that the COMELEC has abdicated its constitutional mandate to enforce election laws. What the petitioners failed to consider is that, although the digital signature shall be assigned by the winning bidder, Bid Bulletin No. 10 further provides

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[107] Issued by the COMELEC-SBAC on April 15, 2009.

[108] Article 21 — Contract Documents

21.1 "Contract Documents" refers to the following documents, and they [sic] are hereby incorporated and made integral parts of this Contract:

x x x x x x x x x

21.4 This Contract, together with the Contract Documents, constitutes the entire agreement between the parties. x x x

that the certificate of authority for the digital signatures must still be approved by the COMELEC. **Thus, the COMELEC retains control over the process of generation and distribution of the digital signatures.**

Abdication denotes a relinquishment or surrender of authority, which has not been done by the COMELEC. Part II of the TOR/RFP provides:

> The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease, with an option to purchase, of an automated election system (AES) that will meet the following needs:
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> x x x x x x x x x
>
> 6. A complete solutions provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, *etc*.), **under COMELEC supervision and control,** to ensure effective and successful implementation of the Project. (Emphasis supplied.)

The COMELEC identified the type of technology, specifications and capabilities of the system to be used in the 2010 elections; and the bidders were required to submit their bids in accordance with the COMELEC's stipulations. All the choices made by the winning bidder were to be subject to approval by the COMELEC, and "the final design and functionality of the system shall still be subject to [its] final customization requirements."[109]

It is clear that the COMELEC has not abdicated its constitutional and legal mandate to control and supervise the elections. Smartmatic and TIM are merely service providers or lessors of goods and services to the Commission. Indeed, Article 6.7 of the Automation Contract, provides that "the entire process of voting, counting, transmission, consolidation and canvassing

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[109] Request for Proposal, Part IV, item 33.

of votes shall be conducted by COMELEC's personnel and officials."

This control and supervision by the COMELEC was assured in the June 23, 2009 hearing of the Senate Committee on Constitutional Amendments and Revision of Codes and Laws. This is reflected in the following exchange between Senator Francis Escudero and COMELEC Executive Director Jose Tolentino, thus:

"THE CHAIRMAN. Will you deputize the workforce of the winning bidder? Or are you going to deputize by way of additional technological support the students?

MR. TOLENTINO. It would be the students, Mr. Chairman, whom we will deputize.

With respect to the providers *(sic)* technical support, we consider them as partners. So, there is really no need for us to deputize them because the supervision and control over the counting center would be solely on the part of the Comelec.

THE CHAIRMAN. *Pero pwede ho nilang pakialaman 'yung makina, hindi po ba? Puwede nilang kalikutin 'yon, galawin 'yon, kasi nga – kung may palpak, di ba?*

So they're employees of Smartmatic without any counterpart authorization or deputization from Comelec. So, anyone can just walk in [and] say, "I am an employee of Smartmatic. Something is wrong with the machine. I'll check it."

MR. TOLENTINO. No. It doesn't work that way, Mr. Chairman.

First of all, aside from our EO who would be going around all over the municipality to check on the polling centers, Comelec aside from our Information Technology Department personnel, would also be going around to determine the status of the machines on election day.

And I am even sure that the watchers of the political parties and the candidates will [not] allow anyone to touch a machine if he is not a member of the Board of Election Inspector *(sic)*.

THE CHAIRMAN. But sir, the workforce of on-site technicians are not allowed to touch the machines? Something is wrong with the machine, who is authorized to . . .

MR. TOLENTINO. Yes, sir. Only when there is a problem with the machine.

THE CHAIRMAN. Precisely my point, sir. So, then these people be at least known to Comelec.

MR. TOLENTINO. Yes, Mr. Chairman. In fact, they'll be given appropriate identification cards . . .

THE CHAIRMAN. From Comelec.

MR. TOLENTINO. Yes, Mr. Chairman.

THE CHAIRMAN. That was my question, sir. Because you said a while ago, they're employees only of Smartmatic and you have BEI, anyway.

So, ... under the control and supervision *din sila ng* Comelec.

MR. TOLENTINO. **Yes, Mr. Chairman.**

THE CHAIRMAN. Yes." (Emphasis supplied.)[110]

Finally, the power and duty of the COMELEC to administer election laws and to have control and supervision over the automated elections is not incompatible with the decision to subcontract services that may be better performed by those who are well-equipped to handle complex technological matters with respect to the implementation of the AES. The subcontractor cannot act independently of the COMELEC.

D. Conclusion

We are not unaware of the many doomsday scenarios peddled by doubting Thomases if the coming May 2010 elections will be fully automated. To downgrade these scenarios, let it be emphasized that the PCOS System procured by COMELEC is a paper-based system. It has a provision for system auditability and a voter-verified paper trail. The official ballots may be compared with their digital images stored in the memory cards. All actions done on the machine are stored and can be printed out by the BEI chairperson as an audit log, which includes time

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[110] TSN, Senate Committee on Constitutional Amendments and Revision of Codes and Laws, June 23, 2009, pp.95-97.

stamps. And in the event of problems arising from non-functioning PCOS machines, the official ballots cast in the precincts, which have previously been fed into the locked ballot box, could be used for a manual recount. With these safeguards, the fear of automation failure should not overwhelm us.

We have been bedevilled in the past by elections that are not free, fair and honest. These elections have made a mockery of our democracy for they frustrated the sovereign right of the people to choose who ought to rule them. These elections have also resulted in instability of governments whose legitimacy has been placed in doubt. All these elections were conducted manually. For the first time, we shall be conducting our May 2010 elections through full automation. To be sure, full automation will not completely cleanse the dirt in our electoral system. But it is a big forward step which can lead us to the gateway of real democracy where the vote of the people is sacred and supreme.

ACCORDINGLY, I vote to DISMISS the petition.

SEPARATE OPINION

CORONA, *J*:

> A new civilization is emerging in our lives, and blind men everywhere are trying to suppress it. This new civilization brings with it new family styles; changed ways of working, loving, and living; a new economy; new political conflicts; and beyond all this, an altered consciousness as well. Pieces of this new civilization exist today. Millions are already attuning their lives to the rhythms of tomorrow. Others, terrified of the future, are engaged in a desperate, futile flight into the past and are trying to restore the dying world that gave them birth.
>
> The dawn of this new civilization is the single most explosive fact of our lifetimes.[1]

The Third Wave of the Philippine electoral system is upon us. The ballot, one of the most significant means through which

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[1] Alvin Toffler, *THE THIRD WAVE.*

the people directly participate in governance by periodically choosing their representatives, is evolving from purely paper-based to computer-readable and the elections are progressing from manual to automated. Indeed, the means by which popular sovereignty may be exercised through suffrage is about to change considerably. The tsunami of change in our electoral system encourages us to adopt the words of the renowned futurist Alvin Toffler as our own: "We are the children of the new transformation, the Third Wave."

Back then, there was the *papeleta oficial*. It was barely the size of this paper and only one side was written with the titles of seven elective offices. On the space corresponding to each office, a voter wrote the name of the chosen candidate. The voter would then deposit the *papeleta* in a ballot box and, at the closing of the polls, the votes would be publicly counted and tallied, with a copy of the statement of the results sent by registered mail or special messenger to the provincial treasurer. If heaven cooperated, the election results were known within two months.[2]

Through the years, the *papeleta* evolved into the official ballot, commonly known as the *balota*. The *balota* was of uniform size and provided by the Commission on Elections (Comelec). It was printed in black ink on white security paper with distinctive, clear and legible water marks that readily distinguished it from ordinary paper. Each *balota* was in the shape of a strip with stub and detachable coupon containing the ballot's serial number and a space for the thumbmark of the voter on the detachable coupon. It contained all the names of all the offices to be voted for in the election, allowing opposite the name of each office sufficient space or spaces with horizontal lines where the voter wrote the name or names of individual candidates voted for by him. The voter, after affixing his thumbmark on the detachable coupon in the presence of the board of election inspectors, deposited his *balota* and the coupon in the respective compartments of the ballot box. As soon as the voting was

[2] See Chapter 18, Revised Administrative Code of the Philippine Islands of 1917. See also Act No. 1582, effective January 15, 1907.

finished, the ballots were counted publicly and the totals of votes recorded in the tally board and election returns. The returns were then submitted to the various boards of canvassers (municipal or city, provincial and national) for canvassing. The election results were hopefully proclaimed within one week (for local positions) or up to two months (for national positions).

In the coming synchronized national and local elections in May 2010, it will be the precinct count optical scan (PCOS) ballot. It will be nearly thrice the size of this paper, with both sides filled with the names of at least 600 candidates and opposite each name will be a spot which the voter can mark to indicate his choice. It will be fed manually into the PCOS which in turn will determine the ballot's authenticity, tally the votes marked therein and generate digitally signed and encrypted election results to be electronically transmitted to different levels for consolidation and canvass.[3] Hopefully, within two days the election results will be known.

The shift from manual elections to an automated election system (AES) has indeed become inevitable. Not just one but four laws have been passed decreeing it: RA[4] 8046[5] in 1995, RA 8436[6] in 1997, RA 9369[7] in 2007 and RA 9525[8] in 2009.

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[3] Request for Proposals (RFP) issued by the Commission on Elections for the 2010 elections automation project.

[4] Republic Act.

[5] An act authorizing the Commission on Elections to conduct a nationwide demonstration of a computerized election system and pilot-test it in the March 1996 elections in the Autonomous Region in Muslim Mindanao (ARMM) and for other purposes.

[6] An act authorizing the Commission on Elections to use and automated election system in the May 11, 1998 national or local elections and in subsequent national and local electoral exercises, providing funds therefor and for other purposes.

[7] An act amending Republic Act No. 8436.

[8] An act appropriating the sum of eleven billion three hundred one million seven hundred ninety thousand pesos (₱11,301,790,000.00) as supplemental appropriation for an automated election system and for other purposes.

For the 2010 elections, automation is envisaged in RA 8436, as amended by RA 9369. Pursuant to that purpose, respondent Commission on Elections-Special Bids and Awards Committee (Comelec-SBAC) conducted biddings and issued to the joint venture of respondents Smartmatic International Corporation and Total Information Management Corporation (Smartmatic-TIM) a notice of award on June 10, 2009.[9] On July 10, 2009, respondent Comelec and Smartmatic-TIM executed a contract governing the procurement of counting machines, including the supply of ballot paper, electronic transmission services using public telecommunications networks, training, technical support, warehousing, deployment, installation, pull-out, systems integration and overall project management.[10] On the same day, Smartmatic-TIM received a notice to proceed with the implementation of the contract.[11]

Early on, however, petitioners as concerned citizens and taxpayers filed a petition in this Court for *certiorari*, prohibition and *mandamus* urging us to annul the June 10, 2009 notice of award and permanently enjoin respondents from signing and/or implementing any contract for the 2010 elections. They also sought to compel all respondents to disclose the full terms and conditions of the relevant agreements between and among themselves, including the agreements among respondent Smartmatic, Dominion Voting Systems (Dominion) and Jartltech International Corporation (Jarltech) and between respondent TIM and 2Go Corporation (2Go), respectively.[12] However, with the execution of the July 10, 2009 contract between Comelec and Smartmatic-TIM, petitioners are now also seeking the annulment of the said contract.[13]

Petitioners argue that the impugned June 10, 2009 notice of award and July 10, 2009 contract violate the following:

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[9] Annex "A", Petition.

[10] Annex "13", Comment.

[11] www.comelec.gov.ph/modernization/2010

[12] Petition, pp. 46-47.

[13] Manifestation and Memorandum for Petitioner, pp. 107-108.

(a) Sections 5 and 12 of RA 8436, as amended by RAs 9329 and 9525 on pilot-testing and Section 7 of RA 8436, as amended by RA 9329, on the systems capability of the PCOS machines and[14]

(b) Section 8 of RA 7042[15] in relation to EO[16] 584[17] and Article IX, Part B, Items 2.2.4, 2.2.6.1.2.2, 2.2.6.1.2.3, 2.2.6.1.2.5 and 2.2.6.2.1 of the Request for Proposal (RFP) on the eligibility of Smartmatic TIM as a bidder.[18]

They also claim that Articles 3.3, 6.7, 7.4, 21.1 and 21.4 of the impugned contract violate paragraphs 1 and 3, Section 2, Article IX-C of the Constitution and Section 26 of RA 9369 on the mandate of the Comelec.[19]

They further contend that Articles 3.1, 3.2 and 21.1 of the impugned contract incorporating the March 10, 2009 RFP and bid documents issued by the Comelec violate Section 2, Article V of the Constitution on the sanctity and secrecy of the ballot.[20]

Petitioners exhort the Court to recognize their *locus standi* in view of the transcendental importance of the matters raised in their petition.[21] They also pray that their failure to exhaust the administrative remedies provided under the implementing rules of RA 9184 (or the Government Procurement Reform Act) be excused.[22]

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[14] Petition, pp. 28-31; Manifestation and Memorandum for Petitioners, pp. 53-80.

[15] Foreign Investments Act of 1991.

[16] Executive Order.

[17] Seventh Regular Foreign Investment Negative List dated December 8, 2006.

[18] Petition, pp. 32-40; Manifestation and Memorandum for Petitioners, pp. 81-93.

[19] Manifestation and Memorandum for Petitioners, pp. 17-29, 49-52.

[20] *Id.*, pp. 37-48.

[21] Manifestation and Memorandum,

[22] Manifestation and Memorandum, pp. 94-100.

In view of the great significance of the matters involved in this case in our national life especially at this critical juncture of our history, I am inclined to gloss over the technical deficiencies and focus only on the substantive issues. Nonetheless, after careful study and reflection, I vote to dismiss the instant petition for the reasons I will explain.

ARE THE JUNE 10, 2009 NOTICE OF AWARD AND JULY 10, 2009 CONTRACT LEGAL?

The mandate of the Comelec under RA 8436, as amended, is two-fold: first, **to use an AES** (automated election system) as provided under Section 1:

> Sec. 1. *Declaration of Policy*. — It is the policy of the State to ensure free, orderly, honest, peaceful, credible and informed elections, plebiscites, referenda, recall and other similar electoral exercises by improving on the election process and adopting systems which shall **involve the use of an automated election system** that will ensure the secrecy and sanctity of the ballot and all election, consolidation and transmission documents in order that the process shall be transparent and credible and that the results shall be fast, accurate and reflective of the genuine will of the people.
>
> **The State recognizes the mandate and authority of the Commission to prescribe the adoption and use of the most suitable technology of demonstrated capability taking into account the situation prevailing in the area and the funds available for the purpose.**[23] (emphasis supplied)

Such authority to use "an automated election system or systems xxx as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/consolidation and transmittal of results of electoral exercises" is reiterated in Section 5 of the law, as amended.

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[23] The original text read:

> Section 1. Declaration of policy. — It is the policy of the State to ensure free, orderly, honest, peaceful and credible elections, and assure the secrecy and sanctity of the ballot in order that the results of elections, plebiscites, referenda, and other electoral exercises shall be fast, accurate and reflective of the genuine will of the people.

Second, as provided under Section 12 of the same law, as amended, **to procure** supplies, equipment, materials, software, facilities, and other services for the purpose of implementing an AES.

There are provisions which outline how the Comelec is to carry out its mandate. Section 5 of RA 8436, as amended, provides:

Sec. 5. *Authority to Use an Automated Election System*. — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/ consolidation and transmittal of results of electoral exercises: ***Provided,*** **that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission**: *Provided, further*, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: *Provided, finally*, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. **In succeeding regular national or local elections, the AES shall be implemented nationwide**.[24] (emphasis supplied)

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[24] The original text read:

Section 6. Authority to use an automated election system. — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system, herein referred to as the System, for the process of voting, counting of votes and canvassing/consolidation of results of the national and local elections: **Provided, however, That for the May 11, 1998 elections, the System shall be applicable in all areas within the country only for the positions of president, vice-president, senators and parties, organizations or coalitions participating under the party-list system**.

To achieve the purpose of this Act, the Commission is authorized to procure by purchase, lease or otherwise any supplies, equipment, materials

Moreover, Section 12 of RA 8436, as amended, states:

Sec.12. *Procurement of Equipment and Materials*. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, **supplies**, **equipment**, **materials**, **software**, **facilities**, and **other service**, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. **With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.** x x x[25] (emphasis supplied)

Citing the proceedings of the Senate on Senate Bill No. 2231 (from which RA 9329 originated),[26] petitioners posit that Sections 5 and 12 of RA 8436, as amended, impose the restriction that no AES can be implemented in the 2010 elections unless the said AES shall have been pilot-tested in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao during the 2007 elections.[27] Petitioners claim that

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and services needed for the holding of the elections by an expedited process of public bidding of vendors, suppliers or lessors: Provided, That the accredited political parties are duly notified of and allowed to observe but not to participate in the bidding. **If, inspite of its diligent efforts to implement this mandate in the exercise of this authority, it becomes evident by February 9, 1998 that the Commission cannot fully implement the automated election system for national positions in the May 11, 1998 elections, the elections for both national and local positions shall be done manually except in the Autonomous Region in Muslim Mindanao (ARMM) where the automated election system shall be used for all positions**. (emphasis supplied)

[25] The original text read:

Section 8. *Procurement of equipment and materials*. — The Commission shall procure the automated counting machines, computer equipment, devices and materials needed for ballot printing and devices for voting, counting and canvassing from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulations.

[26] Manifestation and Memorandum, pp. 57-61, citing Records of the Senate, Volumes II and III.

[27] Petition, p. 28.

the impugned notice of award and contract contravene Sections 5 and 12 of RA 8436, as amended, because they authorize the use of PCOS machines that have never undergone pilot-testing.

The view of petitioners is, however, at odds with the plain language of the law and the proceedings of the Senate.

The aforecited provisions do not limit or restrict the statutory mandate of the Comelec to implement a nationwide AES beginning the 2010 elections. The provisos of Section 5 merely prescribe the minimum scope of, as well as the conditions for, the implementation of an AES by the Comelec in the 2007 elections. On the other hand, Section 12 simply regulates the capability of the supplies, equipment, materials, software, facilities and other services which the Comelec can procure. **Neither provision, however, removes or constrains the mandate of the Comelec to implement an AES nationwide beginning the 2010 elections.**

A review of the evolution of Section 5 of RA 8436, as amended, will shed light on the matter.

Prior to its amendment by RA 9369, Section 5 was numbered Section 6 of RA 8436. It provided that "for the May 11, 1998 elections" the Comelec could use an AES which "shall be applicable in all areas within the country **only for** the positions of president, vice-president, senators and parties, organizations or coalitions participating under the party-list."[28] If by February 9, 1998 it would have become evident that the AES could not be implemented for national positions in the 1998 elections, the provision stated that elections for both national and local positions would be done manually except in the Autonomous Region in Muslim Mindanao where the automated election system would be used for all positions. The then Section 6 of RA 8436, therefore, contained the specific limitation or restriction that, while the Comelec may implement an AES nationwide in the 1998 elections, it could do so only for certain national positions. However, it did not provide that if no AES would have been

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[28] *Supra* at 21.

implemented in the 1998 elections, the Comelec would forfeit its mandate to implement an AES nationwide in the succeeding elections.

As amended and renumbered by RA 9369, (the former Section 6) Section 5 of RA 8436 contains a proviso which provides that "for the regular national and local election, which shall be **held immediately after effectivity of this Act**," the Comelec shall implement an AES "in **at least** two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao." The preceding clause is significant in two aspects.

First, it refers solely to the May 14, 2007 synchronized national and local elections because **the 2007 elections were the only regular and local elections held immediately after the effectivity of RA 9369.** It was held on February 10, 2007.[29]

Second, by ordinary definition, the phrase "at least" sets a minimum[30] scope but does not bar attempts or efforts to exceed or surpass it. The clause in Section 5 deliberately employs the phrase "at least" rather than "not more than" or the word "only" (as in the original text of Section 5). As qualified, the clause means that, in the 2007 elections the Comelec had the discretion to implement an AES within the minimum scope of "two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao," or within the maximum scope of all areas in the country. It did not proscribe the nationwide implementation of an AES in the 2007 elections. Nor does it forbid one in the 2010 and succeeding elections.

In sum, the aforementioned proviso of Section 5 of RA 8436, as amended, merely delineates the minimum scope of implementation of the AES for the 2007 elections.

More significantly, in the event that no AES was implemented in the 2007 elections, Section 5 does not prohibit the Comelec

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[29] Section 47, RA 9369 provides that the law shall take effect 15 days after its publication in a newspaper of general circulation. It was first published in the January 26, 2007 issue of *Malaya*.

[30] www.merriam-webster.com/dictionary.

from implementing an AES nationwide starting in the 2010 elections. Rather, the last clause of Section 5 is categorical that "**in succeeding regular national or local elections, an AES shall be implemented nationwide**." And the 2010 elections were the elections that immediately followed the 2007 elections, the regular elections "held immediately after effectivity of [RA 9369]." In other words, the directive of the law itself is clear: **the nationwide implementation of the AES commences in the 2010 elections**.

Laws are to be interpreted in a way that will render them effective, not in a manner that will make them inoperative. To insist, as petitioners do, that no nationwide AES can be implemented in the 2010 elections because no AES was implemented in the 2007 elections is to disregard the categorical language of the law. It frustrates and defeats the legislative intent to fully automate the 2010 elections. Indeed, if petitioners' argument were to be pursued to its (not-so-) logical conclusion, RA 8436, as amended by RA 9369, would be a dead law. Under petitioners' theory, no AES can be implemented in any future election unless Congress enacts another law. This is so because, according to petitioners themselves, the "condition precedent" for any nationwide implementation of the AES — the implementation of the AES in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao in the 2007 elections — was not complied with.

Moreover, considering that RA 9369 took effect only on February 10, 2007, it was almost impossible to utilize an AES even in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao during the May 14, 2007 elections. Considering that, from the effectivity date of RA 9369, there was only a little over three months left before the 2007 elections, the additional burden (on the preparations for the 2007 elections) of the procurement process for and implementation of even a partial AES of the said elections would have been a superhuman task. More significantly, the 2007 appropriations for the Comelec did not include a budget for AES. The convergence of time and funding constraints made

the implementation of any AES in the 2007 elections impossible for the Comelec to conduct. *Nemo tenetur ad impossibile.*[31] The law obliges no one to perform an impossibility. Laws and rules must be interpreted in a way that they are in accordance with logic, common sense, reason and practicality.[32]

Furthermore, Section 12 of RA 8436, as amended, relevantly states that "[p]articipation in the 2007 pilot exercise shall not be conclusive of the system's fitness." This has a two-fold implication on petitioners' position. *One*, since participation in the intended automation of the 2007 elections was not a conclusive determinant of the system's fitness, partial automation of the 2007 elections pursuant to the proviso of Section 5 (assuming it was a condition for the full/nationwide automation of elections starting 2010) was merely preferable, not indispensable. *Two*, the fact that the PCOS machines were not pilot-tested in the 2007 elections has no significant bearing on the fitness and suitability of those machines for the elections to be held subsequent to the 2007 polls.

The Senate proceedings invoked by petitioners do not at all indicate that partial implementation of the AES in the 2007 elections is a condition *sine qua non* to its full implementation in the 2010 elections. A close reading of the transcript of the proceedings reveals that, in urging his colleagues to approve the proviso in Section 5 (that AES be implemented in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao), Sen. Richard Gordon, the principal sponsor of Senate Bill No. 2231, was merely underscoring the need to demonstrate the possibility and viability of poll automation even in the 2007 elections.[33] Nowhere in the transcript cited by petitioners did the Senate proscribe the nationwide implementation

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[31] *Stemmerik v. Mas*, A.C. No. 8010, 16 June 2009.

[32] *Id.*

[33] Manifestation and Memorandum, p. 57.

The following relevant statements of Senator Gordon during the Senate deliberations on October 11, 2006 regarding Senate Bill No. 2231 is enlightening:

of the AES beginning the 2010 elections if no partial AES was implemented in the 2007 elections.

In addition to the clarity of the language of RA 8436, as amended by RA 9369, as well as the legislative intent to have the nationwide implementation of the AES starting the 2010 elections, the intent of the lawmakers can furthermore be seen from the passage of RA 9525 on March 23, 2009. With this law, an ₱11,301,790,000 supplemental appropriations was specifically made for the automation of the 2010 elections. When Congress passed RA 9525, it was well aware that there was no pilot-testing of the PCOS in any previous Philippine electoral exercise. Nonetheless, Section 2 of the law states that the sum should be disbursed to ensure the "transparency and accuracy in the selection of the relevant technology of the machines to

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Sen. Gordon:

x x x Our position, Mr. President, is that this bill is essentially an amendment of an original bill that says automation of election, which means that it has already started. x x x

So, we are saying, Mr. President, that based on that, with all these things that are covered already, — in fact, there is practically a delegation of authority given to the Comelec which, by the way, is constitutionally the implementor of elections to the advisory council and to the oversight committee which is composed of seven senators and seven congressmen. x x x

x x x The proponent's (Sen. Roxas') amendment will take acts of Congress to continue AES.

In other words, Congress has to act to continue the automated election system. **In our proposal, it will take an act of Congress to stop AES. In other words, the general rule is, AES is now on a heuristic path, *umaandar na iyan*. The reports have already been given, the budget will still have to be approved for that, which means congressional action will be taken every step of the way.** x x x

***Kaya nga ang sinasabi ko, magiging ludicrous tayo na in 1997, ang sabi natin automation. Hindi po ito test. Ito po ay desisyon natin na pairalin na iyong* automation *sa* six provinces and six cities because *gahol na ho tayo sa oras*. We have ran out of time.** x x x

x x x ***I find that hindi tayo lumalakad kung babalik ulit tayo sa 2010 sa six provinces and six cities, para ano pa at naglalagay tayo ng automated election title dito?*** **All I am saying is that, once we go on automation, we should move on.** x x x (Senate Deliberations, 11 October 2006, pp. 191-200.) (emphasis supplied)

be used on **May 10, 2010 automated national and local election[s]**."

In fine, under Section 5 in relation to Section 1 of RA 8436, as amended, the mandate of the Comelec to prescribe the adoption and use of an AES is complete. It can determine which suitable technology of demonstrated capability to adopt for an AES. It can determine which, between a paper-based or a direct recording electronic election system, is more appropriate and practical. More notably, in the 2007 elections, it could decide whether to implement an AES within a maximum scope of all areas in the country or within the minimum scope of two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao. And in the 2010 and succeeding elections, its **unqualified mandate** is to implement an AES nationwide.

Therefore, when it issued the notice of award to and executed the contract with Smartmatic-TIM for the nationwide implementation of an AES in the 2010 elections, the Comelec acted pursuant to its mandate and did not violate Section 5 of RA 8436 as amended by RA 9369.

Neither did the Comelec violate Section 12 of RA 8436, as amended. The provision merely requires that, to implement a nationwide AES starting from the 2010 elections, the Comelec must procure a system that has a demonstrated capability and has been successfully used in a prior electoral exercise here or **abroad**, though application of the system in the 2007 elections would not have been conclusive evidence of its fitness. Clearly, it is not imperative that the system was successfully applied in the 2007 elections; it suffices that the system can be shown to have been viable in an election abroad. As the Comelec averred, the system it procured for the 2010 elections was successfully employed in prior electoral exercises in New Brunswick and New York in 2008 and in Ontario in 2009.[34]

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[34] Memorandum for public respondent, p. 60, citing Annexes "12", "13" and "14".

DID THE JUNE 10, 2009 NOTICE OF AWARD AND THE JULY 10, 2009 CONTRACT COMPLY WITH REQUIREMENTS ON BIDDING ELIGIBILITY?

Petitioners impugn the notice of award and contract in favor of Smartmatic TIM on the ground that the latter violated the RFP when it failed to submit a valid joint venture agreement (JVA), a copy of its single largest contract for the last three years, an ISO 9001 certificate and an environmental protection agency certification.

Petitioners are wrong.

Validity of the JVA

Under RA 9184,[35] to be eligible to bid for a project involving the procurement of goods, a joint venture must submit a valid JVA[36] which must be duly notarized and under oath.[37] It is further required by Section 8 of RA 7042 in relation to EO 584 that Filipino ownership or interest in the joint venture be at least 60%.[38]

The foregoing requirements were reiterated under Items 2.2.4 and 2.2.6.2.1 of the RFP.

On April 23, 2009 Smartmatic and TIM constituted themselves into an unincorporated joint venture under a JVA. They submitted their JVA to the Comelec on May 4, 2009[39] and on July 8, 2009, they caused the incorporation of their joint venture with the Securities and Exchange Commission (SEC).[40]

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[35] Government Procurement Reform Act; effective January 26, 2003.

[36] Sec. 23.6.2(a), Rule VIII, Implementing Rules and Regulations of RA 9184.

[37] *Id.* at Sec. 2.2.7.

[38] See also Sec. 23.11.1, Implementing Rules and Regulations of RA 9184.

[39] Annex 5, p. 9, Comment of public respondent.

[40] Annex 12, Comment of public respondent.

Petitioners contend that Smartmatic-TIM failed to seasonably comply with the eligibility requirements of the law because they were still unincorporated at the time they filed their JVA in the Comelec. Their lack of community of interest surfaced in late June 2009 when the two entities publicly bickered over their rights and obligations. Moreover, petitioners claim that the JVA is defective because it left out key parties to the automation project, namely, Jarltech from which Smartmatic will procure the PCOS machines, Dominion which owns the copyright to the software for the PCOS machines and 2Go which will be responsible for transporting/distributing PCOS machines throughout the country. Petitioners insist that the inclusion of Jarltech, Dominion and 2Go in the joint venture is indispensable to hold them solidarily liable with Smartmatic-TIM for any problem that may arise from the use of their automation system.[41]

Petitioners exaggerate the eligibility requirements of the law.

RA 9184 and its implementing rules only require that the JVA be valid and notarized. Incorporation of a JVA under the Corporation Code through registration with the SEC is not essential for the validity of a JVA. So long as it meets the essential requisites of a contract[42] and is embodied in a public document, a JVA is valid regardless of its incorporation through registration with the SEC. Where the law makes no distinction, no distinction need be made.

Since the validity of the JVA is separate and distinct from its incorporation, I cannot subscribe to petitioners' position that the incorporation of the Smartmatic and TIM JVA must also be required for purposes of the bidding. To hold that the JVA ought to be accompanied by articles of incorporation is to unduly add to the requirement of the law and its implementing regulations, in the guise of interpretation or construction.

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[41] Memorandum, pp. 90-92.

[42] These essential elements are consent, object certain and cause.

Even without an accompanying incorporation paper, a JVA is considered valid if notarized and under oath. As explained by the Government Procurement Policy Board (GPPB):[43]

> For purposes of conducting eligibility on the prospective bidders for the procurement of goods and infrastructure projects, Section 23.6 (2) of the IRR-A of R.A. 9184 requires the prospective bidders to submit the following Class "B" Documents:
>
> (a) Valid joint venture agreement, in case of a joint venture; and
>
> (b) Letter authorizing the BAC or its duly authorized representative/s to verify any or all of the documents submitted for the eligibility check.
>
> **As regards the requirement of a "valid joint venture agreement" for JV bidders, the IRR-A of R.A. 9184 does not prescribe a standard form nor does it spell out the specific terms and conditions that should be included in such agreement to be valid**. However, for purposes of eligibility check, all JVAs are required to be notarized in order to be considered valid as prescribed in the aforequoted section. Further, it is advised that the JVAs should specifically state the name of the person who is appointed as the lawful attorney-in-fact of the JV to sign the contract, if awarded, and the member who is the lead representative of the concerned JV.[44] (emphasis added)

It would likewise be an unreasonable imposition not only on Smartmatic-TIM to absorb into their joint venture each and every entity they do business with, but also on the Comelec to transact directly with all these other entities. Aware of this, the Comelec's Instruction to Bidders allowed the bidders to subcontract portions of the goods or services under the automation project.[45]

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[43] Sec. 63, RA 9184.

[44] GPBB opinion NPM No. NPM 098-2004 dated July 23, 2004. www.gppb.gov.ph/opinions/view_opinion.asp. See also the GPPB Manual of Procedures for the Procurement of Goods and Services.

[45] Sec. 71 of the Instruction to Bidders provides that "The bidder shall specify in its Bid all portions of the Goods and Services that will be subcontracted,

RA 9184 provides under Article XVI for direct contracting as one of the alternative methods of procurement. Direct contracting or single source procurement does not require elaborate bidding because all the supplier needs to do is submit a price quotation, which offer may then be accepted immediately, but only under the following conditions: (a) when the goods may be obtained only from the proprietary source because patents, trade secrets and copyrights prohibit others from manufacturing the same item; (b) when procurement of critical components from a specific manufacturer, supplier or distributor is a condition precedent to hold a contractor to guarantee its project performance and (c) those sold by an exclusive dealer or manufacturer, which does not have a sub-dealer selling. Clearly then, the intention of RA 9184 is not to compel government agencies to deal with every copyright-holder, exclusive manufacturer and exclusive distributor; otherwise, it will restrict the mode of procurement to direct contracting only. Thus, there is no compulsion under the law for the Comelec to contract with Dominion as the holder of the copyright to the PCOS machine or with Jarltech as the manufacturer thereof or 2Go as the transporter/distributor of the PCOS machines. What is crucial is that Smartmatic-TIM assumes solidary liability for the principal prestation of the July 10, 2009 contract and the RFP, and that it stipulates (under Article 3.3 of the contract) that "the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve [it] of said obligations and concomitant liabilities."

Compliance with the Nationality Requirement

Regarding the ownership requirement under RA 7042 and the RFP, the JVA and articles of incorporation of Smartmatic-TIM categorically state that 60% of the shares of the joint venture shall be held by TIM itself or its subsidiary while 40% shall be held by Smartmatic itself or its subsidiary, but each shall be

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if any, including the entities to whom each portion will be subcontracted x x x. Subcontracting of any portion shall not relieve the Bidder from any liability or obligation that may arise from its performance."

jointly and severally liable to the Comelec for the obligations of the other under the RFP.[46]

However, notwithstanding the clarity of the provisions of the JVA and the articles of incorporation, petitioners argue that the 60-40% control of the joint venture by TIM and Smartmatic, respectively, is merely on paper and that, in reality, Smartmatic has control equal to or greater than TIM. According to petitioners, Smartmatic's nominated director can determine the quorum in the board of directors and the executive committee, and approve or veto the acts of the board or executive committee. Smartmatic alone can nominate the chairman of the board, the treasurer and the corporate secretary.[47]

But then, it is not the management but the ownership of the joint venture Smartmatic-TIM which is required to be at least 60% Filipino. The board of directors of a corporation is a creation of the stockholders and, as such, the board controls and directs the affairs of the corporation by delegation of the stockholders.[48] Hence, the authority to be exercised by the board of directors of the joint venture of Smartmatic-TIM is actually the authority of the stockholders of TIM and Smartmatic from which the joint venture derives its authority. As the source of the authority, the stockholders may by auto-limitation impose restraints or restrictions on their own powers such as that allegedly done by TIM in its joint venture with Smartmatic. Besides, issues on the distribution of management powers in the joint venture are a purely business prerogative in which the Court would rather not meddle.[49]

Submission of Required Documents

With regard to petitioners' claim that Smartmatic-TIM failed to comply with the requirement under the RFP for the joint venture to submit the following technical documents: (1) a

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[46] *Supra* at 32.

[47] Memorandum, pp. 32-35.

[48] *Angeles v. Santos*, 64 Phil. 697 (1937).

[49] *Ong Yong, et al. v. David Tui, et al.*, G.R. No. 144476, April 8, 2003.

statement of the value of its largest single contract for the last three years;[50] (2) ISO 9000 certificate or its equivalent[51] and (3) certification from the environment protection agency of the country of origin of the product,[52] the Comelec-SBAC noted in its memorandum dated June 3, 2009 that, while Smartmatic-TIM failed to show a copy of its single largest contract (because of its non-disclosure agreement with the election body of Venezuela), Smartmatic-TIM submitted "a duly authenticated certification from the Consejo Nacional Electoral (CNE) of the Venezuelan government x x x indicating the amount of the contract as [$141,356,604.54], (equivalent to Php6,345,502,017.90) which was well above the eligibility requirement of at least 50% of the Approved Budget for the Contract (ABC) of Php5,611,809,200.50." The certification further indicates "the name of the vendor Smartmatic Group, the name of procuring entity CNE, the period of the contract — between 01 June 2008 to 28 February 2009 and the description of goods and services provided — to provide voting machines and supplies for the elections in the Bolivarian Republic of Venezuela."[53] Thus, the Comelec-SBAC recommended that this certification be admitted under Section 19, Rule 132 of the Rules of Court as it was issued by a government of another country and duly authenticated by the officials of the Philippine embassy.[54] The Comelec-SBAC's recommendation was approved by the Comelec *en banc* in Resolution No. 8608 dated June 9, 2009.[55]

There is no cogent reason to overturn the resolution of the Comelec *en banc* approving the recommendation of the Comelec-SBAC on this matter. It should be borne in mind that, as expressly stated in Section 23.11.1.1, Rule VIII of the implementing rules of RA 9184, the purpose of the requirement is to establish the

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[50] Item 2.2.6.2.2.2.

[51] Item 2.2.6.1.2.3.

[52] Item 2.2.6.1.2.5.

[53] Annex 9, Comment of public respondent.

[54] *Id.*, p. 2.

[55] Annex 10, Comment of public respondent.

track record of the prospective bidder of having completed within the last three years a single contract similar to the contract to be bidded out. This purpose was served when CNE certified that Smartmatic had implemented in Venezuela a $141 Million project similar to the one it was bidding for. With such authenticated information made available to it, the Comelec correctly dispensed with a copy of the contract itself.

The Comelec also did not err in accepting the ISO 9000 and EPA certifications submitted by Smartmatic-TIM. Though not required under RA 9184, ISO 9000 and EPA certificates are required under the RFP. An ISO certificate is intended to assure the Comelec "that the manufacturing process of the solution provider complies with international standards."[56] This purpose is nevertheless still achieved if the PCOS machines are produced by a facility that has an ISO 9000 certification.[57] It is of record that the PCOS machines to be procured by the Comelec are manufactured for Smartmatic by its subsidiary Jarltech. Thus, the ISO certification of Jarltech provides sufficient assurance that the PCOS machines are manufactured according to international standards.

The same principle applies to the EPA certificate. Its purpose is to establish that the product to be procured meets the environmental standards of the country of origin.[58] The EPA certificate submitted by Smartmatic-TIM serves that purpose even though it is in the name of Kenmec Mechanical Engineering Company (Kenmec). As found by the Comelec-SBAC, Kenmec has an outsourcing manufacturing contract with Jarltech under which Kenmec will provide a space within its facility where Smartmatic, through Jarltech, will assemble and manufacture the PCOS machines.[59] It is logical for the EPA certificate to be issued to Kenmec's facility.

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[56] Omnibus SBAC Resolution No. 09-001, Annex 6, Comment of public respondent.

[57] *Id*.

[58] Item 2.2.6.1.2.5, RFP.

[59] *Supra* at 48.

In sum, Smartmatic-TIM substantially complied with the technical requirements for eligibility. Accordingly, no bidding requirement under the law and the RFP was violated by the notice of award and the contract issued to Smartmatic-TIM.

DOES THE JULY 10, 2009 CONTRACT DIMINISH THE COMELEC'S CONSTITUTIONAL MANDATE?

The Constitution appointed the Comelec as the sole authority to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall,[60] and to decide all questions affecting elections, except those involving the right to vote.[61]

Petitioners deplore what they claim to be a denigration of the mandate of the Comelec through the following provisions in its contract with Smartmatic-TIM:

3.3 The PROVIDER[62] shall be liable for all its obligations under this Project, and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.

The PROVIDER must provide to SMARMATIC (sic) at all times the support required to perform the above responsibilities.

x x x x x x x x x

6.7 Subject to the provisions of the General Instructions to be issued by the Commission *En Banc*, the entire processes of voting, counting,

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[60] Article IX-C, Sec. 2, par. 1.

[61] Article IX-C, Sec. 2, par. 3.

[62] Under the contract, the term PROVIDER refers to Smartmatic TIM Corporation.

transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials, and their performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of the COMELEC and the PROVIDER.

x x x x x x x x x

7.4 Upon delivery of the Goods, in whole or in part, to the warehouses as approved by COMELEC, the equipment shall be under the custody, responsibility and control of the PROVIDER.

x x x x x x x x x

According to petitioners, the mandate of the Comelec is seriously undermined by these provisions. Article 3.3 of the contract authorizes Smartmatic to supervise and control the technical aspect of the AES, whereas under Section 26 of RA 8436, it is the Comelec information technology department (Comelec-ITD) which should be given such control. On the other hand, Articles 6.7 and 7.4 of the contract assign to Smartmatic-TIM portions of the electoral responsibilities of the Comelec, whereas the Constitution mandates the authority of the Comelec to be exclusive.

Moreover, by virtue of Articles 21.1 and 21.4 of the contract, bid document no. 10 is deemed part thereof. According to the bid document, it is Smartmatic-TIM which shall generate the digital signature and assign the same to all the members of the board of inspectors, the board of canvassers, the Comelec, the Senate President and the House Speaker. To petitioners' mind, since Smartmatic-TIM has custody of the digital signature, it has virtual control of the election result as it is the digital signature which authenticates the election returns for the canvassing of votes.[63]

Petitioners' fears are unfounded.

We expect that, with the advent of electronic voting, procurement contracts will be accompanied by concerns about

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[63] Memorandum, pp. 17-29, 49-52.

their tendency to obscure traditional lines of responsibility. Nonetheless, well-designed and carefully-crafted contracts will represent neither an abdication of the Comelec's mandate nor a restraint on the Comelec's oversight powers, but rather a valid reconfiguration much needed in election administration.

The Comelec took pains to draft a contract that preserves its constitutional and statutory responsibilities and at the same time meets the novel contingencies resulting from the automation of elections.

For the 2010 automated elections, the Comelec exercises not only exclusive supervision and control of the electoral process,[64] including the discretion over which suitable technology to adopt and use.[65] Article 6.7 of the contract reiterates the authority of the Comelec over the purely electoral component of the process, thus:

> 6.7 Subject to the provisions of the General Instructions to be issued by the Commission *En Banc*, the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by Comelec's personnel and officials x x x.

With respect to the technical component of the Comelec's authority in the automation of elections, several specialized units have been created under RA 8436 and RA 9369 to support the Commission: (1) an Information Technology Department tasked to carry out the full administration and implementation of the AES;[66]

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[64] Section 26 of RA 8436 reads:

> Sec. 26. *Supervision and control* — The System shall be under the exclusive supervision and control of the Commission. For this purpose, there is hereby created an information technology department in the Commission to carry out the full administration and implementation of the System.
>
> The Commission shall take immediate steps as may be necessary for the acquisition, installation, administration, storage, and maintenance of equipment and devices, and to promulgate the necessary rules and regulations for the effective implementation of this Act.

[65] Section 1, RA 9369.

[66] Sec. 26, RA 8436.

(2) an Advisory Council on Information and Communication and Technology,[67] headed by the Chairman of the Commission, tasked to recommend the technology to be applied in the AES and to advise and assist in the review of its system's planning, inception, development, testing, operationalization and evaluation stages and in the identification, assessment and resolution of systems problems or inadequacies,[68] and (3) a Technical Evaluation Committee tasked to certify that, based on documented evaluation, the hardware and software components of the chosen AES are operating properly, securely, and accurately, in accordance with the provisions of RA 9369.[69]

Moreover, under the contract, the Comelec committed to create a project management office (PMO) that will oversee the execution and implementation of the automation project.[70]

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[67] Under RA 9369, the Advisory Council shall be composed of the following:

Sec. 8. x x x x x x x x x The Council shall be composed of the following members, who must be registered Filipino voters, of known independence, competence and probity;

"(a) The Chairman of the Commission on information and Communications Technology (CICT) who shall act as the chairman of the council;

"(b) One member from the Department of Science and Technology;

"(c) One member from the Department of Education;

"(d) One member representing the academe, to be selected by the chair of the Advisory Council from among the list of nominees submitted by the country's academic institutions;

"(e) Three members representing ICT professional organizations to be selected by the chair of the Advisory Council from among the list of nominees submitted by Philippines-based ICT professional organization. Nominees shall be individuals, at least one of whom shall be experienced in managing or implementing large-scale IT projects.

"(f) Two members representing nongovernmental electoral reform organizations, to be selected by the chair of the Advisory Council from among the list of nominees submitted by the country's nongovernmental electoral reform organizations.

[68] Sec. 9.

[69] Sec. 11.

[70] Sec. 6.3.6.

Thus, both under the law and the contract, it is clear that each of the foregoing units of the Comelec is assigned specific technical functions in support of the AES.

On the other hand, Smartmatic is given a specific and limited technical task to assist the Comelec in implementing the AES. The highly specialized language of the contract circumscribes the role of Smartmatic.

For instance, while, under Article 6.7, the counting and canvassing of votes are the responsibilities of the Comelec, under Article 3.3, the technical aspects of the "counting and canvassing software and hardware, including transmission configuration and system integration," and the "[prevention] and troubleshooting [of] technical problems that may arise during the election" are the responsibilities of Smartmatic. The delineation of roles is clear and the tasks assigned to Smartmatic are specific. By no stretch of interpretation can Article 3.3 be deemed to mean that Smartmatic shall count and canvass the votes.

Still under Article 6.7, it is the Comelec through its personnel and officials that shall conduct the entire processes of voting, counting, transmission, consolidation and canvassing of votes. The Comelec, jointly with Smartmatic, will ensure that the performance, completion and final results of these processes meet the stipulated specifications and schedules. This is a reasonable assignment of role to Smartmatic, considering that, under Articles 3.1.a, 3.1.b and 3.2 of the contract, Smartmatic-TIM undertakes to ensure the proper, satisfactory and timely execution and completion of the entire scope of the project.[71] There is no reason to view it as a diminution of the exclusive mandate of the Comelec to control the conduct of the elections.

It has likewise not been established that, under Article 7.4 of the contract, the Comelec abnegated its mandate. It must be borne in mind that the contract entered into by the Comelec is a mere lease with option to purchase. Hence, it will be grossly disadvantageous to the Comelec if, upon delivery of the goods by Smartmatic-TIM, custody thereof will be immediately

[71] Articles 3.1.a, 3.1.b and 3.2 of the contract.

transferred to it, for then liability for damage to or loss of the goods while in storage will be borne by it. It is bad enough that Filipino taxpayers are footing the bill for the continued storage of machines in the scrapped Mega Pacific consortium automation deal. It will be worse if they should likewise be answerable for any PCOS machine that is damaged or lost during storage.

ARE THE SANCTITY OF THE BALLOT AND THE INTEGRITY OF THE AUTOMATED ELECTORAL PROCESS COMPROMISED BY THE JULY 10, 2009 CONTRACT?

The more serious argument raised by petitioners has to do with the sanctity of the ballot and the integrity of the AES.

Petitioners argue that the constitutional right of the people to the secrecy and sanctity of their ballot is compromised by the requirement under the contract and the RFP that the ballot be approximately three-feet long and pre-printed with the names of at least 600 candidates and that it be manually fed into the PCOS machine with the assistance of a Smartmatic-TIM employee, when needed.[72]

Under Section 2, Article V of the Constitution, it is Congress which is primarily tasked with the duty to provide a system of securing the secrecy and sanctity of the ballot. In fulfillment of its duty, Congress adopted the following provisions in RA 9369, to wit:

Sec. 13. Section 11 of Republic Act No. 8436 is hereby amended to read as follows:

"Sec.15. *Official Ballot*. — **The Commission shall prescribe the format of the electronic display and/or the size and form of the official ballot, which shall contain the titles of the position to be filled and/or the proposition to be voted upon in an initiative, referendum or plebiscite. Where practicable, electronic displays must be constructed to present the names of all candidates for the same position**

[72] Memorandum, pp.

> **in the same page or screen, otherwise, the electronic displays must be constructed to present the entire ballot to the voter, in a series of sequential pages, and to ensure that the voter sees all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot. Under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size**. The maiden or married name shall be listed in the official ballot, as preferred by the female candidate. Under each proposition to be vote upon, the choices should be uniformly indicated using the same font and size.
>
> x x x x x x x x x
>
> Sec. 18. *Procedure in voting*. — The Commission shall prescribe the manner and procedure of voting, which can be easily understood and followed by the voters, taking into consideration, among other things, the secrecy of the voting.

While delegating to the Comelec the determination of the size and form of the ballot, Congress prescribed the following minimum requirements of its content: (1) that it shall contain the titles of the position to be filled and/or the proposition to be voted upon in an initiative, referendum or plebiscite; (2) that under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size and (3) that the voter must see all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot.

In effect, the basic contents of the ballot as required by Congress dictate the size and form of the ballot that the Comelec shall prescribe. For as long as the requirements are met, the system of secrecy and sanctity of the ballot adopted by Congress under RA 9369 is deemed observed by the Comelec.

There is no showing that the size and form of the PCOS ballot as prescribed by the Comelec do not fulfill the minimum contents required by Congress. In fact, the three-foot, two-

page ballot filled with 600 entries in font 10 was deliberately adopted by the Comelec to conform to the requirements of existing laws on the number of elective positions, and in anticipation of the possible number of candidates vying for these positions.

Moreover, there is no inherent flaw in the voting procedure adopted by the Comelec whereby each voter must manually feed the ballot into the PCOS machine. There are sufficient safeguards to the secrecy of the voting process in that the voter alone will hold the ballot and feed it to the PCOS machine. It is all up to the voter whether to discard caution and disclose the contents of the ballot. The law can only do so much in protecting its sanctity. Besides, assuming that the requirement under the contract between the Comelec and Smartmatic-TIM as to the size of the ballot poses concerns in connection with the secrecy of the ballot, the Comelec is not without power to issue the necessary rules and regulations that will effectively address them. Such rules and regulations may include the specific manner on how assistance on feeding the ballot to a PCOS machine may be rendered to a voter to avoid compromising the secrecy of the ballot.

Finally, petitioners are alarmed that the digital signature, security keys, source code and removable memory card are at the disposal of Smartmatic-TIM. They argue that all this puts Smartmatic-TIM in control not only of the process but also the outcome of the election.[73]

There are highly technical, specialized interstitial matters that Congress does not decide itself but delegates to specialized agencies to decide.[74] In RA 9369, Congress delegated to not just one but four specialized bodies the duty to ensure that the AES to be adopted for the 2010 elections will be the most appropriate and secure. These are the Comelec itself, the Comelec-ITD, the Advisory Council and the Technical Evaluation Committee. I am not prepared to say that we should doubt their ability and

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[73] Memorandum, pp. 17-29, 49-52.

[74] See *Zuni Public School District No. 89, et al. v. Department of Education, et al.*, 550 U.S. (2007).

their dedication to ensure compliance with the minimum capabilities and features of the AES, as prescribed under Sections 6 and 7 of RA 9369.

It is significant that among the functions of the Advisory Council is to "provide advice and/or assistance in the identification, assessment and resolution of systems problems or inadequacies as may surface or resurface in the course of the bidding, acquisition, testing, operationalization, re-use, storage or disposition of the AES equipment and/or resources as the case may be."[75] Furthermore, the Technical Evaluation Committee is assigned these functions:

> Sec. 9. New sections 8, 9, 10 and 11 are hereby provided to read as follows:
>
> "Sec. 11. *Functions of the Technical Evaluation Committee*. — **The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act based, among others, on the following documented results:**
>
> 1. The successful conduct of a field testing process followed by a mock election event in one or more cities/municipalities;
>
> 2. The successful completion of audit on the accuracy, functionally and security controls of the AES software;
>
> 3. The successful completion of a source code review;
>
> 4. A certification that the source code is kept in escrow with the Bangko Sentral ng Pilipinas;
>
> 5. A certification that the source code reviewed is one and the same as that used by the equipment; and
>
> 6. The development, provisioning, and operationalization of a continuity plan to cover risks to the AES at all points in the

[75] Sec. 9, RA 9369.

process such that a failure of elections, whether at voting, counting or consolidation, may be avoided. (emphasis added)

It has not been satisfactorily shown that the Advisory Council and the Technical Evaluation Committee have shirked their duties. They have not even been given the chance to perform them yet they are already being torpedoed. At this point, the Court should not even attempt to interfere in the work of these specialized bodies and arrogate their functions by deciding highly technical issues that are within their expertise and knowledge, and which the law itself has assigned to them for determination. The Court has to exercise judicial restraint and not pretend to be an expert in something it is not really familiar with. Our function is merely to decide if automation and its implementing contract(s) are legal or not. It is not to find fault in it and certainly, not to determine to what extent the law should be or should not be implemented. After a half century of electoral debacle, there looms in the horizon the dawn of a truly honest, systematic and modern electoral system. But we have to cast our fears and insecurities aside, and take the first step — unsure as it may be — to witness its coming.

Fifteen years ago, the government launched the first on-line lottery ("lotto") system in the country. Back then, brickbats flew thick and fast — that it was nothing but a government racket on a grand scale, that it had a built-in capability to cheat people of their hard-earned money, that government was abdicating a big part of its finances to the Malaysians, that its computers were going to be used to cheat in the elections and a slew of pseudo-intellectual arguments *ad nauseam*. But what has lotto become today? It has become one of the most successful government projects ever, heralded as one of the better lottery systems in any developing country. Practically the entire nation has been "wired together" under one efficient computer system. It has brought in billions to the government coffers and has helped millions of poor beneficiaries of the Philippine Charity Sweepstakes Office. What could have come out of it if the correct first step had never been boldly taken?

A FINAL WORD

We are the final generation of an old civilization and the first generation of a new one. Much of our personal confusion, anguish and disorientation can be traced directly to the conflict within us and within our political institutions, between the dying Second Wave civilization and the emergent Third Wave civilization that is thundering in to take its place. Toffler's words fittingly describe the state of our electoral system.

Congress has vested the Comelec with the authority to modernize the Philippine electoral system through the adoption of an AES. In the exercise of the said authority and considering the nature of the office of the Comelec as an independent constitutional body specifically tasked to enforce and administer all laws relative to the conduct of elections, the Comelec enjoys wide latitude in carrying out its mandate. No worst-case scenarios painted by doomsayers, no speculative political catastrophe should be the basis of invalidating the Comelec's official acts. Only when the exercise by the Comelec of its discretion is done with grave abuse will this Court nullify the challenged discretionary act. Otherwise, the institutional independence of the Comelec will be unduly restricted and eroded, and its constitutional and statutory prerogatives encroached upon. This Court should not allow that in any situation. This Court should not allow that in this case.

Let us welcome the significant change in our electoral system that is the automated election system. The future is upon us. It beckons as it poses the challenge of spurring technological innovation and safeguarding values like accuracy and transparency in our electoral system. Let us not turn our backs on it simply out of speculation and fear. Let us give it a chance.

I vote to **DISMISS** the petition.

DISSENTING OPINION

CARPIO, *J.*:

I vote to grant the petition in part. The stipulations in the Contract[1] between the Commission on Elections (COMELEC), on the one hand, and Total Information Management, Inc., (TIM) and Smartmatic International, Inc., (Smartmatic), on the other, implementing a **nationwide automated election** in the 10 May 2010 elections, are **void for being violative of Section 5 and Section 26 of Republic Act No. 8436 (RA 8436), as amended by Republic Act No. 9369 (RA 9369)**.

Section 5 of RA 8436, as amended, mandates a **pilot or partial automation** before a nationwide automated election system can be implemented. Section 26 of the same law vests on the COMELEC **"exclusive control and supervision" over the automated election system**. The Contract violates these provisions of RA 8436, as amended.

Background

On 23 January 2007, Congress passed RA 9369 amending the first automated election law, RA 8436.[2] Section 5 of RA

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[1] Contract for the Provision of An Automated Election System for the May 10, 2010 Synchronized National and Local Elections ("Contract"). The affected provisions of the Contract are Article 3 (Scope of the Project), Article 4 (Contract Fee and Payment), relevant sub-provisions of Article 5 (Responsibilities of the Provider), relevant sub-provisions of Article 6 (COMELEC's responsibilities), and relevant sub-provisions Article 7 (Delivery and Acceptance). The affected portions of the Request for Proposal (made integral to the Contract under Article 21) are Component 1-B (Precinct Count Optical Scan), Component 1-C (Counting/Consolidation System), Component 2 (Provision for Electronic Transmission Using Public Telecommunication Networks) and Component 3 (Overall Project Management). Under the Contract's Severability Clause (Article 20), the unaffected provisions remain valid and the parties may opt to renegotiate the invalidated provisions.

[2] An Act Authorizing The Commission On Elections To Use An Automated Election System In The May 11, 1998 National Or Local Elections And In Subsequent National And Local Electoral Exercises, Providing Funds Therefor And For Other Purposes.

8436, as amended by RA 9369, which amendment took effect on 10 February 2007, authorized the COMELEC to:

> [U]se an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording automated election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/ consolidation and transmittal of results of electoral exercises: **Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission** x x x In succeeding regular national or local elections, the AES shall be implemented nationwide. (Emphasis supplied)

The COMELEC did not use any automated election system in the 14 May 2007 elections, the national and local elections held after RA 9369 took effect.

On 10 July 2009, the COMELEC, on the one hand, and Tim and Smartmatic (Provider), on the other, signed the contract for the automated tallying and recording of votes cast nationwide in the 10 May 2010 elections. For ₱7,191,484,739.48, the COMELEC leased for use in the 10 May 2010 elections 82,200 optical scanners (and related equipment) and hired ancillary services of the Provider.[3]

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[3] The Contract, divided into three components (paper-based automated-election system [Component 1], provision for electronic transmission using public telecommunications networks [Component 2], and overall project management [Component 3]), requires the Provider to, among others:

> (1) Develop a data management system (Election Management System), capable of generating audit log and integrating with the COMELEC's database to create pre-election configuration data (*i.e.*, voting jurisdictions, number of voters per precinct, positions and seats for election, candidates' information and title and date of elections), generate ballot faces, and configure relevant data for different types of elections (*e.g.* national and local elections, ARMM elections, plebiscites, initiatives, recall elections, and special elections). The Provider is required to secure the system with authorization and authentication requirements (Component I-A). (Contract, p. 1; Request For Proposal [RFP], pp. 14-15);

(2) Configure each of the 82,200 precinct optical scanners (80,136 allocated units plus 2,064 contingency units) for use in the city/municipality/councilor district where each scanner will be deployed on election day to scan "ballots intended for the city/municipality/councilor district for which it has been configured." The Provider's obligations on the security features for the scanning of ballots at, and transmission of election results from, each of the 80,000 clustered precincts of 1,000 voters per cluster, are as follows: (a) to generate access keys (such as usernames and passwords) with at least two access levels (operator and administrator); (b) to program each scanner to require "the electronic authentication and certification of the election results x x x by at least two [Board of Election Inspector] (BEI) members" before transmission of the results, in encrypted form, from the precinct level (to the municipal board of canvassers, the COMELEC central server, and the server for the political parties, accredited citizens' arm and the Kapisanan ng mga Brodkaster ng Pilipinas) using "wireless, wired or satellite-based connection or a combination thereof" ensuring that the transmission service must be "available 99% of the time"; and (c) to program each scanner "to generate a backup copy of the digitally signed and encrypted ER in a removable data storage device" (Component I-B). (Contract, p. 1; RFP, pp. 15-16; Bid Bulletin No. 4, 27 April 2009, p. 5; Bid Bulletin No. 6, 27 April 2009, pp. 1, 7);

(3) Develop a consolidation and canvassing system which will tally election results for municipal, provincial and national offices using transmitted data (*i.e.* for municipal canvassing, using precinct results; for provincial/district canvassing, using consolidated city/municipal results; for COMELEC canvassing [for senatorial and party-list elections], using consolidated provincial/city results; and for canvassing by Congress [for Presidential and Vice-Presidential elections], using consolidated provincial/city results). To secure the system, the contract requires the Provider to: (a) program the consolidation and canvassing system to "monitor, detect, [and] record x x x intrusion and/or unauthorized access and recognize its authorized users with the use of physical security devices, such as USB flash drives or PMCIA cards, with digital certificates, aside from the use of user IDs and passwords"; (b) program the system to "decrypt and authenticate the transmitted encrypted election results prior to consolidation/canvassing"; and (c) to program the system to allow the Board Of Canvassers (BOC) "to digitally sign all electronic results and reports before transmission." (Component I-C). (Contract, pp. 1, 6; RFP, p. 18);

(4) Provide overall project management services and staffing (Component 3) (RFP, pp. 23-27);

(5) Train COMELEC executives (83 to 100), technical personnel (100), field personnel (4,000) and BEI members (160,272) on the systems operations. For the COMELEC technical staff, the training should enable them to "operate the systems on their own." (RFP, p. 31; Bid Bulletin No. 20, 27 April 2009, pp. 1-2); and

On 9 July 2009, petitioners, as taxpayers and citizens, filed this petition[4] to enjoin the signing of the Contract or its implementation and to compel disclosure of the terms of the Contract and other agreements between the Provider and its subcontractors.[5] Petitioners sought the Contract's invalidation for non-compliance with the requirement in Section 5 of RA 8436, as amended, mandating the partial use of an automated election system before deploying it nationwide. To further support their claim on the Contract's invalidity, petitioners alleged that (1) the optical scanners leased by the COMELEC "do not satisfy the minimum systems capabilities" under RA 8436, as amended and (2) the Provider not only failed to submit relevant documents during the bidding but also failed to show "community of interest" among its constituent corporations as required in *Information Technology Foundation of the Philippines v. COMELEC* (*Infotech*).[6]

In their Comments, respondents COMELEC and the Provider raised the following threshold contentions: (1) petitioners neither have legal interest nor *locus standi* to question the validity of the Contract as none of them was party to the Contract and the petition does not raise constitutional issues; (2) the controversy is not ripe for adjudication as the 2010 elections have not taken place; (3) petitioners failed to exhaust administrative remedies;[7]

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(6) Provide, one week before and after the elections, at least "one technician for every voting/counting and data transmission centers," who "must have cellular telephones or other means of real time communication." (RFP, p. 32).

[4] For the writs of *Certiorari*, Prohibition and *Mandamus*.

[5] Jarltech International Corporation (supplier of optical scanners), Dominion Voting Systems (copyright owner of the software for the optical scanners) and ToGo Corporation (hired by the Provider to distribute the optical scanners to their assigned precincts).

[6] 464 Phil.173 (2004).

[7] Respondents TIM and Smartmatic invoke Sections 55 and 58 of Republic Act No. 9184 which provide:

> Section 55. Protests on Decisions of the BAC. — Decisions of the BAC in all stages of procurement may be protested to the head of the procuring entity and shall be in writing. Decisions of the BAC may be

(4) petitioners failed to observe the hierarchy of courts by not seeking prior recourse from lower courts of concurrent jurisdiction; and (5) neither the writ of *mandamus* nor the writ of *certiorari* lies because the documents petitioners wish to compel production are available to the public and the COMELEC's execution of the Contract does not involve the exercise of its quasi-judicial powers.

On the merits, respondents defend the validity of the Contract on the following grounds: (1) the requirement for the limited use of an automated election system was intended for the 14 May 2007 elections, the national and local elections "held immediately after effectivity" of RA 9369 on 10 February 2007; (2) compliance with the requirement of limited automation in the 2007 elections is not a condition precedent for deploying the automated system nationwide in the 2010 elections following the mandate of Section 5, as amended, that "In succeeding regular national or local elections, the AES shall be implemented nationwide;" (3) compliance with Section 5, as amended, is merely directory considering Section 12 of RA 8436, as amended by RA 9369, which provides that "With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or *abroad*. *Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness*"; and (4) Republic Act No. 9525 (RA 9525), enacted

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protested by filing a verified position paper and paying a non-refundable protest fee. The amount of the protest fee and the periods during which the protests may be filed and resolved shall be specified in the IRR.

Section 58. Report to Regular Courts; *Certiorari*. — Court action may be resorted to only after the protests contemplated in this Article shall have been completed. Cases that are filed in violation of the process specified in this Article shall be dismissed for lack of jurisdiction. The regional trial court shall have jurisdiction over final decision of the head of the procuring entity. Court actions shall be governed by Rule 65 of the 1997 Rules of Civil Procedure.

This provision is without prejudice to any law conferring on the Supreme Court the sole jurisdiction to issue temporary restraining orders and injunctions relating to Infrastructure Projects of Government.

on 23 March 2009, allocating the budget for "an automated election system" in the 10 May 2010 elections represents the most recent expression of legislative intent on the subject.

Belying petitioners' allegation that the optical scanners failed to meet minimum systems capabilities under RA 9369, respondents invoked the results of the pre-procurement demonstration of the system before the COMELEC and other government officials on four occasions with the tested scanners showing 100% reading accuracy, surpassing COMELEC's 99.995% standard.[8]

Lastly, respondents contended that the Provider not only complied with the bidding documentation requirements but also met the "community of interest" standard in *Infotech* for joint ventures. On disclosing the terms of its subcontracts, the Provider maintained that the Contract does not require them to do so.

We granted intervention to the Philippine Senate, which filed a Comment-in-Intervention, joining causes with respondents, and to Atty. Pete Quadra, who filed a Petition-in-Intervention, assailing the lack of credible systems audit under the Contract. We also requested three *amici curiae* to comment on the petition.[9]

We heard the parties and an *amicus curiae*[10] in oral arguments on 29 July 2009.

In their Memoranda, respondents called the Court's attention to Senate Resolution Nos. 96 and 567, passed after the 11 August 2008 automated elections in the Autonomous Region in Muslim Mindanao (ARMM), urging the COMELEC to prepare for the "full automation" of the 10 May 2010 elections. Respondents TIM and Smartmatic also raised a new alternative argument that the 2008 ARMM elections constitute "substantial

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[8] The first test used 625 ballots each with 32 "pre-determined" marks while the second test used 650 ballots each similarly bearing 32 marks (COMELEC Comment, pp. 30-31).

[9] The University of the Philippines Computer Center, National Computer Center, and Information Technology Foundation.

[10] Information Technology Foundation of the Philippines.

compliance" with the initial limited use of an automated system under Section 5 of RA 8436, as amended.[11]

On the Threshold Issues

The threshold issues respondents raise on petitioners' lack of *locus standi* and non-exhaustion of administrative remedies were similarly raised and found surmountable in *Infotech*. There, as here, the individual petitioners were citizens and taxpayers who sought immediate recourse from this Court in a petition for *certiorari* to annul the award of the contract to use an automated election system in the 2004 elections. The Court in *Infotech* found the petitioners' status as taxpayers sufficient to give them personality to file the suit since the contract involved the disbursement of public funds.[12] The underlying important public interest involved in the contract in *Infotech*, as here, of ensuring the "conduct of free, orderly, clean, honest and credible elections"[13] also suffices to vest legal standing to petitioners as citizens.

Direct resort to this Court was not deemed fatal to the cause of the petitioners in *Infotech* for facts peculiar to that case[14] and because the nature of the petition allows for the application of some exceptions to the rule on prior resort to administrative remedies, namely, the unreasonability of insisting on compliance with the rule, resort to this Court is the plain, speedy and adequate remedy, and there is urgent need for judicial intervention.[15] These exceptions equally apply here and doubly serve as grounds to reject the COMELEC's objection on prematurity of this suit. Indeed, waiting until after the Contract has been implemented,

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[11] Memorandum (TIM and Smartmatic), pp. 54-63.

[12] *Supra* note 6.

[13] Section 2(4) and Section 4, Article IX(C), Constitution.

[14] The COMELEC awarded the contract to a bidder even before the Bids and Awards Committee submitted its Report on the bidding.

[15] *Supra* 6 at 163. It also appears that the protest mechanism provided in RA 9184, which respondents invoke, applies to losing bidders, not to third parties like petitioners. Section 55.2 of its implementing rules requires the "bidder" to provide relevant contact information in its position paper.

as what the COMELEC wants petitioners to do, is a sure way to moot any challenges to its validity.

Nor can the rule of mandating observance of hierarchy of courts bar resolution of this suit on the merits. Just as we found it proper to review the contract in *Infotech*, we should do so now for the same reasons that we waived compliance with the rule on exhausting remedies before the COMELEC.

On the Validity of the Contract

The Use of an Automated Election System Nationwide Under the Contract Violates Section 5 of RA 8436, as Amended

Section 5 of RA 8436, as Amended, Imposes a Mandatory Two-Tiered Use of an Automated Election System

Contrary to the COMELEC's view that Section 5,[16] as amended, "merely envisions" an initial limited use of an automated system in the 2007 elections,[17] both the text of the law and the intent

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[16] Section 5, as amended, reads in its entirety: "SEC. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

SEC. 5 *Authority to Use an Automated Election System*. — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording automated election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/ consolidation and transmittal of results of electoral exercises: Provided, that for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission: Provided, further, That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: Provided, finally, That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. In succeeding regular national or local elections, the AES shall be implemented nationwide."

[17] COMELEC Comment, p. 23.

behind its enactment show a legislative design to use an automated system following a staggered, dual-phased implementation scheme: the first phase calls for the use of an automated system on a partial or limited scale involving selected, voter-dense areas in each of our three major island groupings while the second phase calls for the full use of an automated system nationwide. Textually, this is made mandatory by the uniform use of the word "shall" when Section 5 mandated that "the AES ***shall*** be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission" (phase one) and "In succeeding regular national or local elections, the AES ***shall*** be implemented nationwide" (phase 2). The word "shall" operates to impose a duty.[18]

The sponsorship speech interpellation and floor deliberations on Senate Bill 2231, the precursor Section 6 of RA 9369 (amending and re-numbering Section 6 of RA 8436), confirm the legislative intent to adopt a dual-phased scheme of implementation, thus:

> [Interpellation by Senator Aquilino Pimentel, Jr. on the Sponsorship Speech of Senator Richard Gordon]:
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> Senator Gordon. [S]o, it is important that we show that in our proposal here today, which I am sure practically every member of the Senate will help me craft better legislation, in the interpellations and on the amendments, it is my hope that we could proceed with this. **We impose an absolute minimum of 2 cities and 2 provinces, so that if we can do so with 10 cities of 10 provinces, so be it, Mr. President**.
>
> Senator Pimentel. **The gentleman is trying to pilot the**. . . .
>
> Senator Gordon. Yes, Mr. President, That is right. **We want to pilot this so that by 2010, we should be ready to go all out. That is why it is important that we take the first steps. We can even pilot this in all the highly urbanized cities or one remote province, like somewhere in Mindanao, even in Tawi-Tawi** or, for that matter, just to prove the point that it can happen.

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[18] *Bersabal v. Salvador*, 173 Phil. 379 (1978).

It is up to us here in the Senate now to say, if we want to inculcate or to put in there the number of cities or the number of provinces that are committed, this shall be part of it. That is why we leave that open-ended, Mr. President.

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Senator Pimentel. Mr. President, the comments of the gentleman really demonstrate that there are practical suggestions that he is espousing, **especially on the matter of starting to cover not the entire country immediately in one fell blow but gradually**. There is merit to that proposal.[19] (Emphasis supplied)

x x x x x x x x x

[Interpellation by Senator Luisa P. Estrada of Senator Gordon during Second Reading]:

Senator Estrada (L). Will the gentleman agree with me that the best way to remove doubt as to the integrity of the system is to conduct the mock elections at least three days prior to the actual elections?

Senator Gordon. Actually, Mr. President, we could do that, yes, but we provided three months for the conduct of the mock elections so that we have enough time to correct the kinks, if there are any. And we would need that time, after which the whole thing is secured and the only time the system gets started is in the morning of the elections, just like the previous elections when the ballot box is opened and the machine codes are simultaneously triggered.

Senator Estrada (L). **Mr. President, I think, that is a long time. Three months is a long time to conduct mock elections before the actual elections**.

Senator Gordon. **That is why, Mr. President, in the initial phase of this exercise, for the year 2007, the absolute minimum is two cities and two provinces so we can really control the scenario.**

Now, when we see that this had worked in a controlled scenario, perhaps, I hope that we can do all the major cities of the country, all the highly urbanized cities in the country, because I guess that this is just an absolute minimum. But, certainly,

[19] 2 Record of the Senate 50-51 (20 March 2006).

when the main elections come in 2010, I am sure technology will be advancing so well that we could actually take the kinks out of the system, protect it and make sure that we can even do a mock election maybe even closer than the aforesaid three months.[20] (Emphasis supplied)

The framework of using an automated election system in a staggered, dual-phased manner in RA 9369 is not novel. The same legislative scheme was adopted by Congress in RA 8436, although the controlled variable in the first phase of RA 8436 was not the scope of the electoral area but the positions included in the automated tallying. Thus, instead of limiting the use of an automation system in highly urbanized areas and provinces in the first phase, RA 8436 mandated the use of an automated system in the 11 May 1998 elections to canvass the votes cast "only for the positions of president, vice-president, senators, and parties, organizations or coalitions participating under the party-list system."[21]

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[20] *Id*. at 67-68 (28 March 2006).

[21] Section 5 of RA 8436 reads in pertinent parts:

> Section 5. *Authority to use an automated election system*. — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system, herein referred to as the System, for the process of voting, counting of votes and canvassing/consolidation of results of the national and local elections: *Provided*, however, That for the May 11, 1998 elections, the System shall be applicable in all areas within the country only for the positions of president, vice-president, senators and parties, organizations or coalitions participating under the party-list system.

Unlike in RA 9369, Congress in Section 5 of RA 8436 provided a contingency mechanism, that is, for the COMELEC to revert to manual system for "the elections for both national and local positions x x x except in the Autonomous Region in Muslim Mindanao (ARMM)," if "inspite of its diligent efforts to implement this mandate in the exercise of this authority, it becomes evident by February 9, 1998 that the Commission cannot fully implement the automated election system for national positions in the May 11, 1998 elections."

Significantly, the original draft for Section 5 in Senate Bill No. 3214, the precursor of RA 8436, provided for the use of an automated system in "three regions" for the 11 May 1998 elections. However, upon the advice of the COMELEC that it will not be able to comply with this scheme, Senator Miriam

One need not search far and wide to see the wisdom, logic and practicality for this legislative insistence on transforming our electoral processes from manual to automated **gradually in phases**. As Senator Gordon puts it, the ultimate goal is to "take the kinks out of the system" before deploying it full scale. **Indeed, in systems implementation, a pilot run or a parallel run before full turn-over to the new system is a norm**.[22] Thus, even as Congress gave the COMELEC discretion in choosing the appropriate technology, Congress insisted on a phased implementation involving local government units from each of our three major island groupings cognizant as it was of the difficulties inherent in automating elections in an archipelago as dispersed as ours, with an average nationwide telecommunications coverage of not more than 75%.

Nor can it be said that compliance with the requirement in RA 9369 for pre-election field test and mock election,[23] stipulated in the Contract,[24] serves the same purpose as the initial staggered or partial implementation of the automated system. Congress treated both mechanisms differently by separately providing for partial implementation in Section 5, as amended, and for a field

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Santiago, the bill's principal author, amended the draft for the first phase to instead cover "17 highly-urbanized cities." During the bill's Second Reading, Senator Marcelo Fernan submitted a proposal to limit the first phase of automation to selected positions instead of selected areas. The Senate approved his proposal (2 Record of the Senate 986-987, 989-990 [19 November 1997]; *id*. at 149 [1 December 1997]).

[22] TSN Oral Arguments (Augusto Lagman), 29 July 2009, pp. 528-529.

[23] Section 11 of RA 9369 provides in pertinent parts:

> SEC. 11. Functions of the Technical Evaluation Committee. — The Committee shall certify, through an established international certification entity to be chosen by the Commission from the recommendations of the Advisory Council, not later than three months before the date of the electoral exercises, categorically stating that the AES, including its hardware and software components, is operating properly, securely, and accurately, in accordance with the provisions of this Act based, among others, on the following documented results:
>
> 1. The successful conduct of a field testing process followed by a mock election event in one or more cities/municipalities;

[24] RFP, pp. 32-33.

test and mock election report by the Technical Evaluation Committee in Section 11.[25] Indeed, field tests and mock elections can never replicate actual conditions on election day.[26]

For the same reason, respondents' reliance on the results of the pre-procurement demonstration of the system hardly suffices to prove its reliability, much less functionality, in actual election conditions. The following observations on the laboratory tests by *amicus* Information Technology Foundation of the Philippines (ITFP), are enlightening:

> The demonstration of PCOS only showed that the machine can scan accurately. Just like any computerized system, designing an Automated Election System (AES) should not only consider hardware that works. It should also ensure that all the other elements of an automated system such as the communication and transmission devices and networks, the servers, the end-to-end software system, the "peopleware" (project managers, system designers, development, maintenance personnel, operators, trainers, *etc*.), and the users (voters) mesh together smoothly. The scanning capability of the hardware

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[25] The distinction was elucidated during the floor deliberations of Senate Bill 2231 when Senator Gordon opposed the amendment of Senator Pimentel to substitute the word "use" in Section 5 with "pilot," thus:

> Senator Pimentel. x x x **I propose that in lieu of the word "USED", we substitute the following two words PILOT-TESTED** IN AT LEAST TWO (2) HIGHLY URBANIZED CITIES AND TWO (2) PROVINCES IN LUZON: AT LEAST TWO (2) HIGHLY URBANIZED CITIES AND TWO (2) PROVINCES IN THE VISAYAS: AND AT LEAST TWO (2) HIGHLY URBANIZED CITIES AND TWO (2) PROVINCES IN MINDANAO TO BE DETERMINED BY THE COMELEC.
>
> Senator Gordon. I accept the amendment, **without the use of the word "PILOT." I would insist that we use the word "USED" because it might be misconstrued. There is already a provision that there would be a mock election in one province or one city in the bill down the line. Maybe we can go ahead with the word "USED**". (2 Record of the Senate 60 [5 April 2006]; capitalization in the original, boldfacing supplied).

[26] Under the Contract, both the field test and mock election will use 10 optical scanners involving 17 canvassing units (8 city/municipality, 6 provincial, 2 national and 1 central backup) using 3,000 ballots (Bid Bulletin No. 4, 27 April 2009, pp. 6-7). On 10 May 2010, 80,136 optical scanners will be used with 1,234 canvassing units tallying results from approximately 40M ballots.

has been demonstrated. The other equally important elements have not. It is these other elements that should now be considered and focused on and be the concentration of the pilot run. **The framers of the law (RA 9369), who were assisted by a Technical Working Group (TWG), appreciate[d] the complexities of an automated election system and for that reason included the requirement of a pilot run**.[27] (Emphasis supplied)

The COMELEC, dangerously parroting the line of the party which stands to profit from the Contract, justifies non-compliance with the partial automation mandated in Section 5, as amended, by treating such partial automation as limited to the 2007 elections. Continuing with their line of reasoning and thus, ignoring the compelling reason behind such partial automation, respondents conclude that if Section 5, as amended, is interpreted as requiring an initial partial use of the automated system before its full deployment nationwide, then "Philippine elections will never be automated."[28]

It may be that, Section 5, as amended, needs statutory interpretation whether a partial automation is a condition precedent to a full national automation. Section 5, as amended, provides that: (1) "for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao" and the elections of 14 May 2007 was the first regular national and local election after RA 9369 took effect on 10 February 2007, and (2) "In succeeding regular national or local elections, the

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[27] ITFP Comment, p. 3. ITFP's observation that based on the laboratory tests results, the optical scanners can scan accurately is not shared by another information technology expert, Prof. Pablo Manalastas, who opined that "under actual election conditions where people may use pencil, ball pen, rolling ball jotter, and felt-tip pen, and using all allowable marking styles (dot, check mark, cross mark, and complete shade), the [optical scanners] will be lucky to achieve an accuracy of 50%." (see http://newsbreak.com.ph/index.php?option=com_content&task=view&id=6589&Itemid=88889287 [last visited on 14 August 2009]).

[28] Memorandum (TIM and Smartmatic), p. 5. The COMELEC advanced the same view (Memorandum [COMELEC]), pp. 36-37.

AES shall be implemented nationwide" and the 10 May 2010 elections is the "regular national or local elections" succeeding the elections of 14 May 2007.

The office of statutory interpretation has never been to privilege the letter of the law over its spirit. On the contrary, it has been and always will be the other way around — to breathe life to the legislative intent even to the extent of ignoring the text.[29] This is because use of language, while a mark of civilization,[30] remains susceptible to error as the Court knows all too well after having reviewed in the past imprecisely drafted legislation.[31]

To give effect to the legislative intent behind Section 5, as amended, the automated election system under the Contract should be limited to partial automation only, covering at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the COMELEC. Afterwards, with the COMELEC having tested its capabilities and manpower and after learning all the valuable lessons from the initial exercise, the automated system the COMELEC selects for the succeeding elections of 12 May 2013 can be fully deployed nationwide.

Procurement Standards Under Section 12, as Amended, Meant to Assure Efficiency of System and Proof of System Provider's Capability, Supplementing Minimum Standards Under Section 6, as Amended

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[29] *City of Baguio v. Marcos,* 136 Phil. 569 (1969); *Lopez & Sons, Inc. v. Court of Tax Appeals,* 100 Phil. 850 (1957). The same rule applies in interpreting the Constitution *(Tañada v. Cuenco,* 103 Phil. 1051 [1958]).

[30] *Philippine Constitutional Association v. Mathay,* 124 Phil. 890, 922 (1966) Castro, *J.*, concurring (referring to language as "one of the distinctive qualities x x x of modern thinking man".)

[31] See *City of Baguio v. Marcos, supra* (involving a textual conflict between the title and Section 1 of Republic Act No. 931 on the reckoning of the prescriptive period to reopen cadastral proceedings) and *Lopez & Sons, Inc. v. Court of Tax Appeals, supra* note 29 (involving a textual conflict between Section 7 and Section 11 of Republic Act No. 1125 on the review jurisdiction of the Court of Tax Appeals).

Section 12[32] of RA 8436, as amended by RA 9369, which involves the procurement of equipment and materials for automation, provides another layer of standard of system and system's provider capability for the 10 May 2010 elections, namely: (1) prior use, here or abroad, of the system and (2) proof by the system provider of its system's fitness, regardless of its "[p]articipation in the 2007 pilot exercise."[33] These are mandatory requirements which any provider bidding to automate the 10 May 2010 elections must show the COMELEC before the COMELEC can procure the offered goods and services.

The phrase "[p]articipation in the 2007 pilot exercise" appears in Section 12 of RA 8436, as amended by RA 9369, under the sub-heading "**Procurement of Equipment and Materials**." The phrase refers to the participation of a bidder in the 2007 elections, which participation is not conclusive that the bidder's system of equipment and materials is fit and suitable for the 2010 nationwide electoral exercise. **This phrase does not mean that the pilot or partial automation in Section 5, as amended, can be dispensed with prior to a nationwide automated**

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[32] The provision reads in its entirety: "SEC. 10. Section 8 of Republic Act No. 8436 is hereby amended to read as follow:

> SEC.12. Procurement of Equipment and Materials. — To achieve the purpose of this Act, the Commission is authorized to procure, in accordance with existing laws, by purchase, lease, rent or other forms of acquisition, supplies, equipment, materials, software, facilities, and other service, from local or foreign sources free from taxes and import duties, subject to accounting and auditing rules and regulation. With respect to the May 10, 2010 election and succeeding electoral exercises, the system procured must have demonstrated capability and been successfully used in a prior electoral exercise here or abroad. Participation in the 2007 pilot exercise shall not be conclusive of the system's fitness.
>
> In determining the amount of any bid from a technology, software or equipment supplier, the cost to the government of its deployment and implementation shall be added to the bid price as integral thereto. The value of any alternative use to which such technology, software or equipment can be put for public use shall not be deducted from the original face value of the said bid.

[33] As pointed out by Justice Teresita J. Leonardo-De Castro in the oral arguments (TSN, 29 July 2009, pp. 499-500).

electoral exercise. The requirement of a pilot or partial automation in Section 5, as amended, is a totally different requirement from the requirement of fitness of a bidder's system in the procurement of equipment and materials under Section 12, as amended.

Consequently, Section 12, as amended, is no authority to support respondents' proposition that the phased automation mandated under Section 5, as amended, may be dispensed with. Indeed, Section 12 has nothing to do with the issue. Section 5 and Section 12, as amended, are separate mechanisms of the law, governing different aspects of the automation project, but commonly intended to ensure the conduct of secure, accurate, and reliable automated elections.

RA 9525 Funding the 10 May 2010 Elections did not Repeal Section 5 of RA 8436, as amended

Neither the text nor purpose of RA 9525 supports respondents' submission that RA 9525 has repealed Section 5 of RA 8436, as amended. On the contrary, the proviso in Section 2 of RA 9525 states that "the disbursement of the amounts herein appropriated or any part thereof shall be authorized only in **strict compliance with** the Constitution [and] **the provisions of Republic Act No. 9369** x x x." **Thus, the COMELEC is authorized to spend the appropriated amount only in strict compliance with RA 9369, which mandates a partial automation**. The statement in Section 2 that "such measures that will guaranty transparency and accuracy in the selection of the relevant technology of the machines to be used in the May 10, 2010 automated national and local election" shall be adopted should be read with the rest of Section 2. At any rate, RA 9525 funds the ***implementation*** of RA 8436, as amended by RA 9369. An implementing statute cannot repeal what it intends to enforce.

The ARMM Elections in 2008 did not Meet the Parameters of a Limited Initial Use of the AES in RA 8436, as Amended

The parameters for the initial limited use of an automated election system under Section 5 of RA 8436, as amended, are (1) the AES is used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, (2) as selected by the COMELEC. The automated elections[34] in the ARMM held last 11 August 2008 did not satisfy these parameters because (1) they were held in southern Mindanao only, involving six provinces and two cities,[35] (2) as mandated by law.[36]

In practical terms, this means that the COMELEC, in the 2008 ARMM elections, did not use the tri-level transmission of election results from voter-dense areas from north to south of the archipelago, the transmission scheme to be used in the 10 May 2010 elections. This fact and the comparatively narrow scope of the 2008 ARMM elections in terms of voter population (1.6M in the 2008 ARMM elections as against 40M in the 10 May 2009 elections), number of machines provided by Smartmatic (2,558 DRE machines in the 2008 ARMM elections as against 82,200 precinct-based scanners in the 10 May 2009 elections), and positions involved (26 in the 2008 ARMM elections as against roughly 300 in the 10 May 2010 elections),[37] put into serious doubt the validity of the Provider's claim that the 2008 ARMM elections constitute "substantial compliance" with the mandate for an initial limited use of the automated system under Section 5 of RA 8436, as amended. On the other hand, the initial implementation under Section 5, as amended, because of its dispersed geographic scope, puts to use all the system's components.

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[34] Using optical mark reader (OMR) and direct recording electronic (DRE) technologies.

[35] Shariff Kabunsuan, Maguindanao, Lanao del Sur, Basilan, Sulu and Tawi-Tawi and the cities of Marawi and Lamitan. Shariff Kabunsuan has since reverted to its mother province, Maguindanao, under the ruling in *Sema v. Commission on Elections* (G.R. No. 177597, 16 July 2008, 558 SCRA 700) voiding its creation.

[36] Republic Act No. 9333.

[37] Governor, Vice-Governor and 24 legislators (members of the Regional Legislative Assembly).

The Position of the Senate, While Entitled to Respectful Consideration, Is not Controlling

The Senate's position that the COMELEC is authorized to use an automated election system nationwide in the 10 May 2010 elections, as reflected in its Resolution Nos. 96 and 567, represents its contemporaneous interpretation of Section 5 of RA 8436, as amended. As the upper half of our legislature, the Senate is certainly entitled to construe legislation. By tradition and for comity, this branch of the government has always accorded interpretive attempts by the other branches with respectful consideration.[38] But it is timely to reiterate that in the distribution of powers ordained in the Constitution, the final word on what the law is lies with this branch.[39]

The Stipulations in the Contract Relinquishing to Smartmatic Control of the "Technical Aspects" of the Automated Election System Violates Section 26 of RA 8436

Implementing the mandate in the Constitution for the COMELEC to "[e]nforce and administer all laws and regulations relative to the conduct of an election,"[40] Section 26 of RA 8426 places the automated election system under the COMELEC's "**exclusive control and supervision**," thus:

Supervision and control. — **The System shall be under the exclusive supervision and control of the Commission.** For this purpose, there is hereby created an information technology department in the Commission to carry out the full administration and implementation of the System.

The Commission shall take immediate steps as may be necessary for the acquisition**, installation, administration,**

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[38] *Yra v. Abaño*, 52 Phil. 381 (1928).

[39] In *Tañada v. Cuenco*, 103 Phil. 1051 (1958), the Court noted but did not follow the interpretation of the Secretary of Justice of Section 11, Article VI of the 1935 Constitution.

[40] Section 2(1), Article IX(C), Constitution.

storage, and maintenance of equipment and devices, and to promulgate the necessary rules and regulations for the effective implementation of this Act. (Italicization in the original; boldfacing supplied)

This power of "exclusive control and supervision" covers the adoption of measures for the "installation, administration, [and] storage" of the system's "equipment and devices."

Juxtaposed with these constitutional and statutory parameters is the sweeping stipulation in the Contract that "Smartmatic x x x shall be ***in charge*** of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration."[41] The extent of Smartmatic's control over the Contract's "technical aspects" is divulged in the Contract's supporting documents which vest on the Provider the responsibility to:

(1) **generate and distribute the access keys for the canvassing equipment and 82,200 optical scanners to be used on election day**;[42]

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[41] Article 3.3 which provides in full:

> The PROVIDER shall be liable for all its obligations under this Project, and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.
>
> SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election.
>
> The PROVIDER must provide to SMARTMATIC at all times the support required to perform the above responsibilities.

[42] RFP, p. 15; Bid Bulletin No. 10, 27 April 2009, p. 2. The importance of controlling the access keys was illustrated in the ARMM Regional elections in 2008 when Smartmatic, which the COMELEC contracted to supply some of the equipment used, **remotely** accessed several tabulating machines to recalibrate their software after the machines "zeroed-out" the results due to an error in logging the number of cast ballots. (Manuel A. Alcuaz, Jr., Mapping the Future [*Is the Smartmatic-TIM-COMELEC Contract Front-Loaded?*],

(2) deliver the 82,200 optical scanners to their designated precincts and secure them on site;[43]

(3) **prepare the polling places and canvassing centers in all levels (that is, municipal, provincial and national) to make them "fully functional"**;[44] and

(4) maintain 100% electronic transmission capability on election day (and thus fill the 25% gap of the country's current 75% network coverage).[45]

Items (1) and (3) are unmistakably repugnant to Section 26 of RA 8426. **Whoever controls the access keys controls the elections. Control of the access keys means the capacity to instantaneously change the election results in any precinct in the country**. Giving to the Provider the access keys — both the private and public access keys — is like giving to the system administrator of Yahoo or Hotmail one's private password to his or her email account. The private key is supposed to be private to the Chair of the Board of Election Inspectors, generated by him and unknown to the Provider. Otherwise, the Provider will have the capacity to alter the election results at the precinct level. **Worse, even the private keys at the canvassing level are generated by the Provider, allowing the Provider to change the election results at the canvassing level**. Clearly, the COMELEC has abdicated control over the elections to the Provider, putting the integrity and outcome of the 10 May 2010

Philippine Daily Inquirer, 20 July 2009, p. B2-2). Commenting on Smartmatic's control over the private and public keys (to be distributed to the BEIs and [Board of Canvassers] personnel), an IT expert noted: "Since Smartmatic has this responsibility [of generating the access keys], it will have possession of all BEIs' private keys, and will give Smartmatic the capability to change the [Election Results] of any precinct in the entire country, resulting in massive computerized cheating in case this capability is exploited by Smartmatic." (Professor Pablo Manalastas at http://pmana.multiply.com/journal/item/68/*Harry_Roque_vs_COMELEC-Smartmatic*[last visited on 25 August 2009]).

[43] Bid Bulletin No. 6, 27 April 2009, p. 7; Bid Bulletin No. 10, 27 April 2009, p. 3.

[44] Bid Bulletin No. 19, 27 April 2009, p. 2.

[45] Bid Bulletin No. 6, 27 April 2009, pp. 1-2.

elections solely in the hands of the Provider. Moreover, the polling places and canvassing centers, which are the critical operational areas during the elections, must be under the full control of the COMELEC.

What Section 26 confines to the COMELEC's "exclusive control and supervision," the COMELEC in the Contract relinquishes to Smartmatic. By designating Smartmatic as the entity "in charge" of the crucial "technical aspects" of the automated system's operation — equipment security and installation and results canvassing and transmission — the COMELEC contented itself with taking charge over the system's "non-technical," that is, manual aspects. However, RA 8436 does not bifurcate control and supervision along technical and non-technical lines. On the contrary, Section 26 treated the entire automated system wholistically by mandating that "**[t]he System** shall be under the exclusive supervision and control of the Commission." Section 26 requires no less than **complete** and exclusive control and supervision by the COMELEC over the automated system. The regime of partial, non-exclusive COMELEC control over the automated system under the Contract falls short of Section 26's stringent standard.

A vital policy consideration lies behind the blanket mandate of Section 26. Under our constitutional scheme, the COMELEC is the state organ tasked to "[e]nforce and administer all laws and regulations relative to the conduct of an election"[46] and of "ensuring x x x credible elections."[47] By exercising exclusive control and supervision over the automated system, the COMELEC can harness its manpower and resources to efficiently prevent or correct fraud. By surrendering to Smartmatic control over the automated system's "technical aspects," the COMELEC closed the door on manual fraud but opened wide the window to its automated counterpart. As highlighted in the findings of

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[46] Section 2(1), Article IX(C), Constitution.

[47] See Section 2(4) and Section 4, Article IX(C) of the Constitution authorizing the COMELEC to deputize law enforcement agencies and regulate franchises, respectively, to ensure "free, orderly, honest, peaceful, and credible elections."

a recent independent study, the threat of internal hacking is all too real:

> The greater threat to most systems comes not from external hackers, but from insiders who have direct access to the machines. Software can be modified maliciously before being installed into individual voting machines. There is no reason to trust insiders in the election industry any more than in other industries, such as gambling,where sophisticated insider fraud has occurred despite extraordinary measures to prevent it.[48] x x x

Respondents gloss over the import of the offending contractual stipulations, calling attention to the request for bid proposals which gave notice that the COMELEC was accepting bids from "a complete solutions provider x x x which can provide x x x overall nationwide project management service and total customer support under COMELEC supervision and control."[49] The Provider also limits the application of the second paragraph of Article 3.3 between TIM and Smartmatic.[50]

A close reading of the RFP shows that the provision by the Provider of "project management service and total customer support" (paragraph 6, Part II) over which the COMELEC will have supervision and control, corresponds only to Component 3 of the Contract, that is, overall project management. The RFP does not say that the COMELEC exercises supervision and control over the Contract's remaining two components, namely, the paper-based automated-election system (Component 1) and the provision for electronic transmission using public telecommunications networks (Component 2).[51]

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[48] Report of the Commission on Federal Election Reform (September 2005), p. 36, available at http://www.american.edu/ia/cfer/report/full_report.pdf (last visited on 14 August 2009).

[49] RFP, p. 5.

[50] Memorandum (TIM and Smartmatic), p. 100.

[51] The relevant portion of the RFP provides (p. 5):

> The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease,

On the Provider's contention that the second paragraph of Article 3.3 regulates the relations between TIM and Smartmatic, suffice it to say that the argument would carry weight if the stipulation was placed in the joint venture agreement. The provision in question was placed in the Contract precisely to hold the Provider "liable for all its obligations under this Project," as the first sentence of Article 3.3 provides.

Until the COMELEC and the Provider amend the offending stipulations, these stipulations govern the rights and obligations between them.

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with an option to purchase, of an automated election system (AES) that will meet the following needs:

(1) Introduction of a new system of voting to the Filipino electorate nationwide without deviating much from the manual manner of voting and which protects the voter's right to the secrecy of his vote;

(2) An automated system of counting of votes which can count the voter's vote accurately and as intended by the voter, which can secure the precinct results in such a way that it cannot be tampered with or read outside the system, and the results of which can be accepted as input by the existing canvassing application of the COMELEC;

(3) An integrated and comprehensive system for preparing and managing pre-election configuration and post-election requirements;

(4) A secure, reliable and redundant service for electronic transmission of precinct results from authorized sources to COMELEC-designated target destinations using public telecommunication network, including Internet access from all cities, municipalities and provinces;

(5) A consolidation/canvassing system that allows consolidation of precinct results, and city/municipal and provincial results; and

(6) A complete solutions provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, *etc*.), under COMELEC supervision and control, to ensure effective and successful implementation of the Project. (Emphasis supplied)

When matched with the Contract's "components," paragraph 3 corresponds to Component 1 (paper-based automated-election system) while paragraphs 4 and 5 correspond to Component 2 (electronic transmission using public telecommunications networks).

The Contract Provides for the Effects of Partial Annulment

Unlike the disposition in *Infotech*, a finding that the Contract violates Section 5 and Section 26 of RA 8436, as amended, results only in its partial invalidation under the Contract's Severability clause.[52] This leaves COMELEC free to renegotiate with the Provider to scale down scope of the Contract, adjust the contract price, and modify other pertinent stipulations.

Using the Automated System Nationwide in the 10 May 2010 Elections Places our Fragile Democracy at Needless Risk

The COMELEC's lack of experience in nationwide automation, its non-familiarity with its chosen technology, the gaps in security features of the system, the scale of its operation, Smartmatic's control over the automation aspects of the system, and the not more than 75% network coverage currently available in this archipelago of more than 7,000 islands all combine to create a gaping black hole of unknown risks which can crash the untested system come 10 May 2010. Undoubtedly, no automated election system is perfect.[53] But we also cannot take chances with our fragile democracy. After all, what these machines count are not the day's earnings of a general merchandise store. They tabulate the rawest expression of the sovereign will of every voter in this polity. This is why Congress saw fit to use technology's benefits gingerly.

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[52] Article 20 of the Contract provides: "If any provision of this Contract is declared illegal, unenforceable or void, the parties shall negotiate in good faith to agree upon a substitute provision that is legal and enforceable and consistent with the intentions of the Project. The rest of this contract that is not materially affected by such declaration shall remain valid, binding and enforceable." Under Article 1409 of the Civil Code, contracts whose purpose is contrary to law are void.

[53] Indeed, even technologically advanced democracies such as the United States and some countries in Europe continue to experience glitches in the operation of their electronic voting systems. (See F. Emmert, *Trouble Counting Votes? Comparing Voting Mechanism in the United States and Selected Countries*, 41 Creighton L. Rev. 3 [2007]).

Lost in the headlong rush to switch this country's electoral system from fully manual to fully automated overnight is the sobering thought that if, for any reason relating to the implementation of the Contract, there is a failure of elections and no President and Vice-President are proclaimed, and no Senate President and Speaker of the House are chosen, by noon of 30 June 2010, a power vacuum is certain to emerge.[54] This is the surest way to defeat the purpose of the entire electoral exercise, and put at unnecessary risk our hard-earned democracy.

Accordingly, I vote to **GRANT IN PART** the petition by annulling the provisions of the Contract relating to the nationwide use of automated election system, and instead to **DIRECT** the COMELEC (1) to implement a partial automation of the 10 May 2010 elections as provided in Section 5 of RA 8436, as amended by RA 9369; (2) to assume full and exclusive control of the access keys to the partial automation system; and (3) to assume control over preparation of the polling places and canvassing centers in all levels to make them fully functional.

DISSENTING OPINION

BRION, *J.*:

I write this Dissent mindful that a new system of exercising the constitutional right of suffrage is upon us. Automated election, first tested in the ARMM election on August 11, 2008, shall sooner or later be applied at the national level. The development, to be sure, is a change that we should welcome for the promises it brings — a peaceful, clean, orderly, fair, honest, efficient, and credible election. The fulfillment of this promise, however, is not a result that we can simply wish into our national life. Nor is it something we can attain in a hurry. Fulfillment is a

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[54] Under Section 7, Article VII of the Constitution, the Vice-President, Senate President and Speaker of the House succeeds to the Office of the President in case of vacancy, in that order. Congress has yet to pass a law providing "for the manner in which one who is to act as President shall be selected until a President or a Vice-President shall have qualified" as required under Section 7.

result that the whole country must plan, work, and sacrifice for.

Interface of Powers: COMELEC and the Supreme Court

At the forefront in the national effort to achieve a computerized election system is, of course, the Commission on Elections (*COMELEC*) — the independent constitutional body tasked with the enforcement and administration of all election laws and regulations. The Supreme Court, as the court of last resort tasked to guard the Constitution and our laws through interpretation and adjudication of judiciable controversies, is an indispensable partner and participant in this endeavor, as the Constitution itself safeguards and regulates our electoral processes and policies, which are expressed through laws and COMELEC regulations. In fact, about five years ago, this Court decisively spoke on the matter of automation when we invalidated the "Mega Pacific Contract" between the COMELEC and Mega Pacific Consortium for the automation of the May 10, 2004 elections.[1]

Once again, we are called upon today with the daunting task of passing upon the validity of another election automation contract, this time between the COMELEC and Smartmatic International Corporation — Total Information Management Corporation (*SMARTMATIC-TIM*) for the coming May 10, 2010 elections.[2] In undertaking this task, I duly acknowledge that the COMELEC exercises considerable latitude and the widest discretion in adopting its chosen means and methods of discharging its tasks, particularly in its broad power "to enforce and administer all laws and regulations relative to the conduct of an election, plebiscite, initiative, referendum and recall."[3] The Court has interpreted this provision to mean the grant to "COMELEC [of] all the necessary and incidental powers for it to achieve

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[1] See *Information Technology Foundation of the Philippines v. COMELEC*, G.R. No. 159139, January 13, 2004, 419 SCRA 141.

[2] Contract for the Provision of An Automated Election System for the May 10, 2010 Synchronized National and Local Elections dated July 10, 2009 (*Automation Contract*).

[3] CONSTITUTION, Article IX (C) Section 2 (1).

the objective of holding free, orderly, honest, peaceful and credible elections"[4] — an expansive view of COMELEC powers that is not at all novel. For, as early as 1941 under the 1935 Constitution, the Court already emphasized in *Sumulong v. COMELEC*[5] that:

> The Commission on Elections is a constitutional body. It is intended to play a distinct and important part in our scheme of government. In the discharge of its functions, it should not be hampered with restrictions that would be fully warranted in the case of a less responsible organization. The Commission may err, so may this court also. **It should be allowed considerable latitude in devising means and methods that will insure the accomplishment of the great objective for which it was created-free, orderly and honest elections. We may not agree fully with its choice of means, but unless these are clearly illegal or constitute gross abuse of discretion, this court should not interfere.**
>
> Politics is a practical matter, and political questions must be dealt with realistically not from the standpoint of pure theory. The Commission on Elections, because of its fact-finding facilities, its contacts with political strategists, and its knowledge derived from actual experience in dealing with political controversies, is in a peculiarly advantageous position to decide complex political questions. [Emphasis supplied]

The automation question now before us, like any other COMELEC administration and enforcement matter, is a concern that COMELEC is entitled by law to handle on its own without any interference from any outside agency, not even from this Court, except pursuant to the allocation of powers that the Constitution has mandated. In other words, the COMELEC reigns supreme in determining how automation shall be phased in, how it shall affect all aspects of our electoral exercise, and how it shall operate, subject only to our intervention when our own constitutional duty calls for enforcement. Specifically, we cannot close our eyes when a grave abuse of discretion amounting to lack or excess of jurisdiction has been committed, such as

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[4] *Loong v. COMELEC*, G.R. No. 133676, April 14, 1999, 305 SCRA 832, 870-871.

[5] 73 Phil. 288, 295-296 (1941).

when the COMELEC acts outside the contemplation of the Constitution and of the law.[6]

Consistent with this view, I do not aim to question the bidding the COMELEC undertook and its compliance with our automation laws — Republic Act (*RA*) Nos. 8436 [7] and 9369 [8] — in the absence of any violation sufficiently gross to amount to the proscribed grave abuse of discretion amounting to lack or excess of jurisdiction. My focus, rather, is on the gut issues that really strike at the heart of the right of suffrage and place the integrity of our electoral process at risk.

The Pilot Testing Issue

For one, I do not question the COMELEC's present automation moves for lack of prior pilot testing — a point that has generated a lot of comment from both the *ponencia* and the separate opinions. I believe that raising a question on this point is misplaced because the disputed provision — Section 5 of RA No. 8436 as amended[9] — does not *categorically and expressly* demand a

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[6] CONSTITUTION, Article VIII, Section 1. See also *supra* note 4.

[7] An Act Authorizing the Commission on Elections to Use an Automated Election System In the May 11, 1998 National or Local Elections And In Subsequent National and Local Electoral Exercises, Providing Funds Therefor and For Other Purposes.

[8] An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing The Commission On Elections to Use an Automated Election System In The May 11, 1998 National or Local Elections and in Subsequent National and Local Electoral Exercises, To Encourage Transparency, Credibility, Fairness and Accuracy of Elections, Amending For The Purpose Batas Pambansa Blg. 881, As Amended, Republic Act No. 7166 And Other Related Election Laws, Providing Funds Therefor and For Other Purposes."

[9] SEC. 6. Section 6 of Republic Act No. 8436 is hereby amended to read as follows:

SEC. 5 *Authority to Use an Automated Election System.* — To carry out the above-stated policy, the Commission on Elections, herein referred to as the Commission, is hereby authorized to use an automated election system or systems in the same election in different provinces, whether paper-based or a direct recording electronic election system as it may deem appropriate and practical for the process of voting, counting of votes and canvassing/ consolidation and transmittal of results of electoral exercises: ***Provided,*** **that**

pilot test and, in fact, does not even mention the term "pilot test." As worded, this provision should be read in the context of its title "*Authority to Use an Automated Election System.*" Thus, the provision is essentially a grant of authority to automate, with the automation being a limited one in the election immediately following the law's passage and only going nationwide in the "succeeding regular national or local elections." A pilot test is not an absolute necessity because it was never imposed as a condition *sine qua non* to a nationwide automation; Section 5 merely expressed a limit on the extent of automation that could take place in the election following the passage of RA No. 9369; the automated election must be partial and local. The COMELEC first exercised its authority to partially automate in the ARMM election held on August 11, 2008, so that this automated electoral exercise was effectively the "pilot exercise" the country embarked on in electoral automation. It can very well be, as the COMELEC posits, the pilot test that Section 5, RA No. 8436, as amended, mentioned.

Strictly speaking, the use of automation for the first time in the ARMM election was not a violation of the limitation that Section 5 imposed, because the automation was properly local and partial. If there had been a violation at all, the violation was in the failure to use automation in the next following election after the passage of RA No. 9369 (in the 2007 national and local elections) and in the failure to strictly follow the terms of Section 5 in the first automated election, because the automated election took place only in portions of Mindanao. These violations, however, pertained to that first use of automation in the ARMM

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for the regular national and local election, which shall be held immediately after effectivity of this Act, the AES shall be used in at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao, to be chosen by the Commission: *Provided, further,* That local government units whose officials have been the subject of administrative charges within sixteen (16) month prior to the May 14, 2007 election shall not be chosen: *Provided, finally,* That no area shall be chosen without the consent of the Sanggunian of the local government unit concerned. The term local government unit as used in this provision shall refer to a highly urbanized city or province. **In succeeding regular national or local elections, the AES shall be implemented nationwide."** [Emphasis supplied]

election, or, if at all, to the failure to use automation in the 2007 elections. They need not affect the automation for the May 10, 2010 election, whose budget for a nationally-implemented automated election Congress specifically provided for despite knowledge that no automation took place in the 2007 election as originally envisioned.[10] From this perspective, pilot testing is an issue that does not need to trigger the Court's *certiorari* powers invoked in the present petition.[11]

The Abdication Issue

Despite the above conclusion, I still take exception to the present implementation of election automation, as it involves another more fundamental violation: the COMELEC, contrary to the Constitution and the law, now shares automation responsibilities with SMARTMATIC-TIM under their Automation Contract. In my view, this is a violation that transgresses the Constitution, at the same time that it is an action plainly outside the contemplation of the law. Based on this characterization, this sharing of responsibility over automation is a grave abuse of discretion on the part of the COMELEC that calls for the active intervention of this Court, pursuant to the second paragraph of Section 1, Article VIII of the Constitution.[12]

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[10] *See* Republic Act No. 9525 entitled "An Act Appropriating the Sum of Eleven Billion Three Hundred One Million Seven Hundred Ninety Thousand Pesos (₱11,301,790,000.00) As Supplemental Appropriations For An Automated Election System and For Other Purposes.

[11] "Section 5 of RA No. 8436 does not state that the use of the AES is necessary or is a condition precedent to the conduct of automated elections in 2010. Had the legislators intended the pilot testing to be mandatory, they could have stated the same in a language that is clear and straightforward. x x x In any event, the pilot automation in the May 10, 2007 elections, as demanded by petitioners, could not be complied with owing to its innate impossibility;" COMELEC's Comment, pp. 23-24.

[12] The provision pertinently states: "Judicial power includes the duty of the courts of justice to settle actual controversies involving rights which are legally demandable and enforceable, and to determine whether or not there has been a grave abuse of discretion amounting to lack or excess of jurisdiction on the part of any branch or instrumentality of the Government."

I take this view in light of Section 2, Article IX-C of the Constitution that commands the "COMELEC to enforce and administer all laws and regulations relative to the conduct of an election" and thereby gives the COMELEC *sole authority* to undertake enforcement and administrative actions in the conduct of elections. In the context of the present case, this constitutional mandate necessarily extends to the enforcement of Section 26 of RA No. 8436[13] which states in full:

> Section 26. Supervision and control. — The System shall be under the **exclusive supervision and control of the Commission**. For this purpose, there is hereby created an **information technology department** in the Commission to carry out the **full administration and implementation of the System.**
>
> **The Commission shall take immediate steps as may be necessary for the acquisition, installation, administration, storage and maintenance of equipment and devices,** and to promulgate the necessary rules and regulations for the effective implementation of this Act. [Emphasis supplied]

Rather than the exclusive supervision and control that this provision envisions, the COMELEC effectively shares responsibilities with SMARTMATIC-TIM in the automated May 10, 2010 elections by giving complete control of the technical aspects of this election to a private entity — SMARTMATIC-TIM. In the words of the petition, this was an **"abdication"** of the COMELEC's constitutional mandate, evidenced by the terms of Articles 3.3, 6.7 and 7.4 of the Automation Contract and by the grant to SMARTMATIC-TIM of the public and private keys to the voting equipment.

The *Ponencia* and the Issue of Abdication

In addressing the issue, the *ponencia* strangely uses the same Articles cited above in arguing that COMELEC did not relinquish its control over the technical aspect of the Automated Election System (*AES*). It asserts that Article 3.3 of the Automation Contract[14] (which designates SMARTMATIC-TIM as the joint

[13] Not amended by RA No. 9436.

[14] Art. 3.3 reads pertinently provides:

venture partner in charge of the technical aspect of the counting and canvassing software and hardware including transmission configuration and system integration) does not translate to ceding control of the electoral process to SMARTMATIC-TIM. To the *ponencia*, SMARTMATIC-TIM's designated role is simply an eligibility requirement imposed on bidders operating under a joint venture.[15] The *ponencia* also supports this view by referring to the Request for Proposals (*RFP*) whose notice is for bids from a "complete solutions provider which can provide experienced and effective overall nationwide project management service and total customer support under COMELEC supervision and control to ensure the effective and successful implementation of the Project."[16]

3.3 The PROVIDER shall be liable for all its obligations under this Project and the performance of portions thereof by other persons or entities not parties to this Contract shall not relieve the PROVIDER of said obligations and concomitant liabilities.

SMARTMATIC, as the joint venture partner with the greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware including transmission configuration and system integration. SMARTMATIC shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the elections. [Emphasis supplied]

[15] Part 5, par. 5.4 (e) of the Instruction to Bidders states:

5.4. A JV of two or more firms as partners shall comply with the following requirements.

x x x x x x x x x

(e) The JV member with a greater track record in automated elections, shall be in charge of the technical aspects of the counting and canvassing software and hardware, including transmission, configuration and system integration.

[16] The pertinent portion of the RFP provides:

The Commission on Elections (COMELEC), through its Bids and Awards Committee (BAC), is currently accepting bids for the lease, with an option to purchase, of an automated election system (AES) that will meet the following needs:

x x x x x x x x x

(6) A complete solutions provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including

The *ponencia* further points to Article 6.7 of the Automation Contract which provides:

> 6.7 Subject to the provisions of the General Instructions to be issued by the Commission *En Banc*, **the entire processes of voting, counting, transmission, consolidation and canvassing of votes shall be conducted by COMELEC's personnel and officials,** and their **performance, completion and final results according to specifications and within the specified periods shall be the shared responsibility of COMELEC and PROVIDER.** [Emphasis supplied]

To the *ponencia*, this provision apparently speaks for itself as it requires action by COMELEC's own personnel.

The *ponencia* also found the petitioners' allegation that SMARTMATIC-TIM has control over the public and private keys necessary to operate the Precinct Count Optical Scan (*PCOS*) machines to be speculative and without factual basis. Instead, it agreed with the opinion of the National Computer Center that the "nowhere in the RFP/TOR was it indicated that the COMELEC would delegate to [SMARTMATIC-TIM] full discretion, supervision and control over the [public and private keys]."

Refutation of the *Ponencia's* Positions

a. Effect of Automation

In my view, the *ponencia* has taken the above positions because it viewed the cited Articles in isolation and really did not take into account the whole election process and the effect of automation on this process. Be it remembered that an election entails an extended process that starts even before actual voting begins when voters register. Voting itself is only a part of the process, as this is followed by the counting of the votes by the Board of Election Inspectors (*BEI*), the canvassing of the tallied votes by the Board of Canvassers (*BOC*), the transmission and consolidation of the canvassed results to the municipal, provincial

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technical support, training, information campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, *etc*.), under COMELEC supervision and control, to ensure effective and successful implementation of the Project. [Emphasis supplied]

and a national BOC, and finally the announcement and proclamation of the winners. True enough, the people undertaking all these activities, particularly in the *traditional* voting process, have been COMELEC officials, employees, and duly deputized government personnel. This consideration, however, is not enough in passing upon the COMELEC-SMARTMATIC-TIM arrangement under the Automation Contract.

b. The *Ponencia's* Omissions

What the *ponencia* did not sufficiently explain is the COMELEC's intent to introduce a new way of voting[17] that affects not only on the act of casting votes, but also the whole manner by which the counting and canvassing of votes, the transmission and collation of results, and the proclamation of winners are to be undertaken. All these are reflected in detail in the RFP, heretofore mentioned, whose call was for a "*complete systems provider, and not just a vendor, which can provide experienced and effective overall nationwide project management service and total customer support (covering all areas of project implementation including technical support, training, information, campaign support, civil and electrical works service, warehousing, deployment, installation and pullout, contingency planning, etc.) under COMELEC supervision and control . . .*"[18] All these automation activities are intrusions into the traditional COMELEC domain and cannot be simply glossed over.

The *ponencia* likewise failed to mention that Section 26 of RA No. 8436 categorically required that the AES to be installed shall be under COMELEC's **exclusive supervision and control**; for this purpose, the law created an **Information Technology Department** (*ITD*) within the COMELEC to carry out the **full administration and implementation of the system.** Underlying the COMELEC's mandate of exclusive supervision and control over the AES in Section 26 is the adoption of measures for the

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[17] *See* RFP, par. 1 and 2 at p. 5.

[18] *Id.*, par. 6.

"acquisition, **installation, administration, storage** and **maintenance** of equipment and devices and the promulgation of the necessary rules and regulations for the effective implementation of RA No. 8436."

c. Section 26 of RA No. 8436

Under Section 26, the mandate of the law is clear — the operative word used is "**exclusive**," which means that the automation responsibility given to the COMELEC cannot be shared with any other entity. Specifically, it means that the COMELEC, through its ITD, shall have full and exclusive control over the entire process of voting, counting, transmission, consolidation and canvassing of votes, including their performance and completion and the final results. No special interpretative skill is necessary to appreciate the meaning of "exclusive." "Supervision and control," on the other hand, are terms that have practically attained technical legal meaning from jurisprudence.[19] "Control" as the established cases signify means to exercise restraining or directing influence over; to dominate, regulate; hence, to hold from action; to curb; to subject; also to overpower.[20] In any interpretation of Section 26, these are key terms and the standards that should predominate in determining whether this Section has been complied with. The *ponencia*, unfortunately does not appear to have considered this Section at all.

d. The Information Technology Department

Given the bidding terms and the qualification imposed on the "complete systems provider," what the ITD remained to do after the systems provider is in place becomes a puzzle whose elusive answer is nowhere to be found in the laws and the regulations in place. Presumably, the ITD can still couch its functions in terms of the "supervision and control" that Section 26 commands and which the COMELEC specified in the RFP.

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[19] *Mondano v. Silvosa*, 97 Phil. 158.

[20] *Roman Catholic Apostolic Administrator v. Land Registration Commission*, 102 Phil. 625.

This intent, however, cannot be simply manifested in the law and parroted in the RFP as proof that there had been compliance; such compliance must be shown and must stand the test of overt acts, particularly contemporaneous acts the COMELEC and its systems provider undertake in furtherance of the intended automation. The best evidence of this intent, of course, is the contract that defines the parties' respective roles in the automation. The contractual terms are likewise the best evidence of whether the responsibility for automation is exclusive, as the cited Section 26 requires.

e. The Automation Contract Examined

The Automation Contract between the COMELEC and SMARTMATIC-TIM, executed on July 10, 2009, fully defines the automation "project" to be undertaken. It delineates as well the roles the parties shall respectively undertake in pursuing the project, and the expectations that each party has from the other.

The "project" is defined as "the COMELEC's nationwide automation of the voting, counting, transmission, consolidation and canvassing of votes for the May 10, 2010 Synchronized National and Local Elections, consisting of the three (3) components mentioned in the Bidding Documents (the RFP)."[21] The three components are:[22]

Component 1: Paper-based Automated Election System (AES)

1-A. Election Management System (EMS)
1-B. Precint-Count Optical Scan (PCOS System)
1-C. Consolidation/Canvassing System (CCS)

Component 2: Provision for Electronic Transmission of Election Results, using Public Telecommunications Network.

Component 3: Overall Project Management.

SMARTMATIC-TIM, as the service provider, has the obligation to provide the **goods** the project shall require, generally

[21] Automation Contract at p. 1.

[22] *Id.*, pp. 1-2.

described in the contract as all the materials necessary to carry out the project," except the ballot boxes.[23] It shall likewise provide the **services** defined as "all the acts to be performed or provided by the PROVIDER [SMARTMATIC-TIM] to COMELEC for the operation and completion of the Project."[24]

Under **Article 3.2,** "[t]he provider shall provide the Goods and perform the Services under this Contract and the Contract Documents. It shall provide competent project management, technical manpower and efficient services. It shall ensure the proper, satisfactory and timely execution and completion of the Project." This is complemented by **Article 3.3** whose second paragraph in turn states that **"[SMARTMATIC-TIM],** as the joint venture partner with the greater track record in automated elections, **shall be in charge of the technical aspects** of the counting and canvassing software and hardware, including transmission, configuration and system integration. [SMARTMATIC-TIM] shall also be primarily responsible for preventing and troubleshooting technical problems that may arise during the election."

The COMELEC, for its part, bound itself to pay under the terms of the contract, and shall be responsible, among others, for:

6.3.2. Closely coordinating with the PROVIDER in the preparation of the Sites and set-up the hardware, network installation, software installation, user testing and training. For the duration of the Project, COMELEC shall provide continuing assistance to the PROVIDER on the needs of the Project.

6.3.6. Creating its own Project Team called the Project Management Office (PMO) for the purpose, among others, of overseeing the Project's execution and implementation. It shall allow the PROVIDER access to concerned or responsible COMELEC officials.[25]

As heretofore mentioned, Article 6.7 of the Automation Contract provides for the conduct by the COMELEC personnel

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

[24] *Id.*, pp. 4-5.

[25] *Id.*, p. 11.

and officials of the entire electoral process, **but their performance, completion and final results, according to specifications and within the specified periods, shall be the shared responsibility of COMELEC and the PROVIDER.** [26] **Article 7.4** provides that "[u]pon delivery of the Goods, in whole or in part, to the warehouses as approved by COMELEC, **the Equipment shall be under the custody, responsibility and control of the PROVIDER.** [27]

Interestingly, the contract does not even mention the COMELEC's ITD and how it will interact with SMARTMATIC-TIM in the implementation of the project. The Project Management Office (*PMO*) is specifically mentioned, but only for the purpose of overseeing the project's execution and implementation; it is not considered as an office with authority to speak on technical matters. On technical matters, SMARTMATIC-TIM reigns supreme and the ITD is not even mentioned. Under this situation, the PMO cannot but merely be a monitoring or liaison office, rather than an office supervising or controlling the project for COMELEC. It cannot supervise and control if SMARTMATIC-TIM has the last say on technical matters. In fact, the COMELEC itself, under Article 6.3.2, only plays an assisting role to SMARTMATIC-TIM, thus raising the direct implication that the latter has the lead role in all technical activities this Article mentions. Thus viewed, can the PMO raise any higher than the COMELEC?

f. The Shared Responsibility

Based on all these considerations drawn from the RFP and the Automation Contract, I cannot escape the conclusion that what exists is not the exclusive supervision and control of the automation process by the COMELEC, but a shared responsibility between the contracting parties to achieve this end. To point out the obvious, SMARTMATIC-TIM takes care of project management, with the PMO relegated to the blurry role of "overseeing the Project's execution and implementation" and

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

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

with no other clearly defined role in the automation project. ITD does not even exist insofar as the project documents are concerned. Thus, while the COMELEC retains its traditional role with respect to the running of the election itself, a new election process is in place that is substantially affected by automation. Stated otherwise, while the COMELEC truly controls the BEI, the BOC, and the administrative and adjudicative staff attending to the election process, the voters themselves, and even the BEI and the BOC, must yield to the process that automation calls for, which process is essentially technical and is in the hands of SMARTMATIC-TIM, the provider who wholly supplies the hardware and the software that controls the voting, counting, canvassing, consolidation and transmission of results, and who expressly has control and custody over the election equipment to be used in the voting, with no reserve power whatsoever on the part of the COMELEC in this regard.[28] Not to be forgotten is that SMARTMATIC-TIM also provides the necessary services that run across voting, counting, canvassing, consolidation and transmission activities.

These arrangements, viewed from all sides, does not indicate an exclusive supervision and control situation over the automation process. To be exact, they involve shared responsibilities that, however practical they may be from the business and technical perspectives, are arrangements that Philippine law does not allow.

Access Keys and Digital Signatures

Separately from all these considerations is the matter of the access keys and digital signatures that are objectionable, not merely because of the intrusion in the technical end of automation, but because they effectively hand over control of the election process to SMARTMATIC-TIM.

Contrary to the *ponencia's* findings, a close perusal of the automation contract's supporting documents indicate that the COMELEC has in fact effectively handed over to SMARTMATIC control over the AES, particularly with respect to the following quoted technical aspects:

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[28] Article 3.3 of the Automation Contract.

a. **Generate and distribute the access keys** for the canvassing equipment and 82,200 optical scanners to be used on election day;[29]

b. Deliver the 82,200 optical scanners to their designated precincts and secure them on site;[30]

c. **Prepare the polling places and canvassing centers in all levels to make them fully functional**;[31] and

d. Maintain 100% electronic transmission capability on election day (SMARTMATIC-TIM to fill the 25% gap of the country's current 75% network coverage) [Emphasis supplied]

The access keys are significant because control and possession of these keys translate to the capacity to change election results in any precinct in the country. This conclusion can be drawn from the following exchanges during the oral arguments:

ASSOCIATE JUSTICE CARPIO: Now what is the first function of the Commission on Elections under the Constitution?

ATTY. ROQUE: Well, to supervise the conduct of elections, Your Honor.

x x x x x x x x x

ASSOCIATE JUSTICE CARPIO: In short, the Constitution mandates that the COMELEC must have control over the election process?

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Okay. Who has possession of the public and private keys of this automation program?

ATTY. ROQUE: Smartmatic, Your Honor.

x x x x x x x x x

ASSOCIATE JUSTICE CARPIO: **Would you know how these public and private keys are generated?**

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[29] Bid Bulletin No. 10, April 27, 2009.

[30] Bid Bulletin No. 6, April 27, 2009, p. 7; Bid Bulletin No. 10, April 27, 2009, p. 3.

[31] Bid Bulletin No. 19, April 27, 2009, p. 2.

ATTY. ROQUE: **Yes, Your Honor. It is also Smartmatic that would generate that.**

x x x x x x x x x

ASSOCIATE JUSTICE CARPIO: Okay. The private keys refer to the keys given to BEI members, correct?

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: Is this generated by the BEI member or given to them?

ATTY. ROQUE: Given to them, Your Honor.

x x x x x x x x x

ASSOCIATE JUSTICE CARPIO: Okay. But in this case, the BEI members will not generate their own password, they will be given the password, the key, the private key by the Smartmatic people?

ATTY. ROQUE: Yes, Your Honor, because as explained by Professor Manalastas, they will have to be **digital signatures** to be provided by Smartmatic.

ASSOCIATE JUSTICE CARPIO: And the public keys — why are the public keys important?

ATTY. ROQUE: Well, Your Honor, because unless you have — It has to be congruence between the private and public key before you can have access to the system, Your Honor. It works as if it is a functional equivalent of two keys, Your Honor. That must be used together, otherwise, it cannot enter.

ASSOCIATE JUSTICE CARPIO: And the public keys will not be known to the BEI but will only be known to the (interrupted)

ATTY. ROQUE: Smartmatic, Your Honor.

x x x x x x x x x

ASSOCIATE JUSTICE CARPIO: **Okay. So the public and private keys will be generated by the Smartmatic and they will be in control of this, they can change it anytime, and that gives them the power to change the results of any precinct, correct?**

ATTY. ROQUE: **Yes, Your Honor.**

ASSOCIATE JUSTICE CARPIO: **So they control the election process?**

ATTY. ROQUE: **Yes, Your Honor.** [Emphasis supplied][32]

Bid Bulletin No. 10 issued by COMELEC-SBAC on April 15, 2009 confirms the correctness of what the above exchange discussed. This Bulletin states, among others, that the "digital signature shall be assigned by the winning bidder [SMARTMATIC-TIM in the present case] to all members of the BEI and BOC. It further states that "for [National Board of Canvassers or NBOC], the digital signatures shall be assigned to all members of the Commission and to the Senate President and the House Speaker." These terms are all consistent with Article 3.3 of the Automation Contract, heretofore mentioned, which allows SMARTMATIC-TIM to be "in charge of the technical aspects of the counting and canvassing software and hardware, including transmission configuration and system integration." On this point, the following oral argument exchanges are illuminating, *viz*.:

ASSOCIATE JUSTICE CARPIO: Are you familiar with Bid Bulletin No. 10 issued on April 15, 2009 of the COMELEC's BAC Committee?

ATTY. ROQUE: Well, off-hand, Your Honor, I cannot recall Bid Bulletin No. 10, and I do not have a copy of Bulletin No. 10.

ASSOCIATE JUSTICE CARPIO: Okay. I will read to you Bid Bulletin No. 10 issued by the COMELEC dated April 15. This is from the website of the PCIJ.

ATTY. ROQUE: Yes, Your Honor.

ASSOCIATE JUSTICE CARPIO: The digital . . . I am quoting now: "The digital signature should be assigned by the winning bidder to all members of the BEI and BOC. The digital signature shall be issued by a Certificate Authority nominated by the winning bidder and approved by the COMELEC." In other words, SMARTMATIC, the winning bidder, will nominate DERISIGN to be the Certification Authority, just ask COMELEC for approval and COMELEC will say "approved." **From then on, it is SMARTMATIC that will deal**

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[32] TSN, Oral Arguments of July 29, 2009, pp. 49-57.

with DERISGIN (sic) on the generation of the public and private keys.

ATTY. ROQUE: **That is correct, Your Honor.**

ASSOCIATE JUSTICE CARPIO: **So, control of the public and private keys are in the hands of SMARTMATIC. Now, what should the COMELEC do to regain control of the election process?**

ATTY. ROQUE: Well, we do not know, Your Honor, because as far as DERISIGN is concerned, they will not deal with the COMELEC, Your Honor.

ASSOCIATE JUSTICE CARPIO: **Yes, but COMELEC should recall this and say we will deal with DERISIGN on generation of the public and private keys and we will hold exclusive possession and control; we will not share these public and private keys with SMARTMATIC-TIM or with anybody because whoever is in possession of these keys can change the results of the election, correct?**

ATTY. ROQUE: **That is possible, Your Honor. Yes. In fact, that is what COMELEC should do.**

ASSOCIATE JUSTICE CARPIO: **So, it is not enough that COMELEC should have co-possession of the keys. They must have sole and exclusive possession of those public and private keys because the Constitution vests in the COMELEC alone control of the electoral process, correct?**

ATTY. ROQUE: **Absolutely, Your Honor.** [Emphasis supplied][33]

A noted expert in computer science, Professor Pablo Manalastas of the Ateneo de Manila University Computer Science Department and the University of the Philippines Department of Computer Science explains the significance of the private keys in relation to the digital signatures to be provided by SMARTMATIC-TIM thus:

The real key to the sanctity of the ballot is the private keys to be issued by the BEI. Unfortunately, the private key is not private at all. **After collation of votes, the BEI seals its tally with a digital signature using private keys before transmitting the results.**

[33] TSN, Oral Arguments of July 29, 2009, pp. 218-221.

These digital signatures would be generated and assigned by SMARTMATIC and or groups authorized by it. SMARTMATIC would have possession of the secret and the public keys of all BEI personnel. The person in possession of the secret key can change the vote of the precinct.[34]

The digital signatures are crucial since Section 22 of the RA No. 8436 as amended provides that "*the election returns transmitted electronically and* ***digitally signed*** *shall be considered* ***as official election results*** *and shall be used as the* ***basis for the canvassing of votes*** *and the* ***proclamation of a candidate***."[35] Thus, by placing solely in the hands of SMARTMATIC-TIM the discretion to assign the "digital signatures," the COMELEC has effectively surrendered control of the May 10, 2010 elections and violated its constitutional mandate to administer the conduct of elections in the country. Significantly, even the counsel for SMARTMATIC-TIM admitted during the oral arguments that the COMELEC should not have given to SMARTMATIC-TIM the possession and control of the public and private keys, thus:

ASSOCIATE JUSTICE CARPIO: Okay, let us go [to] the public and private public keys, you were saying that COMELEC if it wants can have exclusive possession and control of the public and private keys, is that right?

ATTY. LAZATIN: That is correct, Your Honor.

ASSOCIATE JUSTICE CARPIO: And it will not be a problem for SMARTMATIC in performing its obligations under the contract, that is right?

ATTY. LAZATIN: That is correct, Your Honor.

ASSOCIATE JUSTICE CARPIO: **So, it is the choice of COMELEC if they want to have sole and exclusive possession of the public and private keys?**

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[34] See http://pcij.org/stories/2009/election-automation2.html, (last visited September 10, 2009).

[35] Par. 4.5 of the RFP dated March 11, 2009 also states that the Board of Election Inspectors shall digitally sign and encrypt the internal copy of the election return.

ATTY. LAZATIN: **We even believe Your Honor that the COMELEC has no choice because it is the one conducting the elections.**

ASSOCIATE JUSTICE CARPIO: **So, it should not have given to SMARTMATIC possession and control of the public and private keys?**

ATTY. LAZATIN: **Yes, Your Honor.**

ASSOCIATE JUSTICE CARPIO: **So, you agree with me that it should be given back solely to COMELEC because that is the effective control over the automation process?**

ATTY. LAZATIN: That is correct until after the election, Your Honor, I would like to stress that this is a least arrangement Your Honor so that the electronic key will have to be returned to the lessor, Your Honor.

ASSOCIATE JUSTICE CARPIO: **No, I am not talking about the electronic key, I am talking about the digital signatures.**

ATTY. LAZATIN: **Agreed, Your Honor.**

ASSOCIATE JUSTICE CARPIO: **Okay, you agree that it belongs, it should be under the possession and control of COMELEC?**

ATTY. LAZATIN: **That is correct, Your Honor.**[36]

CONCLUSIONS

Section 26 clearly provides that the ITD shall have exclusive supervision and control of the AES and shall carry out the full administration and implementation of the system. To fully implement this statutory requirement, the COMELEC should have stipulated in the automation contract that it is the ITD, and not SMARTMATIC-TIM, that should be made in charge of the technical aspects of the automated May 10, 2010 elections, consistent with its constitutional mandate as well as Section 26 of RA No. 8436. Under the present contract, the exclusive supervision and control over the AES that the law in its wisdom has put in place, has simply been negated.

To be wary of giving control of the critical elements of our election process to an entity other than the COMELEC cannot

[36] TSN, Oral Arguments of July 29, 2009, pp. 461-463.

and should not be regarded as an unhealthy skepticism that we should shy away from. On the contrary, wariness should be our mindset, particularly on legal matters bearing on elections and their automation, given the constitutional and legal guidelines that foist on us the standard of a fair, clean, honest and credible election. We must be wary, too, because we are not wanting in warnings from those who have waded ahead of us into the waters of automation. As observed in foreign jurisdictions with previous experience in the use of automated systems:[37]

> The particular danger in computer-controlled voting machines was said to lie in the fact that elections could be much more effectively influenced via manipulation of the software by the device manufacturer than in ballot box elections. For instance, it was said to be possible for faulty software to allot a certain share of the votes cast to a certain party regardless of the election decision by the respective voter or for the total votes cast to be divided among the parties standing for election according to a set proportion. Manipulations were said to be possible both by politically or financially motivated "insiders", in particular employees of the manufacturer, and by external third parties who gained access to the computers used by the manufacturer (for instance via viruses or trojans); they were said with regard to the complexity of the software used not always to be discovered even in careful quality control effected by the manufacturer. Although it was said to be necessary to prevent unauthorised (sic) access to the devices between the elections through suitable security measures, no such monitoring was said to take place in Germany; there were also said to be no suitable regulations in force that were able to guarantee protected storage of the voting machines.[38]

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[37] In the Judgment dated March 3, 2009, the German Federal Constitutional Court (*GFCC*) held that the use of computer-controlled voting machines under the Federal Voting Machines Ordinance was unconstitutional since it does not ensure that only such voting machines are permitted and used which meet the constitutional requirements of the principle of the public nature of elections. Accordingly, the GFCC ruled that the computer-controlled voting machines used in the election of the 16th German *Bundestag* did not meet the requirements which the constitution places on the use of electronic voting machines; See *Judgment of the Second Senate of 3 March 2009 on the basis of the oral hearing of 28 October 2008*, 2 BvC 3/07, 2 BvC 4/07, http://www.bundesverfassungsgericht.de/entscheidungen/rs20090303_2bvc000307en.html, (last visited September 10, 2009).

[38] *Id*.

Broad as the power of the COMELEC may be as the independent constitutional body tasked to enforce and administer all laws and regulations relative to the conduct of elections, it has no competence to act outside the Constitution and its supporting statutes;[39] the scope of its activities is circumscribed by our election laws and by the Constitution.[40] Thus, while we accord the greatest respect to the means adopted by the COMELEC to resolve policy questions on the conduct and regulation of elections and give its actions the greatest presumption of regularity, we must not hesitate to declare its actions grossly abusive of its constitutionally-granted discretion when it acts outside the contemplation of the Constitution and of our laws.[41] In saying this, I have to hark back to where I started in this Dissent. I am not against and would welcome automation undertaken within the legal and constitutional limits. Consequently, while I vote to strike down automation contract between COMELEC and SMARTMATIC-TIM as invalid for violating Section 2, Article IX (C) of the Constitution and Section 26 of RA No. 8436, as amended by RA No. 9369, I would not hesitate to accept an automation arrangement without the legally objectionable features if COMELEC can still work this out for partial or even national implementation in the May 10, 2010 elections.

Accordingly, I dissent from the majority opinion.

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[39] *Dipatuan v. COMELEC*, 47 SCRA 258 (1972).

[40] *Id*.

[41] *Cauton v. COMELEC*, 19 SCRA 911 (1967).

THIRD DIVISION

[G.R. Nos. 147026-27. September 11, 2009]

CAROLINA R. JAVIER, *petitioner, vs.* **THE FIRST DIVISION OF THE SANDIGANBAYAN and the PEOPLE OF THE PHILIPPINES,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; CRIMINAL PROCEDURE; MOTION TO QUASH; AS A GENERAL RULE, WHEN A MOTION TO QUASH IS DENIED, THE REMEDY IS NOT A PETITION FOR *CERTIORARI*, BUT FOR PETITIONERS TO GO TO TRIAL, WITHOUT PREJUDICE TO REITERATING THE SPECIAL DEFENSES INVOKED IN THEIR MOTION TO QUASH. — A motion to quash an Information is the mode by which an accused assails the validity of a criminal complaint or Information filed against him for insufficiency on its face in point of law, or for defects which are apparent in the face of the Information. Well-established is the rule that when a motion to quash in a criminal case is denied, the remedy is not a petition for *certiorari*, but for petitioners to go to trial, without prejudice to reiterating the special defenses invoked in their motion to quash. Remedial measures as regards interlocutory orders, such as a motion to quash, are frowned upon and often dismissed. The evident reason for this rule is to avoid multiplicity of appeals in a single action.

2. ID.; ID.; ID.; ONE OF THE EXCEPTIONS TO THE RULE IS WHEN THE COURT, IN DENYING THE MOTION TO DISMISS OR MOTION TO QUASH, ACTS WITHOUT OR IN EXCESS OF JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION, THEN *CERTIORARI* OR PROHIBITION LIES. — The general rule, however admits of several exceptions, one of which is when the court, in denying the motion to dismiss or motion to quash, acts without or in excess of jurisdiction or with grave abuse of discretion, then *certiorari* or prohibition lies. The reason is that it would be unfair to require the defendant or accused to undergo the ordeal and expense of a trial if the court has no jurisdiction over the subject matter or offense, or is not the court of proper venue, or if the denial of the motion

to dismiss or motion to quash is made with grave abuse of discretion or a whimsical and capricious exercise of judgment. In such cases, the ordinary remedy of appeal cannot be plain and adequate.

3. CRIMINAL LAW; ANTI-GRAFT AND CORRUPT PRACTICES ACT; PERSONS LIABLE; AN INDIVIDUAL INVESTED WITH SOME PORTION OF THE SOVEREIGN FUNCTIONS OF THE GOVERNMENT, TO BE EXERCISED BY HIM FOR THE BENEFIT OF THE PUBLIC IS A PUBLIC OFFICER. — The NBDB is the government agency mandated to develop and support the Philippine book publishing industry. It is a statutory government agency created by R.A. No. 8047, which was enacted into law to ensure the full development of the book publishing industry as well as for the creation of organization structures to implement the said policy. To achieve this end, the Governing Board of the NBDB was created to supervise the implementation. The Governing Board was vested with powers and functions. A perusal of the powers and functions leads us to conclude that they partake of the nature of public functions. A **public office** is the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, **an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public.** The individual so invested is a public officer.

4. ID.; ID.; ID.; THE FACT THAT PETITIONER WAS APPOINTED FROM THE PUBLIC SECTOR AND NOT FROM OTHER BRANCHES OR AGENCIES OF THE GOVERNMENT DOES NOT TAKE HER POSITION OUTSIDE THE MEANING OF PUBLIC OFFICE. — Petitioner came from the private sector to sit as a member of the NBDB, the law invested her with some portion of the sovereign functions of the government, so that the purpose of the government is achieved. In this case, the government aimed to enhance the book publishing industry as it has a significant role in the national development. Hence, the fact that she was appointed from the public sector and not from the other branches or agencies of the government does not take her position outside the meaning of a public office. She was appointed to the Governing Board in order to see to it that the purposes for which the law was enacted are achieved. The Governing Board

acts collectively and carries out its mandate as one body. The purpose of the law for appointing members from the private sector is to ensure that they are also properly represented in the implementation of government objectives to cultivate the book publishing industry.

5. ID.; ID.; ID.; UNDER THE ANTI-GRAFT LAW, THE NATURE OF ONE'S APPOINTMENT, AND WHETHER THE COMPENSATION ONE RECEIVES FROM THE GOVERNMENT IS NOMINAL, IS IMMATERIAL BECAUSE THE PERSON SO ELECTED OR APPOINTED IS STILL A PUBLIC OFFICER. — The Court is not unmindful of the definition of a public officer pursuant to the Anti-Graft Law, which provides that a public officer includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government. Thus, pursuant to the Anti-Graft Law, one is a public officer if one has been elected or appointed to a public office. Petitioner was appointed by the President to the Governing Board of the NDBD. Though her term is only for a year that does not make her private person exercising a public function. The fact that she is not receiving a monthly salary is also of no moment. Section 7, R.A. No. 8047 provides that members of the Governing Board shall receive per diem and such allowances as may be authorized for every meeting actually attended and subject to pertinent laws, rules and regulations. Also, under the Anti-Graft Law, the nature of one's appointment, and whether the compensation one receives from the government is only nominal, is immaterial because the person so elected or appointed is still considered a public officer.

6. ID.; ID.; ID.; PETITIONER PERFORMS PUBLIC FUNCTIONS IN PURSUANCE OF THE OBJECTIVES OF R.A. NO. 8047; PETITIONER TOOK PART, DURING HER TENURE, IN THE DRAFTING AND PROMULGATION OF SEVERAL RULES AND REGULATIONS IMPLEMENTING R.A. NO. 8047 AND WAS SUPPOSED TO REPRESENT THE COUNTRY IN THE CANCELED BOOK FAIR IN SPAIN. — The Revised Penal Code defines a public officer as any person who, by direct provision of the law, popular election, popular election or appointment by competent authority, shall take part in the performance of public functions in the

Government of the Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent, or subordinate official, of any rank or classes, shall be deemed to be a public officer. Where, as in this case, petitioner performs public functions in pursuance of the objectives of R.A. No. 8047, verily, she is a public officer who takes part in the performance of public functions in the government whether as an employee, agent, subordinate official, of any rank or classes. In fact, during her tenure, petitioner took part in the drafting and promulgation of several rules and regulations implementing R.A. No. 8047. She was supposed to represent the country in the canceled book fair in Spain. In fine, We hold that petitioner is a public officer.

7. ID.; ID.; DOUBLE JEOPARDY; REQUISITES. — It is well settled that for a claim of double jeopardy to prosper, the following requisites must concur: (1) there is a complaint or information or other formal charge sufficient in form and substance to sustain a conviction; (2) the same is filed before a court of competent jurisdiction; (3) there is a valid arraignment or plea to the charges; and (4) the accused is convicted or acquitted or the case is otherwise dismissed or terminated without his express consent. The third and fourth requisites are not present in the case at bar.

8. ID.; ID.; NO DOUBLE JEOPARDY COULD ATTACH CONSIDERING THAT THE TWO CASES REMAIN PENDING BEFORE THE SANDIGANBAYAN AND THE FACT THAT PETITIONER HAD PLEADED TO ONLY ONE IN THE CRIMINAL CASES FILED AGAINST HER. — Anent the issue of double jeopardy, We can not likewise give in to the contentions advanced by petitioner. She argued that her right against double jeopardy was violated when the Sandiganbayan denied her motion to quash the two informations filed against her. We believe otherwise. Records show that the Informations in Criminal Case Nos. 25867 and 25898 refer to offenses penalized by different statues, R.A. No. 3019 and RPC, respectively. It is elementary that for double jeopardy to attach, the case against the accused must have been dismissed or otherwise terminated without his express consent by a court of competent jurisdiction, upon valid information sufficient in form and substance and the accused pleaded to the charge. In the instant case, petitioner pleaded not guilty to the Information for violation of the Anti-

Graft Law. She was not yet arraigned in the criminal case for malversation of public funds because she had filed a motion to quash the latter information. Double jeopardy could not, therefore, attach considering that the two cases remain pending before the Sandiganbayan and that herein petitioner had pleaded to only one in the criminal cases against her.

APPEARANCES OF COUNSEL

Salomon Gonong Dela Cruz Law Offices for petitioner.

D E C I S I O N

PERALTA, *J.*:

Before the Court is a petition for *certiorari*[1] under Rule 65 of the Rules of Court filed by petitioner Carolina R. Javier in Criminal Case Nos. 25867 and 25898, entitled "*People of the Philippines, Plaintiff versus Carolina R. Javier, Accused*," seeking to nullify respondent Sandiganbayan's: (1) Order[2] dated November 14, 2000 in Criminal Case No. 25867, which denied her Motion to Quash Information; (2) Resolution[3] dated January 17, 2001 in Criminal Case No. 25898, which denied her Motion for Reconsideration and Motion to Quash Information; and (3) Order[4] dated February 12, 2001, declaring that a motion for reconsideration in Criminal Case No. 25898 would be superfluous as the issues are fairly simple and straightforward.

The factual antecedents follow.

On June 7, 1995, Republic Act (R.A.) No. 8047,[5] or otherwise known as the "Book Publishing Industry Development Act," was enacted into law. Foremost in its policy is the State's goal

[1] *Rollo*, pp. 3-24.

[2] *Id.* at 26.

[3] *Id.* at 27-28.

[4] *Id.* at 29-30.

[5] "AN ACT PROVIDING FOR THE DEVELOPMENT OF THE BOOK PUBLISHING INDUSTRY THROUGH THE FORMULATION AND

in promoting the continuing development of the book publishing industry, through the active participation of the private sector, to ensure an adequate supply of affordable, quality-produced books for the domestic and export market.

To achieve this purpose, the law provided for the creation of the National Book Development Board (NBDB or the Governing Board, for brevity), which shall be under the administration and supervision of the Office of the President. The Governing Board shall be composed of eleven (11) members who shall be appointed by the President of the Philippines, five (5) of whom shall come from the government, while the remaining six (6) shall be chosen from the nominees of organizations of private book publishers, printers, writers, book industry related activities, students and the private education sector.

On February 26, 1996, petitioner was appointed to the Governing Board as a private sector representative for a term of one (1) year.[6] During that time, she was also the President of the Book Suppliers Association of the Philippines (BSAP). She was on a hold-over capacity in the following year. On September 14, 1998, she was again appointed to the same position and for the same period of one (1) year.[7] Part of her functions as a member of the Governing Board is to attend book fairs to establish linkages with international book publishing bodies. On September 29, 1997, she was issued by the Office of the President a travel authority to attend the Madrid International Book Fair in Spain on October 8-12, 1997.[8] Based on her itinerary of travel,[9] she was paid ₱139,199.00[10] as her travelling expenses.

IMPLEMENTATION OF A NATIONAL BOOK POLICY AND A NATIONAL BOOK DEVELOPMENT PLAN"; records, Vol. I (Crim. Case No. 25867), pp. 101-107.

[6] Records, Vol. I (Crim. Case No. 25867), p. 90.

[7] Records, Vol. I (Crim. Case No. 25867), pp. 91-92.

[8] *Id.* at 122.

[9] *Id.* at 123.

[10] Per Check No. 10188-AY; *id.* at 125.

Unfortunately, petitioner was not able to attend the scheduled international book fair.

On February 16, 1998, Resident Auditor Rosario T. Martin advised petitioner to immediately return/refund her cash advance considering that her trip was canceled.[11] Petitioner, however, failed to do so. On July 6, 1998, she was issued a Summary of Disallowances[12] from which the balance for settlement amounted to ₱220,349.00. Despite said notice, no action was forthcoming from the petitioner.

On September 23, 1999, Dr. Nellie R. Apolonio, then the Executive Director of the NBDB, filed with the Ombudsman a complaint against petitioner for malversation of public funds and properties. She averred that despite the cancellation of the foreign trip, petitioner failed to liquidate or return to the NBDB her cash advance within sixty (60) days from date of arrival, or in this case from the date of cancellation of the trip, in accordance with government accounting and auditing rules and regulations. Dr. Apolonio further charged petitioner with violation of Republic Act (R.A.) No. 6713[13] for failure to file her Statement of Assets and Liabilities.

The Ombudsman found probable cause to indict petitioner for violation of Section 3(e) of R.A. No. 3019,[14] as amended, and recommended the filing of the corresponding information.[15] It, however, dismissed for insufficiency of evidence, the charge for violation of R.A. No. 6713.

In an Information dated February 18, 2000, petitioner was charged with violation of Section 3(e) of R.A. No. 3019 before the Sandiganbayan, to wit:

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[11] *Id.* at 126.

[12] *Id.* at 127.

[13] Otherwise known as the "Code of Conduct and Ethical Standards for Public Officials and Employees."

[14] Otherwise known as the "Anti-Graft and Corrupt Practices Act."

[15] Resolution dated February 18, 2000; records, Vol. I (Crim. Case No. 25867), pp. 5-10.

That on or about October 8, 1997, or for sometime prior or subsequent thereto, in the City of Quezon, Philippines and within the jurisdiction of this Honorable Court, the aforenamed accused, a public officer, being then a member of the governing Board of the National Book Development Board (NBDB), while in the performance of her official and administrative functions, and acting with evident bad faith or gross inexcusable negligence, did then and there willfully, unlawfully and criminally, without any justifiable cause, and despite due demand by the Resident Auditor and the Executive Director of NBDB, fail and refuse to return and/or liquidate her cash advances intended for official travel abroad which did not materialize, in the total amount of ₱139,199.00 as of September 23, 1999, as required under EO No. 248 and Sec. 5 of COA Circular No. 97-002 thereby causing damage and undue injury to the Government.

CONTRARY TO LAW.[16]

The case was docketed as Criminal Case No. 25867 and raffled to the First Division.

Meanwhile, the Commission on Audit charged petitioner with Malversation of Public Funds, as defined and penalized under Article 217 of the Revised Penal Code, for not liquidating the cash advance granted to her in connection with her supposed trip to Spain. During the conduct of the preliminary investigation, petitioner was required to submit her counter-affidavit but she failed to do so. The Ombudsman found probable cause to indict petitioner for the crime charged and recommended the filing of the corresponding information against her.[17]

Thus, an Information dated February 29, 2000 was filed before the Sandiganbayan, which was docketed as Criminal Case No. 25898, and raffled to the Third Division, the accusatory portion of which reads:

That on or about and during the period from October 8, 1997 to February 16, 1999, or for sometime prior or subsequent thereto, in Quezon City, Philippines, and within the jurisdiction of this Honorable

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[16] Records, Vol. II (Crim. Case No. 25867), pp. 1-2.

[17] Resolution dated February 29, 2000; records , Vol. I, (Crim. Case No. 25898), pp. 4-8.

Court, the above-named accused, a high ranking officer, being a member of the Governing Board of the National Book Development Board and as such, is accountable for the public funds she received as cash advance in connection with her trip to Spain from October 8-12, 1997, per LBP Check No. 10188 in the amount of ₱139,199.00, which trip did not materialize, did then and there willfully, unlawfully and feloniously take, malverse, misappropriate, embezzle and convert to her own personal use and benefit the aforementioned amount of ₱139,199.00, Philippine currency, to the damage and prejudice of the government in the aforesaid amount.

CONTRARY TO LAW.[18]

During her arraignment in Criminal Case No. 25867, petitioner pleaded not guilty. Thereafter, petitioner delivered to the First Division the money subject of the criminal cases, which amount was deposited in a special trust account during the pendency of the criminal cases.

Meanwhile, the Third Division set a clarificatory hearing in Criminal Case No. 25898 on May 16, 2000 in order to determine jurisdictional issues. On June 3, 2000, petitioner filed with the same Division a Motion for Consolidation[19] of Criminal Case No. 25898 with Criminal Case No. 25867, pending before the First Division. On July 6, 2000, the People filed an *Urgent Ex-Parte Motion to Admit Amended Information*[20] in Criminal Case No. 25898, which was granted. Accordingly, the Amended Information dated June 28, 2000 reads as follows:

That on or about and during the period from October 8, 1997 to February 16, 1999, or for sometime prior or subsequent thereto, in Quezon City, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, a high ranking officer, being a member of the Governing Board of the National Book Development Board equated to Board Member II with a salary grade 28 and as such, is accountable for the public funds she received as case advance in connection with her trip to Spain from October 8-12, 1997, per

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[18] Records, Vol. I (Crim Case No. 25898), pp. 1-2.

[19] *Id.* at 31-32.

[20] *Id.* at 45.

LBP Check No. 10188 in the amount of ₱139,199.00, which trip did not materialize, did then and there willfully, unlawfully and feloniously take, malverse, misappropriate, embezzle and convert to her own personal use and benefit the aforementioned amount of ₱139,199.00, Philippine currency, to the damage and prejudice of the government in the aforesaid amount.

CONTRARY TO LAW.[21]

In its Resolution dated October 5, 2000, the Third Division ordered the consolidation of Criminal Case No. 25898 with Criminal Case No. 25867.[22]

On October 10, 2000, petitioner filed a Motion to Quash Information,[23] averring that the Sandiganbayan has no jurisdiction to hear Criminal Case No. 25867 as the information did not allege that she is a public official who is classified as Grade "27" or higher. Neither did the information charge her as a co-principal, accomplice or accessory to a public officer committing an offense under the Sandiganbayan's jurisdiction. She also averred that she is not a public officer or employee and that she belongs to the Governing Board only as a private sector representative under R.A. No. 8047, hence, she may not be charged under R.A. No. 3019 before the Sandiganbayan or under any statute which covers public officials. Moreover, she claimed that she does not perform public functions and is without any administrative or political power to speak of — that she is serving the private book publishing industry by advancing their interest as participant in the government's book development policy.

In an Order[24] dated November 14, 2000, the First Division[25] denied the motion to quash with the following disquisition:

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[21] *Id.* at 46.

[22] *Id.* at 52.

[23] *Rollo*, pp. 40-50.

[24] *Rollo*, p. 26.

[25] Composed of then Presiding Justice Francis E. Garchitorena, Associate Justices Catalino R. Castañeda, Jr. and Gregory S. Ong.

The fact that the accused does not receive any compensation in terms of salaries and allowances, if that indeed be the case, is not the sole qualification for being in the government service or a public official. The National Book Development Board is a statutory government agency and the persons who participated therein even if they are from the private sector, are public officers to the extent that they are performing their duty therein as such.

Insofar as the accusation is concerned herein, it would appear that monies were advanced to the accused in her capacity as Director of the National Book Development Board for purposes of official travel. While indeed under ordinary circumstances a member of the board remains a private individual, still when that individual is performing her functions as a member of the board or when that person receives benefits or when the person is supposed to travel abroad and is given government money to effect that travel, to that extent the private sector representative is a public official performing public functions; if only for that reason, and not even considering situation of her being in possession of public funds even as a private individual for which she would (sic) also covered by provisions of the Revised Penal Code, she is properly charged before this Court.

On November 15, 2000, the First Division accepted the consolidation of the criminal cases against petitioner and scheduled her arraignment on November 17, 2000, for Criminal Case No. 25898. On said date, petitioner manifested that she is not prepared to accept the propriety of the accusation since it refers to the same subject matter as that covered in Criminal Case No. 25867 for which the Sandiganbayan gave her time to file a motion to quash. On November 22, 2000, petitioner filed a Motion to Quash the Information[26] in Criminal Case No. 25898, by invoking her right against double jeopardy. However, her motion was denied in open court. She then filed a motion for reconsideration.

On January 17, 2001, the Sandiganbayan issued a Resolution[27] denying petitioner's motion with the following disquisition:

The accused is under the jurisdiction of this Court because Sec. 4 (g) of P.D. 1606 as amended so provides, thus:

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[26] *Id.* at 55-58.

[27] *Rollo*, pp. 27-28.

> Sec. 4. *Jurisdiction*. — The Sandiganbayan shall exercise exclusive original jurisdiction in all cases involving:
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> x x x x x x x x x
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> (g) Presidents, *directors or trustees*, or managers of government-owned or controlled corporations, state universities or educational institutions or foundations;
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> x x x x x x x x x

The offense is office-related because the money for her travel abroad was given to her because of her Directorship in the National Book Development Board.

Furthermore, there are also allegations to hold the accused liable under Article 222 of the Revised Penal Code which reads:

> Art. 222. *Officers included in the preceding provisions.* — The provisions of this chapter shall apply to *private individuals* who, in any capacity whatever, have charge of any insular, provincial or municipal funds, revenues, or property and to any administrator or depository of funds or property attached , seized or deposited by public authority, even if such property belongs to a private individual.

Likewise, the Motion to Quash the Information in Criminal Case No. 25898 on the ground of *litis pendencia* is denied since in this instance, these two Informations speak of offenses under different statutes, *i.e.*, R.A. No. 3019 and the Revised Penal Code, neither of which precludes prosecution of the other.

Petitioner hinges the present petition on the ground that the Sandiganbayan has committed grave abuse of discretion amounting to lack of jurisdiction for not quashing the two informations charging her with violation of the Anti-Graft Law and the Revised Penal Code on malversation of public funds. She advanced the following arguments in support of her petition, to wit: *first*, she is not a public officer, and *second*, she was being charged under two (2) informations, which is in violation of her right against double jeopardy.

A motion to quash an Information is the mode by which an accused assails the validity of a criminal complaint or Information

filed against him for insufficiency on its face in point of law, or for defects which are apparent in the face of the Information.[28]

Well-established is the rule that when a motion to quash in a criminal case is denied, the remedy is not a petition for *certiorari*, but for petitioners to go to trial, without prejudice to reiterating the special defenses invoked in their motion to quash. Remedial measures as regards interlocutory orders, such as a motion to quash, are frowned upon and often dismissed. The evident reason for this rule is to avoid multiplicity of appeals in a single action.[29]

The above general rule, however admits of several exceptions, one of which is when the court, in denying the motion to dismiss or motion to quash, acts without or in excess of jurisdiction or with grave abuse of discretion, then *certiorari* or prohibition lies. The reason is that it would be unfair to require the defendant or accused to undergo the ordeal and expense of a trial if the court has no jurisdiction over the subject matter or offense, or is not the court of proper venue, or if the denial of the motion to dismiss or motion to quash is made with grave abuse of discretion or a whimsical and capricious exercise of judgment. In such cases, the ordinary remedy of appeal cannot be plain and adequate.[30]

To substantiate her claim, petitioner maintained that she is not a public officer and only a private sector representative, stressing that her only function among the eleven (11) basic purposes and objectives provided for in Section 4, R.A. No. 8047, is to **obtain priority status for the book publishing industry**. At the time of her appointment to the NBDB Board, she was the President of the BSAP, a book publishers association. As such, she could not be held liable for the crimes imputed

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[28] *Ariel Los Baños, et al. v. Joel Pedro*, G.R. No. 173588, April 22, 2009.

[29] *Serana v. Sandiganbayan*, G.R. No. 162059, January 22, 2008, 542 SCRA 224.

[30] *Newsweek, Inc. v. Intermediate Appellate Court*, No. 63559, May 30, 1986, 142 SCRA 171.

against her, and in turn, she is outside the jurisdiction of the Sandiganbayan.

The NBDB is the government agency mandated to develop and support the Philippine book publishing industry. It is a statutory government agency created by R.A. No. 8047, which was enacted into law to ensure the full development of the book publishing industry as well as for the creation of organization structures to implement the said policy. To achieve this end, the Governing Board of the NBDB was created to supervise the implementation. The Governing Board was vested with powers and functions, to wit:

a) assume responsibility for carrying out and implementing the policies, purposes and objectives provided for in this Act;

b) formulate plans and programs as well as operational policies and guidelines for undertaking activities relative to promoting book development, production and distribution as well as an incentive scheme for individual authors and writers;

c) formulate policies, guidelines and mechanisms to ensure that editors, compilers and especially authors are paid justly and promptly royalties due them for reproduction of their works in any form and number and for whatever purpose;

d) conduct or contract research on the book publishing industry including monitoring, compiling and providing data and information of book production;

e) provide a forum for interaction among private publishers, and, for the purpose, establish and maintain liaison will all the segments of the book publishing industry;

f) ask the appropriate government authority to ensure effective implementation of the National Book Development Plan;

g) promulgate rules and regulations for the implementation of this Act in consultation with other agencies concerned, except for Section 9 hereof on incentives for book development, which shall be the concern of appropriate agencies involved;

h) approve, with the concurrence of the Department of Budget and Management (DBM), the annual and supplemental budgets submitted to it by the Executive director;

i) own, lease, mortgage, encumber or otherwise real and personal property for the attainment of its purposes and objectives;

j) enter into any obligation or contract essential to the proper administration of its affairs, the conduct of its operations or the accomplishment of its purposes and objectives;

k) receive donations, grants, legacies, devices and similar acquisitions which shall form a trust fund of the Board to accomplish its development plans on book publishing;

l) import books or raw materials used in book publishing which are exempt from all taxes, customs duties and other charges in behalf of persons and enterprises engaged in book publishing and its related activities duly registered with the board;

m) promulgate rules and regulations governing the matter in which the general affairs of the Board are to be exercised and amend, repeal, and modify such rules and regulations whenever necessary;

n) recommend to the President of the Philippines nominees for the positions of the Executive Officer and Deputy Executive Officer of the Board;

o) adopt rules and procedures and fix the time and place for holding meetings: Provided, That at least one (1) regular meeting shall be held monthly;

p) conduct studies, seminars, workshops, lectures, conferences, exhibits, and other related activities on book development such as indigenous authorship, intellectual property rights, use of alternative materials for printing, distribution and others; and

q) exercise such other powers and perform such other duties as may be required by the law.[31]

A perusal of the above powers and functions leads us to conclude that they partake of the nature of public functions. A **public office** is the right, authority and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, **an individual is invested with some portion of the sovereign functions of the government**, **to be exercised by him for the benefit of the public**. The individual so invested is a public officer.[32]

Notwithstanding that petitioner came from the private sector to sit as a member of the NBDB, the law invested her with

[31] R.A. 8047, Sec. 8; records, Vol. I (Crim. Case No. 25867), pp. 103-104.

[32] F.R. Mechem, *A Treatise on the Law of Public Offices and Officers*, Sec. 1.

some portion of the sovereign functions of the government, so that the purpose of the government is achieved. In this case, the government aimed to enhance the book publishing industry as it has a significant role in the national development. Hence, the fact that she was appointed from the public sector and not from the other branches or agencies of the government does not take her position outside the meaning of a public office. She was appointed to the Governing Board in order to see to it that the purposes for which the law was enacted are achieved. The Governing Board acts collectively and carries out its mandate as one body. The purpose of the law for appointing members from the private sector is to ensure that they are also properly represented in the implementation of government objectives to cultivate the book publishing industry.

Moreover, the Court is not unmindful of the definition of a public officer pursuant to the Anti-Graft Law, which provides that a public officer includes elective and appointive officials and employees, permanent or temporary, whether in the classified or unclassified or exempt service receiving compensation, even nominal, from the government.[33]

Thus, pursuant to the Anti-Graft Law, one is a public officer if one has been elected or appointed to a public office. Petitioner was appointed by the President to the Governing Board of the NBDB. Though her term is only for a year that does not make her private person exercising a public function. The fact that she is not receiving a monthly salary is also of no moment. Section 7, R.A. No. 8047 provides that members of the Governing Board shall receive per diem and such allowances as may be authorized for every meeting actually attended and subject to pertinent laws, rules and regulations. Also, under the Anti-Graft Law, the nature of one's appointment, and whether the compensation one receives from the government is only nominal, is immaterial because the person so elected or appointed is still considered a public officer.

On the other hand, the Revised Penal Code defines a public officer as any person who, by direct provision of the law, popular

[33] R.A. No. 3019, Sec. 2 (b).

election, popular election or appointment by competent authority, shall take part in the performance of public functions in the Government of the Philippine Islands, or shall perform in said Government or in any of its branches public duties as an employee, agent, or subordinate official, of any rank or classes, shall be deemed to be a public officer.[34]

Where, as in this case, petitioner performs public functions in pursuance of the objectives of R.A. No. 8047, verily, she is a public officer who takes part in the performance of public functions in the government whether as an employee, agent, subordinate official, of any rank or classes. In fact, during her tenure, petitioner took part in the drafting and promulgation of several rules and regulations implementing R.A. No. 8047. She was supposed to represent the country in the canceled book fair in Spain.

In fine, We hold that petitioner is a public officer. The next question for the Court to resolve is whether, as a public officer, petitioner is within the jurisdiction of the Sandiganbayan.

Presently,[35] the Sandiganbayan has jurisdiction over the following:

Sec. 4. *Jurisdiction.* — The Sandiganbayan shall exercise exclusive original jurisdiction in all cases involving:

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[34] Revised Penal Code, Art. 203.

[35] On June 11, 1978, then President Ferdinand E. Marcos promulgated Presidential Decree (P.D.) No. 1486 which created the Sandiganbayan. The Whereas Clause of the decree aimed to attain the highest norms of official conduct required of public officers and employees, based on the concept that public officers and employees shall serve with the highest degree of responsibility, integrity, loyalty and efficiency and shall remain at all times accountable to the People. On December 10, 1978, P.D. No. 1486 was amended by P.D. No. 1606 which expanded the jurisdiction of the Sandiganbayan. Thereafter, P.D. No. 1861 amended P.D. No. 1606 on March 23, 1983, which decree further altered the Sandiganbayan jurisdiction. On March 30, 1995, Republic Act (R.A.) No. 7975 was approved, making succeeding amendments to P.D. No. 1606, which was again amended on February 5, 1997 by R.A. No. 8249. Section 4 of which further modified the jurisdiction of the Sandiganbayan.

A. Violations of Republic Act No. 3019, as amended, other known as the Anti-Graft and Corrupt Practices Act, Republic Act No. 1379, and Chapter II, Section 2, Title VII, Book II of the Revised Penal Code, where one or more of the accused are officials occupying the following positions in the government, whether in a permanent, acting or interim capacity, at the time of the commission of the offense:

(1) Officials of the executive branch occupying the positions of regional director and higher, otherwise classified as Grade "27" and higher, of the Compensation and Position Classification Act of 989 (Republic Act No. 6758), specifically including:

x x x x x x x x x

(2) Members of Congress and officials thereof classified as Grade "Grade '27'" and up under the Compensation and Position Classification Act of 1989;

(3) Members of the judiciary without prejudice to the provisions of the Constitution;

(4) Chairmen and members of Constitutional Commission, without prejudice to the provisions of the Constitution; and

(5) All other national and local officials classified as Grade "Grade '27'" and higher under the Compensation and Position Classification Act of 1989.

x x x x x x x x x

Notably, the Director of Organization, Position Classification and Compensation Bureau, of the Department of Budget and management provided the following information regarding the compensation and position classification and/or rank equivalence of the member of the Governing Board of the NBDB, thus:

Per FY 1999 Personal Services Itemization, the Governing Board of NBDB is composed of one (1) Chairman (*ex-officio*), one (1) Vice-Chairman (*ex-officio*), and nine (9) Members, four (4) of whom are *ex-officio* and the remaining five (5) members represent the private sector. The said five members of the Board do not receive any salary and as such their position are not classified and are not assigned any salary grade.

For purposes however of determining the rank equivalence of said positions, notwithstanding that they do not have any salary grade assignment, the same may be equated to Board Member II, SG-28.[36]

Thus, based on the Amended Information in Criminal Case No. 25898, petitioner belongs to the employees classified as SG-28, included in the phrase "all other national and local officials classified as 'Grade 27' and higher under the Compensation and Position Classification Act of 1989."

Anent the issue of double jeopardy, We can not likewise give in to the contentions advanced by petitioner. She argued that her right against double jeopardy was violated when the Sandiganbayan denied her motion to quash the two informations filed against her.

We believe otherwise. Records show that the Informations in Criminal Case Nos. 25867 and 25898 refer to offenses penalized by different statues, R.A. No. 3019 and RPC, respectively. It is elementary that for double jeopardy to attach, the case against the accused must have been dismissed or otherwise terminated without his express consent by a court of competent jurisdiction, upon valid information sufficient in form and substance and the accused pleaded to the charge.[37] In the instant case, petitioner pleaded not guilty to the Information for violation of the Anti-Graft Law. She was not yet arraigned in the criminal case for malversation of public funds because she had filed a motion to quash the latter information. Double jeopardy could not, therefore, attach considering that the two cases remain pending before the Sandiganbayan and that herein petitioner had pleaded to only one in the criminal cases against her.

It is well settled that for a claim of double jeopardy to prosper, the following requisites must concur: (1) there is a complaint or information or other formal charge sufficient in form and substance to sustain a conviction; (2) the same is filed before a court of competent jurisdiction; (3) there is a valid arraignment or plea

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[36] Records, Vol. I (Crim. Case No. 25898), p. 36.

[37] *Cabo v. Sandiganbayan*, G.R. No. 169509, June 16, 2006, 491 SCRA 264.

to the charges; and (4) the accused is convicted or acquitted or the case is otherwise dismissed or terminated without his express consent.[38] The third and fourth requisites are not present in the case at bar.

In view of the foregoing, We hold that the present petition does not fall under the exceptions wherein the remedy of *certiorari* may be resorted to after the denial of one's motion to quash the information. And even assuming that petitioner may avail of such remedy, We still hold that the Sandiganbayan did not commit grave abuse of discretion amounting to lack of or in excess of jurisdiction.

WHEREFORE, the Petition is *DISMISSED*. The questioned Resolutions and Order of the Sandiganbayan are *AFFIRMED*. Costs against petitioner.

SO ORDERED.

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

THIRD DIVISION

[G.R. No. 157901. September 11, 2009]

ORIX METRO LEASING AND FINANCE CORPORATION, *petitioner, vs.* **M/V "PILAR-I" and SPOUSES ERNESTO DY and LOURDES DY,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; THE SUPREME COURT IS NOT A TRIER OF FACTS AND IS UNDER NO

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[38] *Id.*

OBLIGATION TO EXAMINE AND WEIGH ANEW EVIDENCE ADDUCED BELOW; THE COURT WILL DELVE INTO THE EVIDENCE ON RECORD IN ORDER TO DISPEL ANY DOUBT AS TO THE CORRECTNESS OF THE ASSAILED DECISION OF THE COURT OF APPEALS. — Strictly, the Court, not being a trier of facts, is under no obligation to examine and weigh anew evidence adduced below. It should already be bound by the aforementioned findings of fact of the RTC, as affirmed by the Court of Appeals. True, there are recognized exceptions to this general rule and the Court may be prevailed upon to review the findings of fact of the Court of Appeals when the same are manifestly mistaken, or when the appealed judgment was based on a misapprehension of facts, or when the appellate court overlooked certain undisputed facts which, if properly considered, would justify a different conclusion. No such circumstances, however, exist in this case. Nonetheless, in this case, the Court delves into the evidence on record in order to dispel any doubt as to the correctness of the assailed Decision of the Court of Appeals.

2. CIVIL LAW; GENERAL PRINCIPLES; *ESTOPPEL*; APPLICABLE IN CASE AT BAR; RESPONDENT'S RELIED ON THE ACCEPTANCE WITHOUT ANY OBJECTION BY PETITIONER OF THE PAYMENTS MADE BASED ON THE NEW SCHEDULE. — The argument of Orix Metro that it did not accede to the restructuring of the loan is only a belated repudiation of the new schedule of payments and deserves scant consideration. Orix Metro had already benefited from the said new schedule when it accepted the payments made by the spouses Dy based thereon. In fact, as further proof of its consent to the restructured schedule of payment, records show that Orix Metro wrote a letter to Limchia Enterprises, Inc. on 10 August 1992 informing the latter that the monthly amortization on its loan had been reduced to ₱127,261.00 for the next 12 months. The spouses Dy relied on the acceptance without any objection by Orix Metro of the payments made based on the new schedule. On equitable principles, particularly on the ground of estoppel, this Court upholds the new schedule of payment. Let it be noted that the doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed

and who reasonably relied thereon. The doctrine of estoppel springs from equitable principles and the equities in the case. It is designed to aid the law in the administration of justice where, without its aid, injustice might result. Suffice it to say that as of the time Orix Metro instituted the foreclosure proceedings against the spouses Dy, the legal basis for foreclosure of mortgage did not exist. Thus, Orix Metro had no cause of action against them and cannot demand foreclosure of the mortgage on M/V Pilar-I.

3. ID.; OBLIGATIONS AND CONTRACTS; EXTINGUISHMENT OF OBLIGATIONS; PAYMENT; APPLICATION OF PAYMENTS; RESPONDENTS PROPERLY APPLIED THE ADVANCE PAYMENT AGAINST THEIR OUTSTANDING OBLIGATION FOLLOWING THE NEW SCHEDULE OF PAYMENTS UNDER ARTICLE 1252 OF THE CIVIL CODE. — On the application of the advance payment of ₱289,480.00 to the obligation, the Court affirms the ruling of the Court of Appeals that Article 1252 of the Civil Code controls. Therefore, the spouses Dy may properly apply said advance payment against their outstanding obligation following the new schedule of payments. Additionally, in contracts involving installment payments with interest chargeable against the remaining balance of the obligation, the creditor is duty-bound to inform the debtor of the amount of interest that falls due, and that he is applying the installment payments to cover said interest. Without notifying the debtor, the creditor cannot apply the payments to the interest and then later on hold the debtor in default for nonpayment of installments on the principal. In this case, as found by the appellate court, Orix Metro clearly failed to provide the spouses Dy a detailed accounting of the remaining principal obligation, interest, and payments already made. The spouses Dy had all the right to apply the advance payment to the amount due in the new schedule of payments.

4. ID.; DAMAGES; ACTUAL OR COMPENSATORY; ACTUAL DAMAGES AWARDED BY THE TRIAL COURT WAS PROPERLY DELETED BY THE APPELLATE COURT; ONLY THE BARE AND SELF-SERVING TESTIMONIES OF RESPONDENTS' WITNESSES SUPPORT THE CLAIM FOR ACTUAL DAMAGES. — The Court further agrees in the deletion by the Court of Appeals of the award for actual damages made by the RTC. Actual or compensatory damages

cannot be presumed, but must be proven with a reasonable degree of certainty. Here, only the bare and self-serving testimonies of respondents' witnesses support the claim for actual damages. The Court cannot simply rely on speculation, conjecture, or guesswork as to the fact and amount of damages, but must depend on competent proof that the claimant has suffered, and an evidence of, the actual amount thereof.

5. ID.; ID.; ID.; ORDER OF APPELLATE COURT FOR REIMBURSEMENT OF EXPENSES INCURRED IN REPAIRING AND DRYDOCKING IS SET ASIDE BY THE COURT; THE BILLS REPRESENTING THE EXPENSES DO NOT DESERVE MUCH EVIDENTIARY WEIGHT FOR BEING SELF-SERVING HAVING BEEN PREPARED BY THE SHIPYARD ITSELF. — The Court cannot sustain the order of the Court of Appeals for the spouses Dy to reimburse Colorado, as the successor-in-interest of Orix Metro, for the expenses incurred by the latter in repairing and drydocking MV Pilar-I, which, according to Bills No. 1 and 2, presented by Colorado, amounted to ₱5,154,620.20. Said Bills do not deserve much evidentiary weight, being also self-serving, having been prepared by Colorado itself. The items therein are not even substantiated by official receipts.

APPEARANCES OF COUNSEL

Castillo Laman Tan Pantaleon & San Jose for petitioner.

D E C I S I O N

CHICO-NAZARIO, *J.*:

Before this Court is a Petition for Review on *Certiorari* under Rule 45 of the Revised Rules of Court seeking the reversal of the Decision[1] dated 22 November 2002 and Resolution[2] dated 2 April 2003 of the Court of Appeals in CA-G.R. CV No. 57321. The appellate court, in its assailed Decision and Resolution,

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[1] Penned by Associate Justice Juan Q. Enriquez, Jr. with Associate Justices Bernardo P. Abesamis and Edgardo F. Sundiam, concurring; *rollo*, pp. 60-71.

[2] *Rollo*, p. 73.

affirmed with modifications the Decision[3] dated 31 July 1997 of the Regional Trial Court (RTC), Makati City, Branch 64, in Civil Case No. 92-2311.

Petitioner Orix Metro Leasing and Finance Corporation (Orix Metro) is a domestic corporation engaged in the leasing and financing business. Respondents Ernesto and Lourdes Dy (spouses Dy) are the proprietors of Limchia Enterprises, engaged in the shipping business.

Needing to raise funds for the acquisition of a cargo vessel, Limchia Enterprises, with Lourdes Dy as co-maker, obtained a loan from Orix Metro in the amount of ₱4,764,024.00[4] evidenced by a Promissory Note executed on 3 August 1990.[5] According to the Promissory Note, Lourdes Dy would pay for the loan, without need of notice or demand, in 36 monthly installments due and payable on the 6th day of each month starting 6 September 1990. Ernesto Dy likewise executed a Continuing Suretyship Agreement,[6] wherein he made himself a solidary obligor in the event his wife Lourdes Dy would default under the terms of the Promissory Note.

With the proceeds of the loan, Limchia Enterprises was able to acquire and register in its name the vessel M/V Pilar-I. On 16 July 1990, the Philippine Coast Guard in Zamboanga City issued in favor of Limchia Enterprises the Certificate of Ownership and Certificate of Philippine Registry of M/V Pilar-I.

As additional security for the loan from Orix Metro, Limchia Enterprises, with Lourdes Dy as signatory, executed on 3 August 1990 a Deed of Chattel Mortgage[7] over M/V Pilar-I in favor of Orix Metro. The mortgage was registered with the Office of the Philippine Coast Guard in Zamboanga City, and annotated on the Certificate of Ownership of Limchia Enterprises, pursuant

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[3] CA *rollo*, pp. 144-153.

[4] Breakdown: ₱3 million loan, the rest withheld by Orix as interest payment *etc*.

[5] *Rollo*, pp. 111-112.

[6] *Id*. at 114-115.

[7] *Id*. at 107-109.

to the Ship Mortgage Act of 1978. Furthermore, the spouses Dy also constituted a Real Estate Mortgage on their Quezon City home in favor of Orix Metro.

On 27 December 1990, M/V Pilar-I was attacked by pirates, and the vessel was brought to Palau Sapi, Kota Kinabalu, Malaysia. The spouses Dy suffered financial losses from the incident and, thus, failed to pay according to the schedule of payments set forth in the Promissory Note dated 3 August 1990. As of August 1992, the spouses Dy should have already paid amortizations amounting to ₱3,140,364.00; however, they were only able to pay ₱2,775,339.00.[8] Consequently, Orix Metro sent them several demand letters.

[8] Orix Metro presented the following table of amortizations:

Monthly Amortization		Date of Payment	
6 September 1990	₱ 132,334.00	6 September 1990	₱ 132,334.00
6 October 1990	132,334.00	6 October 1990	132,334.00
6 November 1990	132,334.00	6 November 1990	132,334.00
6 December 1990	132,334.00	12 December 1990	132,334.00
6 January 1991	132,334.00	20 February 1991	132,334.00
6 February 1991	132,334.00	12 April 1991	132,334.00
6 March 1991	132,334.00	10 June 1991	132,334.00
6 April 1991	132,334.00	10 June 1991	67,666.00
		10 July 1991	50,000.00
		18 July 1991	14,668.00
6 May 1991	132,334.00	18 July 1991	1,999.00
		6 August 1991	130,335.00
6 June 1991	132,334.00	6 August 1991	132,334.00
6 July1991	132,334.00	6 August 1991	132,334.00
6 August 1991	132,334.00	6 August 1991	132,334.00
6 September 1991	129,363.00	6 August 1991	129,363.00
6 October 1991	129,363.00	6 August 1991	129,363.00
6 November 1991	129,363.00	6 August 1991	13,937.00
		2 September 1991	115,426.00
6 December 1991	129,363.00	2 September 1991	16,908.00
		29 January 1992	112,455.00
6 January 1992	129,363.00	29 January 1992	19,679.00
		13 March 1992	50,000.00
		6 April 1992	50,000.00
		7 May 1992	9,484.00
6 February 1992	129,363.00	7 May 1992	40,516.00

The spouses Dy appealed for the restructuring of their loan with Orix Metro. Lourdes Dy also requested the release of the mortgage on their Quezon City home, so they could mortgage the same real property to secure a bank loan, the proceeds of which they would use, in turn, to pay the arrears, penalty charges, as well as advance payments, on their loan from Orix Metro.

On 29 July 1991, Orix Metro sent Lourdes Dy a letter approving the release of the real estate mortgage, thus:

We are pleased to inform you that your request for the release of Real Estate Property located at San Francisco del Monte, Quezon City which is presently mortgaged with us, has been approved subject to the final payment amounting to EIGHT HUNDRED THOUSAND

		6 July 1992	88,847.00
6 March 1992	129,363.00	6 July 1992	129,363.00
6 April 1992	129,363.00	6 July 1992	81,790.00
		13 August 1992	47,573.00
6 May 1992	129,363.00	13 August 1992	102,427.00
		31 August 1992	26,936.00
6 June 1992	129,363.00	31 August 1992	23,064.00 (partial and incomplete)
6 July 1992	129,363.00		
6 August 1992	129,363.00		
6 September 1992	127,261.00		
6 October 1992	127,261.00		
6 November 1992	127,261.00		
6 December 1992	127,261.00		
6 January 1993	127,261.00		
6 February 1993	127,261.00		
6 March 1993	127,261.00		
6 April 1993	127,261.00		
6 May 1993	127,261.00		
6 June 1993	127,261.00		
6 July 1993	127,261.00		
6 August 1993	127,261.00		
TOTAL	₱4,667,496.00		₱2,775,[1]39.00 (Memorandum, *rollo*, pp. 1289-1290):

PESOS only (₱800,000.00) to cover all your arrearages, penalty charges and advance payment.

Release of the said property shall be subject to the final clearing of your check.[9]

When the spouses Dy still failed to make any payments, counsel for Orix Metro sent a final demand letter to Lourdes Dy on 21 February 1992, which reads:

For and in behalf of my client therefore, we are constrained to make FINAL LEGAL DEMAND against your company and its surety, ERNESTO T. DY, for the considered amount of THREE MILLION FOUR HUNDRED ELEVEN THOUSAND FIFTY PESOS (₱3,411,050.00) to be paid and on hand on or before 28 February 1992, failing which we will be constrained to exercise our options under our contract, the pertinent provisions of which have been reproduced above for your perusal, and collect the full amount of ₱4,167,702.00 inclusive of penalties, attorney's fees and liquidated damages as provided for under our contract.[10]

It would appear that several checks issued by Lourdes Dy to Orix Metro to cover the loan bounced, prompting Orix Metro to file several criminal complaints against her for violation of Batas Pambansa Blg. 22, otherwise known as the Bouncing Checks Law, with the Makati RTC, Branch 134, where it was docketed as Criminal Cases No. 92-3964-68.[11] Lourdes Dy wrote Orix Metro a letter on 30 May 1992, and perhaps in the hope of settling aforesaid criminal cases, proposed that she and her husband Ernesto be allowed to update their loan account:

This has reference to I.S. No. 922871, Makati and our plea that you allow us to update our account. We will be paying interest and charges until we are able to reinstate our monthly payments of ₱132,334.00.

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[9] Records, Vol. II, p. 9.

[10] *Rollo*, pp. 214-216.

[11] Criminal Cases No. 92-3964-68 for Violation of Batas Pambansa Blg. 22 were eventually filed against Lourdes Dy before the Makati RTC, Branch 134. In a Decision dated 7 February 1996, the RTC found her guilty beyond reasonable doubt. She has since then jumped bail.

After a careful study and deliberation of cash flow and considering the onset of rainy season which renders mobility slower we would like to offer the following schedule of payment:

June 30, 1992	₱280,000.00
July 31, 1992	330,000.00
August 31, 1992	330,000.00
September 30, 1992	330,000.00
October 30, 1992	130,000.00
November 28, 1992	130,000.00[12]

Orix Metro replied in a letter dated 9 June 1992[13] that it was considering Lourdes Dy's foregoing proposal. It presented a counter-offer, which included, as a condition, the posting by the spouses Dy of additional collateral worth not less than ₱550,000.00.[14]

The spouses Dy, however, asked Orix Metro to waive the requirement for additional collateral:

This is in reply to your letter of June 9, 1992 addressed to our client, Mrs. Lourdes Dy and to inform you that we will be amenable to incorporate the amount of ₱55,128.00 in order that their arrearages will be obliterated on November 30, 1992.

However, we beg to be allowed to reinstate the account without being required to post an additional collateral of ₱500,000.00 considering that the value of the vessel mortgaged is more than double the amount of the loan.[15]

In a letter dated 14 July 1992, Orix Metro agreed to waive the additional collateral, but it required the spouses Dy to reinsure M/V Pilar-I and to issue postdated checks for the proposed payments, to wit:

In response to your letter dated June 22, 1992, we acknowledge your request to waive the requirement of additional collateral of

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[12] Proposed Restructured Schedule of Payment; *rollo,* p. 217.

[13] *Rollo,* p. 218.

[14] *Id.* at 218.

[15] *Id.* at 219.

₱500,000.00 provided that (1) the vessel M/V Pilar I should be reinsured in the amount of ₱3.5 million with an insurance company accredited to COLF; (2) we would require the issuance of post dated checks for all proposed payments including the additional of ₱55,128.00; and (3) we would execute an affidavit of desistance only after the second payment of ₱330,000.00 on 31 July 1992 is cleared and credited to our account.[16]

The spouses Dy did not meet the foregoing conditions and were not able to reinsure the vessel or deliver all of the required postdated checks. In the meantime, on 18 August 1992, Orix Metro filed a Complaint and Petition for Extrajudicial Foreclosure of Preferred Ship Mortgage under Presidential Decree No. 1521 with Urgent Prayer for Attachment[17] with the RTC of Makati City, Branch 64, where it was docketed as Civil Case No. 92-2311.[18]

Upon the filing of an affidavit of merit and the posting of a bond in the amount of ₱2,386,825.00 by Orix Metro as required by the Revised Rules of Court, the RTC issued an Order of Arrest (of Vessel) dated 1 September 1992, directing the Sheriff to arrest, seize, and take immediate possession of M/V Pilar-I and to keep it under the custody of the court. Pursuant to the said arrest order, the Sheriff seized the vessel on 30 September 1992 at Pier 18 in North Harbor, Manila.

On 13 October 1992, Orix Metro filed an Urgent *Ex Parte* Motion asking the RTC to turn over possession of M/V Pilar-I to it.[19]

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[16] *Id.* at 220.

[17] Records, pp. 1-16.

[18] Orix Metro filed criminal complaints against Lourdes Dy for violation of Batas Pambansa Bilang 22, otherwise known as "The Bouncing Checks Law," as a result of the latter's issuance of five worthless checks totaling ₱661,670.00 in payment of her loan obligation to Orix Metro. The criminal informations were docketed as Criminal Cases No. 92-3964 to 68, entitled "*People of the Philippines v. Lourdes P. Dy*," before the Regional Trial Court, Makati City, Branch 134. In a Decision dated 7 February 1996, Branch 134 found Lourdes Dy guilty beyond reasonable doubt. She has since jumped bail.

[19] 9 October 1992; records, pp. 128-130.

Also on 13 October 1992, the spouses Dy filed a Motion to Lift and/or Set Aside Order of Arrest/Seizure of Defendants' vessel M/V Pilar-I, manifesting that the obligation sought to be enforced by Orix Metro was not yet due. The spouses Dy claimed that it acted favorably on their request for restructuring of the loan in its letter dated 10 August 1992,[20] thus, resulting in the reduction of the monthly amortizations and the extension of the terms of payment. The initial payment of the loan under the extended period was to begin on 6 September 1992, or after the Complaint was filed on 18 August 1992.[21] Expectedly, Orix Metro opposed the Motion of the spouses Dy.

Subsequently, the spouses Dy filed their Answer,[22] again averring that there was yet no default on their part at the time the Complaint was filed on 18 August 1992, considering that Orix Metro acquiesced to the restructuring of their loan and to the extension of time to pay.

On 1 February 1993, the RTC issued an Order granting the motion to lift/set aside the order of arrest/seizure of M/V Pilar-I and ordering the Sheriff to return the vessel to the spouses Dy, but requiring them to pay Orix Metro according to the terms embodied in the 10 August 1992 letter of Orix Metro to spouses Dy.[23] However, acting on the Motion for Reconsideration filed by Orix Metro, the RTC set aside its 1 February 1993 Order and directed that M/V Pilar-I be returned to Orix Metro.

The spouses Dy assailed the RTC Order of 23 June 1993 before the Court of Appeals *via* a Petition for *Certiorari*, docketed as CA-G.R. SP No. 32000. In a Resolution dated 21 March 1994, the Court of Appeals dismissed CA-G.R. SP No. 32000 after finding no grave abuse of discretion on the part of the RTC judge when he reinstated the Order of Arrest of the vessel. The Court of Appeals held that the Attachment of the vessel

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[20] Records, p. 163.

[21] 13 October 1992; records, pp. 131-139.

[22] 6 November 1992; *id.* at 249-283.

[23] 1 February 1993; *id.* at 365-368.

was an ancillary remedy, with both parties being protected by the bond put up by Orix Metro.[24] The spouses Dy intended to elevate their case to this Court, but failed to file the proper pleadings within the extended period granted to them; thus, their case was deemed closed and terminated. Thereafter, the proceedings before the RTC resumed.

On 28 September 1994, Orix Metro transferred all of its rights, title to and interests in M/V Pilar-I, as mortgagee, to Colorado Shipyard Corporation (Colorado).[25] Despite the objection of the spouses Dy, the RTC approved the assignment on the condition that the term "foreclosed vessel," used in the Deed of Assignment to refer to M/V Pilar-I, be changed to "mortgaged vessel." An Amended Transfer of Rights by Orix Metro and Colorado, executed and submitted to the RTC on 4 December 1994, was approved on 5 December 1994. Possession of M/V Pilar-I was then transferred to Colorado.

Trial on the merits ensued.

The RTC rendered its Decision[26] on 31 July 1997 in favor of the spouses Dy. It ruled that they had not yet incurred a default, since Orix Metro agreed to a restructured schedule of payment. There being no default, the attempt at foreclosure of the chattel mortgage on M/V Pilar-I by Orix Metro was premature, and the Complaint in Civil Case No. 92-2311 had no cause of action. The dispositive portion of the said RTC Decision is reproduced below:

WHEREFORE, in view of the foregoing, judgment is hereby rendered:

1. Ordering [herein petitioner] Consolidated Orix Leasing and Finance Corporation and whoever is presently in actual possession of M/V "Pilar I" to return said vessels to [herein respondents]. The Sheriff of this Court with the assistance of the Philippine Coast Guard is ordered to effect the return

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[24] Records, pp. 495-498.

[25] *Rollo*, pp. 827-829.

[26] CA *rollo*, pp. 144-153.

of M/V Pilar I to [respondents] Limchia Enterprises and Spouses Ernesto Dy and Lourdes Dy; and

2. Ordering [petitioner] Consolidafted (sic) Orix Leasing and Finance Corporation [to pay] the following amounts to the [respondents]:

   a) ₱2,340,000.00 as actual damages;

   b) ₱300,000.00 as attorney's fees; and,

   c) ₱500,000.00 as moral damages.[27]

Orix Metro sought recourse from the Court of Appeals by filing a Notice of Appeal on 2 September 1997. After being granted its request for extension, Orix Metro finally filed its Appellant's Brief on 29 March 1999. The spouses Dy were able to file their Appellee's Brief on 19 July 1999. The appellate court, however, still found for the spouses Dy based on the following ratiocination:

> Evidently, the parties agreed to restructure the loan and [herein petitioner Orix Metro] acceded to the [herein respondents'] proposed schedule of payments. Records show that in accordance with [Lourdes Dy]'s letter dated May 30, 1992, [respondents] have partially complied with the payment of their obligation for the months of June and July 1992. This is so because [respondents] failed to pay the additional amounts of ₱55,128.00 which they agreed to incorporate in their monthly payments in addition to what was proposed in the May 30, 1992 letter.
>
> **The question we will now resolve is whether or not [respondents] are in default, in order to determine whether or not [Orix Metro] has a cause of action to institute the instant case.**
>
> In the instant case, [Orix Metro] gave [respondents] until November 28, 1992 to pay the amortizations which were not paid on time. However, instead of paying the agreed amount for July 1992, of ₱330,000.00, [respondents] paid only ₱130,000.00, claiming that they still have an advance payment of ₱289,480.00 with [Orix Metro].
>
> When [respondents] defaulted in the payment of the monthly amortizations, [Orix Metro] demanded from [respondents] the full

[27] *Id.* at 153.

payment of the total obligation due in accordance with the terms in the contract of mortgage. However, after representations were made by [respondents], [Orix Metro] accepted the late and partial payments of [respondents], making their default immaterial. When they again defaulted in paying the next amortization due, [Orix Metro] this time made no demand for the full payment of the total obligation. Consequently, [respondents] made payments even after the due date, as in fact they paid several installments to [Orix Metro] which the latter accepted. Thus, upon expiration of the period to pay the monthly amortization, [Orix Metro] continued accepting late payments, an act which cannot but be construed as a waiver of the right to demand full payment of the obligation due and to foreclose the preferred mortgage. When the mortgagee, instead of availing of their right as embodied in the contract of mortgage, accepted and received delayed payments of installments beyond the period stipulated, and the mortgagors were in arrears, the mortgagee in effect waived and are now estopped from exercising such right. (*Heirs of Escanlar vs. Court of Appeals*, 281 SCRA 176).

Under the contract of mortgage, [Orix Metro] was given the right to demand payment of the entire unpaid obligation upon default of [respondents] in the payment of any installments. In other words, without default, such provision remains dormant as the [Orix Metro] could not demand payment of the entire obligation while [respondents] were religiously complying with their monthly obligation. In this case, while it is clear that [respondents] defaulted in paying their monthly amortizations, the parties agreed to update the delayed amortizations payments by way of a new schedule of payments. Thus, unless [respondents] default in paying any of the amortizations in accordance with the new schedule of payments agreed upon, [Orix Metro]'s right to demand payment of the total obligation becomes dormant. Admittedly, there were several defaults as evidenced by previous unsatisfied or partially satisfied payments. However, the previous defaults became immaterial when [Orix Metro], through pleas and entreaties of [respondents] for a chance to continue paying the obligation by partial payments, consequently, and compassionately allowed the latter to resume paying the unpaid amortizations by restructuring the monthly installments. Having become immaterial, it was as though no default previously occurred. This leaves that provision in the Contract of Mortgage on [Orix Metro]'s right to demand payment of the total obligation still dormant, thus, having the effect of stalling the right to foreclose the preferred mortgage (*Jacinto v. Intermediate Appellate Court*, August 29, 1988) [Orix

Metro]'s acceptance of the late and partial payments from [respondents] constitutes a waiver of [Orix Metro]'s right as embodied in the contract of mortgage. (*Elisco Tool Mfg. Corp. vs. Court of Appeals*, 307 SCRA 731).[28]

The Court of Appeals, thus, affirmed the RTC Decision of 31 July 1997, with the following modifications: (1) the award for actual and moral damages be deleted; (2) attorney's fees be reduced to ₱50,000.00; and (3) the spouses Dy be ordered to reimburse Orix Metro for repair and drydocking expenses while the vessel was in the latter's possession. The *fallo* of the Decision of the appellate court reads:

> WHEREFORE, premises considered, the Decision dated July 31, 1997 rendered by the Regional Trial Court of Makati City, Branch 64, is hereby AFFIRMED with modifications, as follows:
>
> 1. The award for actual damages is deleted for lack of basis;
> 2. The award for moral damages is reduced to ₱100,000.00;
> 3. The award (for) attorney's fees is likewise reduced to ₱50,000.00; and
> 4. [Herein respondents] are ordered to reimburse [herein petitioner Orix Metro] for the expenses it incurred for the repair and drydocking of the subject vessel at the time it was under [Orix Metro]'s possession.

The Motion for Reconsideration and Supplement to the Motion for Reconsideration filed by Orix Metro were both denied by the Court of Appeals in its Resolution dated 2 April 2003.

Hence, the instant Petition of Orix Metro with the following assignment of errors:

> I. THE APPELLATE COURT ERRED IN RULING THAT THE PARTIES AGREED TO RESTRUCTURE THE LOAN AND THAT ORIX METRO ACCEEDED TO THE SPOUSES DY'S PROPOSED SCHEDULE OF PAYMENTS.
>
> II. THE APPELLATE COURT ERRED IN RULING THAT ORIX METRO'S ACCEPTANCE OF THE LATE AND PARTIAL

[28] *Rollo,* pp. 66-67.

PAYMENTS FROM THE SPOUSES DY CONSTITUTED A WAIVER OF ORIX METRO'S RIGHT TO FORECLOSE THE SHIP MORTGAGE.

III. THE APPELLATE COURT ERRED IN RULING THAT ORIX METRO SHOULD NOT HAVE APPLIED THE ADVANCE PAYMENT OF ₱289,439.00 TO INTEREST DUE ON THE LOAN WITHOUT INFORMING THE SPOUSES DY.

IV. THE APPELLATE COURT ERRED IN RULING THAT THE SPOUSES DY ARE THE LEGAL POSSESSORS OF RESPONDENT VESSEL.

V. THE APPELLATE COURT ERRED IN RULING THAT ORIX METRO'S ASSIGNEE, COLORADO, COULD NOT BE REIMBURSED BY THE SPOUSES DY FOR EXPENSES INCURRED IN DRYDOCKING AND REPAIRING RESPONDENT VESSEL.

VI. THE APPELLATE COURT ERRED IN RULING THAT THE SPOUSES DY ARE ENTITLED TO MORAL DAMAGES AND ATTORNEY'S FEES.

VII. THE APPELLATE COURT ERRED IN FAILING TO MAKE A SPECIFIC RULING WITH REGARD TO THE BALANCE OF THE SPOUSES DY'S OBLIGATION TO ORIX METRO.

VIII. THE APPELLATE COURT ERRED IN NOT AWARDING DAMAGES TO PETITIONER.[29]

It is a settled doctrine that foreclosure is proper when the debtors are in default of the payment of their obligation. The conditions essential for that foreclosure would be to show, firstly, the existence of the chattel mortgage; and, secondly, the default of the mortgagor.[30]

The constitution of a chattel mortgage over M/V Pilar-I was never disputed. The Deed of Chattel Mortgage over the vessel, in favor of Orix Metro, was signed by Lourdes Dy, on behalf of Limchia Enterprises, on 3 August 1990. The mortgage was

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[29] *Id.* at 1273-1274.

[30] *Servicewide Specialists, Inc. v. Court of Appeals,* 376 Phil. 602, 612 (1999).

duly registered with the Office of the Philippine Coast Guard in Zamboanga City, and annotated on the Certificate of Ownership of Limchia Enterprises.

The issue arises as to the existence of the second condition for foreclosure, *i.e.*, whether the spouses Dy were already in default at the time Orix Metro filed, on 18 August 1992, its Complaint for foreclosure of the mortgage constituted on M/V Pilar-I.

Orix Metro maintains that the spouses Dy defaulted in the payment of their obligation and denies that it acceded to the proposed restructure of payments of the spouses Dy. Orix Metro argues that it rejected the proposal for restructuring of the loan of the spouses Dy when it made a counter-offer with certain conditions, which spouses Dy failed to accept and comply with.

Both parties, however, agree that the issue of whether the spouses Dy were already in default when Orix Metro instituted foreclosure proceedings is factual in nature. There is a question of fact when the doubt arises as to the truth or falsity of the alleged facts.[31] It requires a re-evaluation of the evidence on record and is generally not under the cognizance of this Court. In petitions for review on *certiorari*, the Court only passes upon questions of law in light of the general rule that findings of fact of the appellate court are binding on this Court, especially when these merely affirm the factual findings of the trial court.[32]

In the instant case, both the RTC and the Court of Appeals uniformly found, based on the evidence adduced by the parties, that the filing of the foreclosure proceedings was premature, since the spouses Dy were not yet in default of their obligation at the time thereof. The RTC and the Court of Appeals both observed that while the spouses Dy may not have been up to date on the payment of their monthly amortizations, Orix Metro

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[31] *Barbacina v. Court of Appeals*, G.R. No. 135365, 31 August 2004, 437 SCRA 300, 305.

[32] *Cargolift Shipping, Inc. v. L. Acuario Marketing Corporation*, G.R. No. 146426, 27 June 2006, 493 SCRA 157, 163.

did not pursue its right to foreclose and opted to accept the spouses Dy's offer to restructure their loan obligation. The Court of Appeals, in particular, held that the previous defaults became immaterial when Orix Metro continued to accept the spouses Dy's partial payments.

Strictly, the Court, not being a trier of facts, is under no obligation to examine and weigh anew evidence adduced below. It should already be bound by the aforementioned findings of fact of the RTC, as affirmed by the Court of Appeals. True, there are recognized exceptions to this general rule and the Court may be prevailed upon to review the findings of fact of the Court of Appeals when the same are manifestly mistaken, or when the appealed judgment was based on a misapprehension of facts, or when the appellate court overlooked certain undisputed facts which, if properly considered, would justify a different conclusion.[33] No such circumstances, however, exist in this case.

Nonetheless, in this case, the Court delves into the evidence on record in order to dispel any doubt as to the correctness of the assailed Decision of the Court of Appeals.

The foreclosure proceedings were instituted by Orix Metro on 18 August 1992. An examination of the records discloses that the obligation of the spouses Dy was not yet fully due and demandable on that date. In light of the new schedule of payments, by August 1992, the spouses Dy owed Orix Metro only ₱610,000.00,[34] broken down as follows:

Date of Payment	Monthly Amortization
June 30, 1992	₱280,000.00
July 31, 1992	₱330,000.00

From the admission of Orix Metro, as of 18 August 2002, the spouses Dy already paid, and the former accepted, partial payments in the total amount of ₱450,000.00,[35] the details of which are presented below:

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[33] *Id*.

[34] CA *rollo*, pp. 149-150.

[35] *Rollo*, p. 1280.

Date of Payment	Amount of Partial Payment
July 6, 1992	₱ 88,847.00
July 6, 1992	129,363.010
July 6, 1992	81,790.00
August 13, 1992	47,573.00
August 13, 1992	102,427.00

In addition to the aforementioned payments, the spouses Dy had previously advanced the amount of ₱289,480.00. Resultantly, they have already paid Orix Metro the sum of ₱739,480.00.

Simple computation would reveal that the amount paid (₱739,480.00) by the spouses Dy even exceeded the amount they were due to pay (₱610,000.00) by August 1992. Thus, at the time the foreclosure proceedings were instituted by Orix Metro on 18 August 1992, there was no installment payment due and demandable, and remaining unpaid, which would have rendered the spouses Dy in default and justified the foreclosure of the mortgage on M/V Pilar-I.

The argument of Orix Metro that it did not accede to the restructuring of the loan is only a belated repudiation of the new schedule of payments and deserves scant consideration. Orix Metro had already benefited from the said new schedule when it accepted the payments made by the spouses Dy based thereon. In fact, as further proof of its consent to the restructured schedule of payment, records show that Orix Metro wrote a letter to Limchia Enterprises, Inc. on 10 August 1992 informing the latter that the monthly amortization on its loan had been reduced to ₱127,261.00 for the next 12 months. The spouses Dy relied on the acceptance without any objection by Orix Metro of the payments made based on the new schedule. On equitable principles, particularly on the ground of estoppel, this Court upholds the new schedule of payment. Let it be noted that the doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith and justice, and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon. The doctrine of estoppel springs from equitable principles and the equities in the case. It is designed

to aid the law in the administration of justice where, without its aid, injustice might result. As aptly ruled by the Court of Appeals in this case:

> When [the spouses Dy] defaulted in the payment of the monthly amortizations, [Orix Metro] demanded from [spouses Dy] the full payment of the total obligation due in accordance with the terms in the contract of mortgage. However, after representations were made by [spouses Dy], [Orix Metro] accepted the late and partial payments of [spouses Dy], making their default immaterial. When they again defaulted in paying the next amortization due, [Orix Metro] this time made no demand for the full payment of the total obligation. Consequently, [spouses Dy] made payments even after the due date, as in fact they paid several installments to [Orix Metro] which the latter accepted. **Thus, upon the expiration of the period to pay the monthly amortization, [Orix Metro] continued accepting late payments, an act which cannot but be construed as a waiver of the right to demand full payment of the obligation due and to foreclose the preferred mortgage. When the mortgagee, instead of availing of their right as embodied in the contract of mortgage, accepted and received delayed payments of installments, beyond the period stipulated, and the mortgagors were in arrears, the mortgagee in effect waived and are now estopped from exercising such right**. x x x.
>
> Under the contract of mortgage, [Orix Metro] was given the right to demand payment of the entire unpaid obligation upon default of [spouses Dy] in the payment of any installments. In other words, without default, such provision remains dormant as the [Orix Metro] could not demand payment of the entire obligation while [spouses Dy] were religiously complying with their monthly obligations. **In this case, while it is clear that [spouses Dy] defaulted in paying their monthly amortizations, the parties agreed to update the delayed amortization payments by way of a new schedule of payments. Thus, unless [spouses Dy] default in paying any of the amortizations in accordance with the new schedule of payments agreed upon, [Orix Metro]'s right to demand payment of the total obligation becomes dormant**. Admittedly, there were several defaults as evidenced by previous unsatisfied or partially satisfied payments. However, the previous defaults became immaterial when [Orix Metro], through the pleas and entreaties of [spouses Dy] for a chance to continue paying the obligation by partial payments, consequently and compassionately allowed the latter to resume paying

the unpaid amortizations by restructuring the monthly installments. Having become immaterial, it was as though no default previously occurred. This leaves that payment of the total obligation still dormant, thus, having the effect of stalling the right to foreclose the preferred mortgage. [Orix Metro]'s acceptance of the late and partial payments from [spouses Dy] constitutes a waiver of petitioner's right as embodied in the contract of mortgage.[36] (Emphases supplied.)

Suffice it to say that as of the time Orix Metro instituted the foreclosure proceedings against the spouses Dy, the legal basis for foreclosure of mortgage did not exist. Thus, Orix Metro had no cause of action against them and cannot demand foreclosure of the mortgage on M/V Pilar-I.

On the application of the advance payment of ₱289,480.00 to the obligation, the Court affirms the ruling of the Court of Appeals that Article 1252[37] of the Civil Code controls. Therefore, the spouses Dy may properly apply said advance payment against their outstanding obligation following the new schedule of payments. Additionally, in contracts involving installment payments with interest chargeable against the remaining balance of the obligation, the creditor is duty-bound to inform the debtor of the amount of interest that falls due, and that he is applying the installment payments to cover said interest. Without notifying the debtor, the creditor cannot apply the payments to the interest and then later on hold the debtor in default for nonpayment of installments on the principal.[38] In this case, as found by the

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[36] *Id.* at 66-67.

[37] The provision reads:

Art. 1252. He who has various debts of the same kind in favor of one and the same creditor, may declare at the time of making the payment, to which of them the same must be applied. Unless the parties so stipulate, or when the application of payment is made by the party for whose benefit the term has been constituted, application shall not be made as to debts which are not yet due.

If the debtor accepts from the creditor a receipt in which an application of the payment is made, the former cannot complain of the same, unless there is a cause for invalidating the contract.

[38] *Rapanut v. Court of Appeals*, 316 Phil. 391, 398 (1995).

appellate court, Orix Metro clearly failed to provide the spouses Dy a detailed accounting of the remaining principal obligation, interest, and payments already made.[39] The spouses Dy had all the right to apply the advance payment to the amount due in the new schedule of payments.

The Court further agrees in the deletion by the Court of Appeals of the award for actual damages made by the RTC. Actual or compensatory damages cannot be presumed, but must be proven with a reasonable degree of certainty.[40] Here, only the bare and self-serving testimonies of respondents' witnesses support the claim for actual damages. The Court cannot simply rely on speculation, conjecture, or guesswork as to the fact and amount of damages, but must depend on competent proof that the claimant has suffered, and an evidence of, the actual amount thereof.[41]

Finally, the Court cannot sustain the order of the Court of Appeals for the spouses Dy to reimburse Colorado, as the successor-in-interest of Orix Metro, for the expenses incurred by the latter in repairing and drydocking MV Pilar-I,[42] which, according to Bills No. 1 and 2, presented by Colorado, amounted to ₱5,154,620.20.[43] Said Bills do not deserve much evidentiary weight, being also self-serving, having been prepared by Colorado itself. The items therein are not even substantiated by official receipts.[44]

WHEREFORE, premises considered, the petition for review on *certiorari* is *DENIED*. The Decision dated 22 November 2002 and Resolution dated 2 April 2003 of the Court of Appeals

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[39] CA *rollo*, p. 234.

[40] *MCC Industrial Sales Corporation v. Ssangyong Corporation*, G.R. No. 170633, 17 October 2007, 536 SCRA 408, 466.

[41] *Id.* at 468.

[42] CA *rollo*, p. 236.

[43] Records, pp. 74-112.

[44] See *MCC Industrial Sales Corporation v. Ssangyong Corporation, supra* note 40 at 467.

in CA-G.R. CV No. 57321 are *AFFIRMED with the MODIFICATION* that the order requiring respondents spouses Dy to reimburse petitioner Orix Metro/Colorado's expenses incurred for the repair and drydocking of the vessel MV Pilar-I is *DELETED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Velasco, Jr., Nachura, and *Peralta, JJ.,* concur.

THIRD DIVISION

[G.R. No. 161902. September 11, 2009]

EDGAR MERCADO, *petitioner, vs.* **PEOPLE OF THE PHILIPPINES,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; FACTORS TO BE CONSIDERED IN DETERMINING THE RELIABILITY OF OUT-OF-COURT IDENTIFICATION MADE BY A WITNESS; BURDEN TO PROVE THAT THE OUT-OF-COURT IDENTIFICATION WAS UNDULY SUGGESTIVE RESTS ON THE ACCUSED. — The Court, in a long line of cases, has reiterated *the totality of circumstance test* set forth in *People v. Teehankee, Jr.*, which dictates that the following factors be considered in determining the reliability of the out-of-court identification made by a witness, *i.e.*, (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at the time of the crime; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness at the identification; (5) the length of time between the crime and the identification; and (6) the suggestiveness of

the identification procedure. To prevent any undue suggestiveness in the identification process, it was held that the correct way is to: *first*, present a series of photographs to the witness, not solely the photograph of the suspect; and *second*, when showing a group of pictures to the witness, the arrangement and display of said photographs should give no suggestion whatsoever which one of the pictures belongs to the suspect. The photographic identification must be free from any impermissible suggestions that would single out a person to the attention of the witness making the identification. However, as held in *Teehankee, Jr.*, the burden to prove that the out-of-court identification was unduly suggestive rests on the accused.

2. ID.; ID.; ID.; OUT-OF-COURT IDENTIFICATION OF EYEWITNESS FOUND TO BE VERY RELIABLE AND ADMISSIBLE APPLYING THE TOTALITY OF CIRCUMSTANCES TEST. — Applying the totality of circumstance test in this case, the Court finds the out-of-court identification made by Gonzales to be very reliable, thus, admissible. Gonzales had ample opportunity to view petitioner at the time of the crime. From the time petitioner arrived at the store where Gonzales' group was drinking, petitioner stood very near Gonzales, about one-and-a- half arm's length away, and Gonzales even tried to start a conversation with him and Cabiles. The latter had been able to observe petitioner buy a bottle of beer, pay for it, break said bottle then draw his weapon and stab Nelson Docto. Gonzales' unwavering testimony, even while being grilled on cross-examination, reveals that petitioner's startling attack on Nelson Docto had his full attention. Even if Gonzales was also attacked and wounded, Cabiles' attack on him only began after petitioner had already stabbed Nelson Docto. Thus, Gonzales' attention on petitioner was unhampered. The Court acknowledged in *Teehankee, Jr.*, that: Experience shows that precisely because of the unusual acts of bestiality committed before their eyes, eyewitnesses, especially the victims to a crime, can remember with a high degree of reliability the identity of criminals. We have ruled that the natural reaction of victims of criminal violence is to strive to see the appearance of their assailants and observe the manner the crime was committed. Most often, the face and body movements of the assailant create an impression which cannot be easily erased from their memory. Moreover, Gonzales also said that petitioner's face had become familiar to him

even before the stabbing incident because he used to be a CVO of *Barangay* Mansilingan, and when he was on duty, he often saw petitioner around said *barangay*. The identification was also done around December 26, 1996 to December 31, 1996, still near the date of the incident.

3. ID.; ID.; ID.; NO CIRCUMSTANCE WAS SHOWN THAT WOULD POINT TO ANY IMPERMISSIBLE SUGGESTION GIVEN TO THE EYEWITNESS DURING THE IDENTIFICATION OF PETITIONER AS ONE OF THE ASSAILANTS. — Petitioner had been unable to show any circumstance that would point to any impermissible suggestion given to Gonzales during the identification of petitioner as one of the assailants. Instead, Gonzales' answers during cross-examination reveal that investigators complied with the guidelines when Gonzales, one of the victims, was asked to identify the suspects from several pictures. Verily, with nearly a hundred photographs from which Gonzales may pick out and identify who his assailant is, it is highly improbable for the witness to have been given impermissible suggestions. Thus, Gonzales' identification of petitioner as one of the assailants is highly reliable and should be accorded great credence.

4. ID.; ID.; ID.; ALLEGED INCONSISTENCIES ARE MORE APPARENT THAT REAL; WITNESSES' CANDID, THOUGH, IMPRECISE LANGUAGE IN HIS AFFIDAVIT BOLSTERS HIS CREDIBILITY. — An examination of the records reveal that the alleged inconsistencies are more apparent than real. The statement in Gonzales' affidavit calling the two accused as "two unidentified men" does not foreclose the fact that the affiant is familiar with the faces of the assailants but cannot identify them by their names. In fact, in his affidavit, Gonzales already mentioned that he remembered seeing accused Cabiles before as the latter had a scar on his face. As stated in *Decasa v. Court of Appeals*, to wit: x x x [T]his Court had consistently ruled that the **alleged inconsistencies between the testimony of a witness in open court and his sworn statement before the investigators are not fatal defects** to justify a reversal of judgment. Such discrepancies do not necessarily discredit the witness since *ex parte* affidavits are almost always incomplete. A sworn statement or an affidavit does not purport to contain a complete compendium of the details of the event narrated by the affiant. Sworn statements

taken *ex parte* are generally considered to be inferior to the testimony given in open court. x x x The discrepancies in [the witness]'s testimony do not damage the essential integrity of the prosecution's evidence in its material whole. Instead, **the discrepancies only erase suspicion that the testimony was rehearsed or concocted. These honest inconsistencies serve to strengthen rather than destroy [the witness]'s credibility**. Here, Gonzales' statement in his affidavit that "two unidentified men arrived" cannot be taken to mean that he cannot identify the assailants from mug shots or if he comes face to face with said persons again. His candid, though, imprecise language in his affidavit merely bolsters his credibility.

5. ID.; ID.; ID.; DEFENSE OF ALIBI; UNAVAILING IN THE FACE OF CREDIBLE AND RELIABLE POSITIVE IDENTIFICATION OF PETITIONER AS ONE OF THE ASSAILANTS. — In the face of the credible and reliable positive identification made by Gonzales, petitioner's defense of alibi is absolutely unavailing. As held in *People v. Tormis*, "the defense of alibi, being inherently weak, cannot prevail over the clear and positive identification of the accused as the perpetrator of the crime." Indeed, petitioner's bare allegation that he arrived in Bacolod only on the morning of December 24, 1996 cannot be given much credence since it is unsupported by evidence of the time of his travel or the time he left Iloilo, such as a ticket from the ferry he boarded. There is no evidence presented showing that petitioner was actually in Iloilo as of the time of the commission of the crime. The witnesses petitioner presented only proved that they **saw** him only on the morning of December 24, 1996, but **this does not prove that petitioner could not have been in Bacolod at an earlier time before they saw him**.

APPEARANCES OF COUNSEL

Wenslow B. Teodosio for petitioner.
The Solicitor General for respondent.

D E C I S I O N

PERALTA, *J.*:

This resolves the Petition for Review on *Certiorari* under Rule 45 of the Rules of Court, praying that the Decision[1] of the Court of Appeals (CA) dated December 23, 2003, be reversed and set aside.

Petitioner was charged under the following Amended Informations in Criminal Case No. 97-18386 with Frustrated Homicide and Criminal Case No. 97-18387 with Homicide.

The Amended Information for Criminal Case No. 97-18386 reads as follows:

> The undersigned Assistant City Prosecutor accuses ROMULO CABILES and EDGAR MERCADO *alias* "TOMING" of the crime of FRUSTRATED HOMICIDE (Under Article 249, in relation to Article 6 of the Revised Penal Code), committed as follows:
>
> That on or about the 24th day of December 1996, in the City of Bacolod, Philippines, and within the jurisdiction of this Honorable Court, the herein accused, conspiring, confederating and acting in concert, without any justifiable cause or motive, being then armed and provided with a bladed weapon (knife), with intent to kill, did then and there willfully, unlawfully and feloniously attack, assault and stab with said weapon one JOHN B. GONZALES, thereby inflicting upon his person the following injuries, to wit:
>
> – Incised Wound 3 cm., Base of Thumb, Left with Transection of Extensor Pollices Longus & Brevis Tendons;
> – Incised Wound, 6 cm., Wrist, Right;
> – Incised Wound 7 cm., Forehead
> – Incised Wound 5 cm., Axilla, Left
>
> Operation/Procedure Done: Tendon Repair;
> Ligation of Bleeders & Suturing of Wounds
>
> thus performing all the acts of execution which could have produced the crime of homicide, as a consequence directly by overt acts, but

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[1] Penned by Associate Justice Amelita G. Tolentino, with Associate Justices Eloy R. Bello, Jr. and Noel G. Tijam, concurring; *rollo*, pp. 27-45.

nevertheless, did not produce it by reason of cause independent of the will of the perpetrators, that is, due to the timely and able medical assistance which saved the life of the victim.

Act contrary to law.[2]

The Amended Information for Criminal Case No. 97-18387 reads, thus:

The undersigned Assistant City Prosecutor accuses ROMULO CABILES and EDGAR MERCADO *alias* "TOMING" of the crime of HOMICIDE (Under Article 249 of the Revised Penal Code), committed as follows:

That on or about the 24th day of December 1996, in the City of Bacolod, Philippines, and within the jurisdiction of this Honorable Court, the herein accused, conspiring, confederating and acting in concert, without any justifiable cause or motive, being then armed and provided with an ice pick, with intent to kill, did, then and there wilfully, unlawfully and feloniously assault, attack and stab with said weapon one NELSON DOCTO, thereby inflicting upon the person of the latter wounds, which directly caused his death, to wit:

– Wound, stab, .02 cm. in diameter, 7 inches deep at the 5th intercost space directed medially downward hitting the right lung and liver.

– Wound, stab, 0.3 cm. in diameter, 7 inches deep at the left lower hypochoriac region directed medially forward rupturing the abdominal aorta.

– Wound, stab, 0.2 cm in diameter, 7 inches at the upper left buttock directed forward medially involving the intestines.

– Wound, stab, 0.3 cm. in diameter, 7 inches deep at the lower left buttock involving the intestines.

Cause of Death: Cardio-respiratory arrest, hypovolemic shock ruptured abdominal aorta due to multiple stab wounds.

Act contrary to law.[3]

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[2] Records (Crim. Case No. 97-18386), p. 40.

[3] Records (Crim. Case No. 97-18387), p. 23.

Petitioner pleaded not guilty to the Amended Informations and the cases were tried jointly.

The prosecution evidence presents the following scenario:

Around 9 o'clock in the evening of December 23, 1996, brothers Nelson and Agaton Docto, together with John Gonzales, were drinking beer in front of the *sari-sari* store owned by Sheila Realista located at St. Francis Subdivision, Taculing, Bacolod City. Also drinking beer at the store was another group comprised of Morito Piansay, Jose Ramos, and a certain Jesse and Monding. After a while, an altercation broke out between Nelson Docto and Morito Piansay when the former belittled the latter's "magic" card tricks. Irked, Piansay left in a huff saying, "You just wait for me here, I cannot fight back because I am old." Piansay's companions also left with him. Nelson and Agaton Docto, as well as John Gonzales, remained at the store and continued drinking.

Around 12 o'clock midnight of December 24, 1996, Nelson Docto sang "Bayang Magiliw." Soon thereafter, Romulo Cabiles alias "Small" arrived at the store to buy beer. Sheila Realista initially refused to sell beer to Cabiles but relented upon the insistence of Nelson Docto. After getting his beer, Cabiles stood near the barbecue stand about one-and-a-half arms length away from Agaton Docto. Agaton Docto [should be Nelson Docto] and John Gonzales continued their conversation while Nelson Docto [should be Agaton Docto], who was by then heavily drunk, was almost dozing.

At this point, petitioner Edgar Mercado *alias* "Taming" arrived and also bought a bottle of beer. Petitioner sat on the stool near John Gonzales. Engaging petitioner in a conversation, Gonzales asked the former where he was from. Petitioner replied that he was from Barangay 29. Petitioner then asked for his bill and paid it. After receiving his change, petitioner suddenly broke the beer bottle he was holding in front of Realista, who cried out "*Linti!*" in surprise. Almost simultaneously, Cabiles struck Agaton Docto with a wooden stool. At the time, Agaton Docto was almost asleep and sitting with his head bowed. He slumped down on the table, unconscious, after being hit.

Cabiles then turned his attention to John Gonzales and repeatedly stabbed him with a stainless knife. Gonzales tried to defend himself but was nevertheless hit on his forehead, hands and left armpit. When Cabiles stabbed Gonzales in the armpit, Cabiles was sitting on top

of Gonzales who was lying supine on the ground. Witnessing the attack, Realista threw a stone at Cabiles in an effort to stop him. The stone hit Cabiles on the neck, momentarily stunning him and affording Gonzales a chance to escape. Cabiles, however, soon recovered and pursued the fleeing Gonzales.

While Gonzales was being attacked by Cabiles, petitioner, after breaking the beer bottle, pulled out a weapon called "*tres cantos*" and repeatedly stabbed Nelson Docto. Petitioner then joined Cabiles in pursuing the fleeing Gonzales. Realista followed, but was unable to catch up with the group.

John Gonzales and Nelson Docto were rushed to the Bacolod Sanitarium Hospital. Dr. Alan Nodal, the attending physician, treated John Gonzales for the following injuries:

> Incised wound 3 cm. base of thumb, left with Transection of Exterior Pollices Longus and Brevis Tendons;
>
> Incised wound, 6 cm., wrist, right;
> Incised wound, 7 cm., forehead;
> Incised wound, 5 cm., maxilla, left.

Nelson Docto died as a result of the injuries he sustained. His Certificate of Death states the cause of his death as "Cardiopulmonary Arrest, Hypovolemic Shock due to multiple stab wounds on the abdomen and chest."

The autopsy on the cadaver of Nelson Docto conducted by Dr. Johnnie V. Raito, Jr., City Health Officer of Bacolod City, showed the following *Post Mortem* findings:

1. Wound, stab 0.2 cm. in diameter, 7 inches deep at the intercostal space, directed medially downward hitting the right lung and liver;
2. Wound, stab, 0.3 cm. in diameter, 7 inches deep at the left lower hypochoriac region directed medially forward rupturing the abdominal aorta;
3. Wound, stab, 0.3 cm. in diameter, 7 inches at the upper left buttocks directed forward medially involving the intestines;
4. Wound, stab, 0.3 cm. in diameter, 7 inches deep at the lower left buttock involving the intestines.[4]

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[4] *Rollo*, pp. 156-160.

On the other hand, petitioner maintains that he could not have been the malefactor because he resides in Iloilo and only arrived in Bacolod between 7 and 8 o'clock in the morning of December 24, 1996. Petitioner presented his testimony and those of his aunt Milagros Vasquez, his sister-in-law Catherine Mercado and his friend Rey Diorama. They all testified that petitioner, who resides in Iloilo, only arrived in Bacolod City on the morning of December 24, 1996. Petitioner said he, together with his wife and child, and a secretary of his wife, left Iloilo at 5:30 in the morning of December 24, 1996 and they arrived at Banago wharf at around 7 o'clock in the morning of the same day. It was already 8 o'clock in the morning of that day when they arrived in Bacolod. Catherine Mercado stated that petitioner's party arrived at their house in Bacolod between 7 and 8 o'clock in the morning of December 24, 1996; and that the ferry trip from Iloilo to Bacolod only takes one hour. Rey Diorama testified that he only saw petitioner in Bacolod around 9 o'clock in the morning of that day. Milagros Vasquez also said that at around 8:30 to 9 o'clock in the morning of December 24, 1996, petitioner called her on the phone, informing her that they had just arrived in Bacolod and they were bringing salad to the family reunion. Witness for the accused SPO4 Ismail Tan only stated that he accompanied SPO3 Amador Versos to the Bacolod Sanitarium and Hospital. It was the latter who interviewed the victim John Gonzales and the available witnesses, so he could not say with certainty whether Versos asked questions about the identity of the assailants. He, however, identified the Police Blotter Report where it was stated that the attackers were "2 unidentified persons."

After the parties rested their case, the Regional Trial Court (RTC) of Bacolod City, Branch 52 promulgated its Joint Decision[5] on May 30, 2000. The dispositive portion thereof reads, thus:

> WHEREFORE, in view of all the foregoing premises, the Court hereby finds both accused EDGAR MERCADO *alias* "TOMING" and ROMULO CABILES *alias* "SMALL" GUILTY beyond reasonable doubt:

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[5] *Rollo,* pp. 46-69.

1. In Criminal Case No. 97-18387 for Homicide, and hereby sentences each accused to suffer the indeterminate penalty of eight (8) years and seven (7) months of *prison mayor*, as minimum, to sixteen (16) years of *reclusion temporal*, as maximum; to jointly and severally pay the amount of ₱50,000.00 for the death of Nelson Docto, Jr. and to pay the cost of suit; and

2. In Criminal Case No. 97-18386 for Frustrated Homicide, each accused is hereby sentenced to suffer the indeterminate penalty of two (2) years and six (6) months of *prison correctional*, as minimum, to eight (8) years and six (6) months of *prison mayor*, as maximum, and also to pay for the cost of suit.

The two accused are entitled to the full credit of their preventive detention.

SO ORDERED.[6]

On appeal with the CA, said conviction was affirmed *in toto*.

Only petitioner Edgar Mercado availed of the remedy of the present petition for review on *certiorari* under Rule 45 of the Rules of Court, hence, as to Romulo Cabiles, the CA Decision has become final and executory.

In the present petition, petitioner alleges that:

A. THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE DECISION OF THE LOWER COURT SUSTAINING THE FINDINGS OF CONVICTION OF THE ACCUSED BASED ON THE ALLEGED POSITIVE IDENTIFICATION BY THE PROSECUTORS' TWO WITNESSES, NAMELY: JOHN GONZALES AND SHEILA REALISTA;

B. THE COURT OF APPEALS ERRED WHEN IT SUSTAINED THE FACTUAL FINDINGS OF THE LOWER COURT ON THE TESTIMONY OF THE TWO PROSECUTION WITNESSES, NOTWITHSTANDING THE FACT THAT IT OVERLOOKED CERTAIN MATERIAL FACTS LIKE THE CONFLICTING AND MATERIAL DISCREPANCIES IN THE TESTIMONIES OF THE TWO (2) WITNESSES WHICH IF DULY CONSIDERED WOULD AFFECT THE RESULT OF THE JUDGMENT;

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[6] *Id.* at 69.

C. THE COURT OF APPEALS ERRED WHEN IT FAILED TO CONSIDER THE DEFENSE OF ALIBI BY THE ACCUSED NOTWITHSTANDING THE DOUBTFUL AND UNRELIABLE IDENTIFICATION OF THE ACCUSED BY THE TWO (2) PROSECUTION WITNESSES.[7]

The meat of petitioner's argument is that the identification of petitioner made by prosecution witnesses John Gonzales and Sheila Realista is fraught with defects, thus, unreliable and insufficient to warrant a finding of guilt beyond reasonable doubt. He further points out that there are inconsistencies between the witnesses' statements in their affidavits and their testimony.

Petitioner's arguments are baseless.

The Court, in a long line of cases,[8] has reiterated *the totality of circumstance test* set forth in *People v. Teehankee, Jr.*,[9] which dictates that the following factors be considered in determining the reliability of the out-of-court identification made by a witness, *i.e.*, (1) the witness' opportunity to view the criminal at the time of the crime; (2) the witness' degree of attention at the time of the crime; (3) the accuracy of any prior description given by the witness; (4) the level of certainty demonstrated by the witness at the identification; (5) the length of time between the crime and the identification; and (6) the suggestiveness of the identification procedure.

To prevent any undue suggestiveness in the identification process, it was held that the correct way is to: *first*, present a series of photographs to the witness, not solely the photograph of the suspect; and *second*, when showing a group of pictures to the witness, the arrangement and display of said photographs should give no suggestion whatsoever which one of the pictures belongs to the suspect. The photographic identification must be free from any impermissible suggestions that would single out

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[7] *Rollo*, pp. 11-12

[8] *People of the Philippines v. Samuel Algarme y Bond and Rizaldy Gelle y Biscocho*, G.R. No. 175978, February 12, 2009; *People v. Rodrigo*, G.R. No. 176159, September 11, 2008; *People v. Rivera*, 458 Phil. 856 (2003).

[9] G.R. Nos. 111206-08, October 6, 1995, 249 SCRA 54, 96.

a person to the attention of the witness making the identification.[10] However, as held in *Teehankee, Jr.*,[11] the burden to prove that the out-of-court identification was unduly suggestive rests on the accused.

Applying the totality of circumstance test in this case, the Court finds the out-of-court identification made by Gonzales to be very reliable, thus, admissible. Gonzales had ample opportunity to view petitioner at the time of the crime. From the time petitioner arrived at the store where Gonzales' group was drinking, petitioner stood very near Gonzales, about one-and-a- half arm's length away, and Gonzales even tried to start a conversation with him and Cabiles. The latter had been able to observe petitioner buy a bottle of beer, pay for it, break said bottle then draw his weapon and stab Nelson Docto. Gonzales' unwavering testimony, even while being grilled on cross-examination, reveals that petitioner's startling attack on Nelson Docto had his full attention. Even if Gonzales was also attacked and wounded, Cabiles' attack on him only began after petitioner had already stabbed Nelson Docto. Thus, Gonzales' attention on petitioner was unhampered.[12] The Court acknowledged in *Teehankee, Jr.*,[13] that:

> Experience shows that precisely because of the unusual acts of bestiality committed before their eyes, eyewitnesses, especially the victims to a crime, can remember with a high degree of reliability the identity of criminals. We have ruled that the natural reaction of victims of criminal violence is to strive to see the appearance of their assailants and observe the manner the crime was committed. Most often, the face and body movements of the assailant create an impression which cannot be easily erased from their memory.[14]

Moreover, Gonzales also said that petitioner's face had become familiar to him even before the stabbing incident because he

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[10] *People v. Rodrigo, supra* note 8, citing *People v. Pineda*, 429 SCRA 478, 497-498 (2004); and *People v. Villena*, G.R. No. 140066, October 14, 2002, 390 SCRA 637, 650.

[11] *Supra* note 9, at 95.

[12] TSN, September 29, 1998, pp. 12-24.

[13] *People v. Teehankee, Jr., supra* note 9.

[14] *Id.* at 97-98.

used to be a CVO of *Barangay* Mansilingan, and when he was on duty, he often saw petitioner around said *barangay*. The identification was also done around December 26, 1996 to December 31, 1996, still near the date of the incident.[15]

On the other hand, petitioner had been unable to show any circumstance that would point to any impermissible suggestion given to Gonzales during the identification of petitioner as one of the assailants. Instead, Gonzales' answers during cross-examination reveal that investigators complied with the guidelines when Gonzales, one of the victims, was asked to identify the suspects from several pictures, to wit:

ATTY. NATU-EL:
Q You said you identified specifically Toming Mercado by his picture shown to you by the Police Investigator after you were released from the hospital, is that correct?

WITNESS:
A Yes, Sir.

ATTY. NATU-EL:
Q And that was still December 1996 when the picture was shown to you?

WITNESS:
A Yes, Sir.

ATTY. NATU-EL:
Q By the way Mr. Witness, **how many pictures were shown to you** by the Police Investigator of the person for you to identify the suspect or assailant?

WITNESS:
A **Many Sir**.

x x x x x x x x x

ATTY. NATU-EL:
Q Mr. Witness, you said there were several pictures shown to you by the police. Could you roughly estimate how many pictures were shown to you?

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[15] TSN, September 29, 1998, pp. 35-48.

WITNESS:
A **Nearly one hundred** (100).[16]

Verily, with nearly a hundred photographs from which Gonzales may pick out and identify who his assailant is, it is highly improbable for the witness to have been given impermissible suggestions. Thus, Gonzales' identification of petitioner as one of the assailants is highly reliable and should be accorded great credence.

Gonzales' identification of petitioner is already sufficient to prove that petitioner is the author of the crime, justifying his conviction. Sheila Realista's identification of the malefactors is merely corroborating. Therefore, although the process through which Realista identified petitioner and the other accused do not exactly comply with the aforementioned guidelines, *i.e.*, only their pictures were shown to Realista and the widow of Nelson Docto pointed out to her the two accused before she testified in court, these defects are not enough to negatively affect in any way the identification made by Gonzales.

Next, petitioner points out the supposed inconsistencies in Gonzales' affidavit and his testimony in court. Petitioner harps on the fact that in Gonzales' Affidavit[17] dated February 1, 1997, he said that "two unidentified men arrived" while he testified in court that even before that fateful night, he had seen petitioner around *Barangay* Mansilingan, and he used to see accused Cabiles everytime his passenger jeepney passed by the road junction.[18] An examination of the records reveal that the alleged inconsistencies are more apparent than real. The statement in Gonzales' affidavit calling the two accused as "two unidentified men" does not foreclose the fact that the affiant is familiar with the faces of the assailants but cannot identify them by their names. In fact, in his affidavit, Gonzales already mentioned that he remembered seeing accused Cabiles before as the latter had a scar on his face. As stated in *Decasa v. Court of Appeals*,[19] to wit:

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[16] TSN, September 29, 1998, pp. 47, 48, 74. (Emphasis supplied.)

[17] Record, p. 8.

[18] TSN, September 29, 1998, pp. 37-44.

[19] G.R. No. 172184, July 10, 2007, 527 SCRA 267.

x x x [T]his Court had consistently ruled that the **alleged inconsistencies between the testimony of a witness in open court and his sworn statement before the investigators are not fatal defects** to justify a reversal of judgment. Such discrepancies do not necessarily discredit the witness since *ex parte* affidavits are almost always incomplete. A sworn statement or an affidavit does not purport to contain a complete compendium of the details of the event narrated by the affiant. Sworn statements taken *ex parte* are generally considered to be inferior to the testimony given in open court.

x x x x x x x x x

The discrepancies in [the witness]'s testimony do not damage the essential integrity of the prosecution's evidence in its material whole. Instead, **the discrepancies only erase suspicion that the testimony was rehearsed or concocted. These honest inconsistencies serve to strengthen rather than destroy [the witness]'s credibility**.[20]

Here, Gonzales' statement in his affidavit that "two unidentified men arrived" cannot be taken to mean that he cannot identify the assailants from mug shots or if he comes face to face with said persons again. His candid, though, imprecise language in his affidavit merely bolsters his credibility.

In the face of the credible and reliable positive identification made by Gonzales, petitioner's defense of alibi is absolutely unavailing. As held in *People v. Tormis*,[21] "the defense of alibi, being inherently weak, cannot prevail over the clear and positive identification of the accused as the perpetrator of the crime." Indeed, petitioner's bare allegation that he arrived in Bacolod only on the morning of December 24, 1996 cannot be given much credence since it is unsupported by evidence of the time of his travel or the time he left Iloilo, such as a ticket from the ferry he boarded. There is no evidence presented showing that petitioner was actually in Iloilo as of the time of the commission of the crime. The witnesses petitioner presented only proved

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[20] *Id.* at 280-282. (Emphasis supplied.)

[21] G.R. No. 183456, December 18, 2008, 574 SCRA 903, 916.

that they **saw** him only on the morning of December 24, 1996, but **this does not prove that petitioner could not have been in Bacolod at an earlier time before they saw him**.

In sum, petitioner failed to show any reason for the Court to overturn the findings of the RTC and the CA.

IN VIEW OF THE FOREGOING, the petition is *DENIED*. The Decision of the Court of Appeals dated December 23, 2003 is hereby *AFFIRMED*.

SO ORDERED.

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

FIRST DIVISION

[G.R. No. 163270. September 11, 2009]

EDUARDO M. TOMADA, SR., *petitioner, vs.* **RFM CORPORATION-BAKERY FLOUR DIVISION and JOSE MARIA CONCEPCION III,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; FACTUAL FINDINGS OF QUASI-JUDICIAL AND ADMINISTRATIVE BODIES ARE ACCORDED GREAT RESPECT AND EVEN FINALITY. — We see no reason to overturn the factual findings of the Labor Arbiter, which were subsequently approved by the NLRC and the appellate court. The present case adheres to the rule that factual findings of quasi-judicial and administrative bodies are accorded great respect and even finality by the courts. Tomada failed to show that the factual findings were arbitrarily made and disregarded evidence on record.

2. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS, TERMINATION OF EMPLOYMENT; AN EMPLOYER MAY NOT BE EXPECTED TO CONTINUE IN EMPLOYMENT A PERSON WHO LACKS REGARD FOR HIS EMPLOYER'S RULES; CASE AT BAR. — Tomada's acts constitute serious misconduct, one of the five enumerated causes for termination by employer in Article 282 of the Labor Code. 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; x x x By sleeping on the job and leaving his work area without prior authorization, Tomada did not merely disregard company rules. Tomada, in effect, issued an open invitation for others to violate those same company rules. Indeed, considering the presence of trainees in the building and Tomada's acts, Tomada failed to live up to his company's reasonable expectations. Tomada's offenses cannot be excused upon a plea of being a "first offense," or have not resulted in prejudice to the company in any way. No employer may rationally be expected to continue in employment a person whose lack of morals, respect and loyalty to his employer, regard for his employer's rules, and appreciation of the dignity and responsibility of his office, has so plainly and completely been bared.

3. ID.; ID.; ID.; MISCONDUCT; REQUISITES TO BE A JUST CAUSE FOR DISMISSAL; PRESENT IN CASE AT BAR. — Misconduct is improper or wrong conduct. It is the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error of judgment. The misconduct to be serious must be of grave and aggravated character and not merely trivial or unimportant. Such misconduct, however serious, must nevertheless be in connection with the employee's work to constitute just cause for his separation. Thus, for misconduct or improper behavior to be a just cause for dismissal, (1) it must be serious; (2) it must relate to the performance of the employee's duties; and (3) it must show that the employee has become unfit to continue working for the employer. Indeed, an employer may not be compelled to continue to employ such person whose continuance in the service would be patently inimical to his

employer's interest. The present case fulfills the requisites mentioned above.

4. ID.; ID.; ID.; ID.; AN EMPLOYEE FOUND GUILTY OF SERIOUS MISCONDUCT IS NOT ENTITLED TO FINANCIAL ASSISTANCE OR SEPARATION PAY. — It has been shown that Tomada, in the normal and routine exercise of his functions, was directly responsible for a significant portion of respondents' property. By his acts, Tomada is guilty of serious misconduct, such that he is not entitled to financial assistance or separation pay. Indeed, the Labor Arbiter even categorized Tomada's acts under "dereliction of duty and gross negligence." Although his nearly two decades of service might generally be considered for some form of financial assistance to shield him from the effects of his termination, Tomada's acts reflect a regrettable lack of concern for his employer. If length of service justifies the mitigation of the penalty of dismissal, then this Court would be awarding disloyalty, distorting in the process the meaning of social justice and undermining the efforts of labor to cleanse its ranks of undesirables.

APPEARANCES OF COUNSEL

Remigio D. Saladero, Jr. for petitioner.
Castro Canilao & Associates for respondents.

D E C I S I O N

CARPIO, *J.*:

The Case

This is a petition for review[1] assailing the Decision[2] promulgated on 23 December 2003 as well as the Resolution[3] promulgated on 19 April 2004 of the Court of Appeals (appellate court) in

[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] *Rollo*, pp. 21-34. Penned by Associate Justice Mariano C. Del Castillo with Associate Justices Rodrigo V. Cosico and Rosalinda Asuncion-Vicente, concurring.

[3] *Id.* at 35-36.

CA-G.R. SP Nos. 69901 and 70069. The appellate court dismissed the petition filed by Eduardo M. Tomada, Sr. (Tomada) and partially granted the petition filed by RFM Corporation-Bakery Flour Division and Jose Maria Concepcion III (respondents). The appellate court affirmed the decision of the National Labor Relations Commission (NLRC) with the modification that RFM Corporation should pay Tomada ₱127,660 as separation pay.

The Facts

The appellate court narrated the facts as follows:

On February 24, 1998, [Tomada] filed a complaint for illegal dismissal against RFM Corporation Bakery Flour Division and Jose Ma. Concepcion, Jr.

The case was subsequently assigned to Labor Arbiter Daniel C. Cueto who required both parties to submit their respective position papers. In his position paper, [Tomada] alleged:

"x x x x x x x x x

2. That I have worked with the said company since March 9, 1979 and my latest salary therein is ₱491.00 per day;

3. That the company dismissed me from work because I was allegedly sleeping on my job during my working time and in the process, I failed to detect the fire which was taking place inside my work area;

4. That I was not sleeping however and was never negligent in my job;

5. That on November 22, 1997, there was no certified operator manning the third floor of the flour mill. What was present there was only a trainee;

6. Since there was no certified operator in the third floor, I was forced to go up to the said area whenever there was trouble even if my assigned area was only at the second floor where I was head spoutman;

7. At about 9:00 in the evening of November 22, 1997, the B3A Plan Sifter at the 3rd Floor choked up. I was therefore forced to go up to the said area to assist the trainee (Fernando Filarea) to attend to the said trouble;

8. After attending to the choke-up, I went up to the Fourth Floor to inspect the cyclone if it had trouble also;

9. After seeing that the cyclone was in good condition, I went down to the second floor but felt the call of nature so I entered the screen room from where I could proceed to the comfort room;

10. That at the screen room, I tried to fight the urge to relieve myself and it was at this point in time when Ver Ignacio, the duty shift miller arrived and told me that there was a fire at the bran grinder;

11. That I assisted in putting out said fire but Ver Ignacio eventually charged me with sleeping on my job which resulted to my dismissal on January 26, 1998;

12. That as I have explained earlier, I was not sleeping on my job. I was not also negligent. If ever I was not at the vicinity of the bran grinder at the time of the fire, it was because I attended to a trouble at the 3rd floor and inspected the 4th floor due to the lack of available personnel therein;

13. That under the circumstances, it is clear that my dismissal was illegal."

For their part, RFM and Jose Ma. Concepcion made the following allegations in their position paper:

1. The complainant was a former employee of the respondent, assigned to the position headspoutman of the Flour Milling Department at the time of his termination;

2. As headspoutman of the Flour Milling Department, the complainant was assigned at the second floor and is in-charge of the bran grinding machine on the same floor;

3. Sometime on November 22, 1997, at about 9:00 in the evening, Aries Lazaro, a contractual employee assigned at the Semolina Tipping, noticed the thick smoke coming from the bran;

4. That when he made an investigation, the said employee noticed that smoke was coming from the bran grinding machine and the bran being grounded inside the machine was already smoldering;

5. That immediately, Aries Lazaro went down to the ground floor to seek assistance and found Heronico Mancilla;

6. Together, they went back upstairs to the second floor to try to contain the fire;

7. It was then that Heronico Mancilla instructed Aries Lazaro to go down and call Virgilio F. Ignacio, the Shift Miller on duty;

8. That Virgilio F. Ignacio hurriedly ran upstairs and found that the fire was already growing rapidly;

9. That immediately, Virgilio F. Ignacio went down to the ground floor panel board to shut down mills II and IA;

10. That when Virgilio F. Ignacio returned to the bran grinding machine at the second floor, he found Heronico Mancilla, Fernando Felarca and a number of flour packers were already trying to stop the fire with the use of fire extinguishers;

11. Realizing that the packing area and the screen room were still operating, Virgilio F. Ignacio ran to the panel board of the packing area to shut down the machine and then to the screen room, likewise with the intention of shutting off the screen room machine;

12. That it was in the screen room, an air-conditioned room, where Virgilio F. Ignacio found the complainant [Tomada] who was supposed to be at the second floor watching and monitoring the machine thereat, soundly asleep on top of two (2) units of automatic voltage regulators (AVR);

13. That it was only after Virgilio F. Ignacio woke the complainant up did the latter proceed to the bran grinding machine room on the second floor;

14. The following day, November 23, 1997, Virgilio F. Ignacio submitted a memorandum report of the incident, a copy of which is hereto attached as Annex '1';

15. That same day, a memorandum was likewise issued to the complainant, requiring him to explain within 48 hours why no disciplinary action should be taken against him for violating company rules and regulations, a copy of the memorandum is hereto attached as Annex '2';

16. In compliance [with] the aforesaid memorandum, the complainant submitted his written explanation dated November 27, 1997, a copy of which is hereto attached as Annex '3';

17. In a memorandum dated December 4, 1997, the complainant was served notice that his case was set for administrative investigation on December 6, 1997 and that he was directed to attend the said investigation, a copy of the memorandum is hereto attached as Annex '4';

18. The investigation and hearings were set three (3) times where the complainant was apprised of the nature and the cause of the charges against him; afforded the opportunity of confronting the witness against him; and full opportunity to present his side duly assisted by a representative of his own choice;

19. After hearing, investigation and evaluation of complainant's case, management found him guilty of violating company rules and regulations #32, that of sleeping on company time outside of work area with adverse effect or damage, and his services were terminated. A copy of the Memorandum dated February 21, 1998 is hereto attached as Annex '5'.

Both parties filed their respective Reply to the Position Papers and Rejoinder to Reply. Thereafter, the case was submitted for decision.[4]

The Labor Arbiter's Ruling

In his Decision dated 4 May 2000, the Labor Arbiter dismissed Tomada's case for lack of merit. The Labor Arbiter found that Tomada was grossly remiss in performing his assigned duties and his separation from work was justified. The Labor Arbiter further stated that:

Precisely, personnel rules and regulations are promulgated as a vital component in sound personnel administration and for as long as the rules and regulations are reasonable in character and in application, this Office should not interfere in the matter of its exercise. Such is part and parcel of the duly recognized prerogatives

[4] *Id.* at 22-26.

of management in instilling discipline to its employees that should not be interferred [sic] into by this Tribunal.

In the case at bar, since the rules and regulations upon which [Tomada's] dismissal was based are reasonable in application and it appearing that [Tomada] by his conduct shown violated the rules against sleeping on company time that caused damage and/or adverse effect to the respondent's operation his conduct is considered serious and thus cannot be taken lightly by this Office considering the unfavorable and serious impact on respondent's business which also deserves legal protection against erring personnel like in the case of [Tomada].

[Tomada's] act amounted to dereliction of duty and gross negligence which is a legal ground to dismiss him for cause.

[Tomada], it appears, was given the opportunity to explain his side but sadly, it was not convincing to us based on the factual milieu of the case.

WHEREFORE, instant case is dismissed for lack of merit.

SO ORDERED.[5]

The Ruling of the NLRC

Tomada filed an appeal before the NLRC. In its Decision promulgated on 22 October 2001, the NLRC also dismissed Tomada's appeal for lack of merit. The NLRC reiterated the Labor Arbiter's findings that Tomada was not only absent from his area of responsibility at the time the fire started in the second floor, but Tomada was also sleeping in the screen room. The NLRC, however, modified the Labor Arbiter's decision when it decreed that Tomada should receive separation pay, equivalent to one-half month's pay for every year of service with a fraction of six months considered as one whole year, since the cause of Tomada's dismissal was not reflective of his moral character.

On 12 December 2001, the NLRC resolved to deny Tomada's Motion for Reconsideration for lack of merit.[6]

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[5] *Id.* at 82.

[6] *Id.* at 26.

The Decision of the Appellate Court

Tomada, as well as respondents, assailed the NLRC's decision and resolution before the appellate court. Tomada imputed grave abuse of discretion upon the NLRC in sustaining the validity of his dismissal from employment. On the other hand, respondents questioned the NLRC's grant of separation pay to Tomada, as well as Jose Maria Concepcion III's joint liability with RFM Corporation.

The appellate court ruled that Tomada's dismissal from employment was valid. RFM Corporation entrusted Tomada with the responsibility involving a delicate matter, that of the care, custody and operation of the bran grinding machine for the duration of his duty. The nature of Tomada's infraction, leaving his post and sleeping while on duty, rendered Tomada unworthy of the trust and confidence demanded by his position. The appellate court agreed with the NLRC's award of separation pay to Tomada. The appellate court considered Tomada's service to RFM Corporation for 20 years, as well as his commission of only one, yet very serious, violation of company rules. However, the appellate court modified the NLRC's ruling regarding Jose Maria Concepcion III's liability. The award of separation pay may only be enforced against RFM Corporation because of the corporation's separate juridical personality. A stockholder or an officer of a corporation cannot be made personally liable for corporate liabilities in the absence of malice or bad faith. The dispositive portion of the appellate court's decision reads as follows:

> WHEREFORE, the petition filed by Eduardo Tomada, Sr. is hereby DISMISSED and the petition filed by petitioners RFM and Jose Ma. Concepcion is PARTIALLY GRANTED. Accordingly, the assailed decision of public respondent dated October 22, 2001 is hereby AFFIRMED with modification that petitioner RFM Corporation — Bakery, Flour Division is hereby ordered to pay Eduardo M. Tomada, Sr. his separation pay in the amount of ₱127,660.00.
>
> SO ORDERED.[7]

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[7] *Id.* at 33.

The appellate court denied both parties' respective motions for reconsideration in a Resolution promulgated on 19 April 2004.[8]

All parties filed their respective petitions for review before this Court. On 13 March 2006, we issued a Resolution denying respondents' petition, docketed as G.R. Nos. 163263-64, for failure to file the required reply. Respondents, however, filed the requisite comment to the present petition. On 23 June 2008, this Court resolved to deconsolidate the present petition from G.R. Nos. 163263-64 in view of our 13 March 2006 Resolution.

The Issues

Tomada raises the following grounds for allowance of his petition:

1. The appellate court committed a serious error of law in imposing the penalty of dismissal upon Tomada despite the fact that respondents did not sustain any damage on account of Tomada's supposed negligence.

2. The appellate court's ruling that Tomada was negligent in his job is a patent nullity and should be reversed.[9]

The Ruling of the Court

The petition has no merit. We see no reason to overturn the factual findings of the Labor Arbiter, which were subsequently approved by the NLRC and the appellate court. The present case adheres to the rule that factual findings of quasi-judicial and administrative bodies are accorded great respect and even finality by the courts. Tomada failed to show that the factual findings were arbitrarily made and disregarded evidence on record.

Serious Misconduct as a Just Cause for Dismissal

Tomada's acts constitute serious misconduct, one of the five enumerated causes for termination by employer in Article 282 of the Labor Code.

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[8] *Id.* at 35-36.

[9] *Id.* at 13.

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;

x x x x x x x x x

By sleeping on the job and leaving his work area without prior authorization, Tomada did not merely disregard company rules. Tomada, in effect, issued an open invitation for others to violate those same company rules. Indeed, considering the presence of trainees in the building and Tomada's acts, Tomada failed to live up to his company's reasonable expectations. Tomada's offenses cannot be excused upon a plea of being a "first offense," or have not resulted in prejudice to the company in any way. No employer may rationally be expected to continue in employment a person whose lack of morals, respect and loyalty to his employer, regard for his employer's rules, and appreciation of the dignity and responsibility of his office, has so plainly and completely been bared.[10]

Misconduct is improper or wrong conduct. It is the transgression of some established and definite rule of action, a forbidden act, a dereliction of duty, willful in character, and implies wrongful intent and not mere error of judgment. The misconduct to be serious must be of grave and aggravated character and not merely trivial or unimportant. Such misconduct, however serious, must nevertheless be in connection with the employee's work to constitute just cause for his separation. Thus, for misconduct or improper behavior to be a just cause for dismissal, (1) it must be serious; (2) it must relate to the performance of the employee's duties; and (3) it must show that the employee has become unfit to continue working for the employer. Indeed, an employer may not be compelled to continue to employ such person whose continuance in the service would be patently inimical to his employer's interest.[11]

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[10] See *Stanford Microsystems, Inc. v. NLRC*, 241 Phil. 426 (1988).

[11] See *Fujitsu Computer Products Corp. of the Phils. v. Court of Appeals*, 494 Phil. 697 (2005).

The present case fulfills the requisites mentioned above. The Labor Arbiter established the following facts:

1. That the fire incident occurred in the second floor of the building which is specifically within the area of jurisdiction of [Tomada].

2. That at the time of the occurrence of the fire, [Tomada] was on duty but he was not in his area of work/jurisdiction and that his absence in his area was without any approval of the supervisory authorities and/or incurred for an urgent nature which are official in character. It is not shown that [Tomada] is authorized to trouble shoot or conduct inspection beyond his area of jurisdiction.

3. That [Tomada] no less admitted that he entered the screenroom on November 22, 1997, the night when the incident occurred. The screenroom does not appear to be within the area of work jurisdiction of [Tomada]. It is the place where [Tomada] was located by supervisor Ver Ignacio when the fire was already taking place.

4. The official fire incident (Annex 1, respondent's position paper) of supervisor Ignacio that he saw [Tomada] "soundly sleeping atop two (2) units of AVR at screenroom," was not effectively rebutted by [Tomada] other than his bare denial. The fact however remains undisputed that it was at the screenroom where [Tomada] was caught by Supervisor Ver Ignacio at the very time when the fire broke out in [Tomada's] actual area of work wherein he was supposed to be working during the time of the incident. There is no showing that Supervisor Ignacio's report was motivated by personal ill-will or motive as to create a suspicion or belief that his report was personally motivated to oust [Tomada] from his job.

5. [Tomada's] allegation that he was attending to some trouble shooting works at the third and fourth floors was not established by concrete and convincing evidence. On the contrary, the logbook entries presented by the respondent (Annex "2", Reply (respondent)), do not indicate any trouble shooting work to be undertaken in the said sections of the third and fourth floors.[12]

It has been shown that Tomada, in the normal and routine exercise of his functions, was directly responsible for a significant portion of respondents' property. By his acts, Tomada is guilty

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[12] *Rollo,* pp. 80-81.

of serious misconduct, such that he is not entitled to financial assistance or separation pay. Indeed, the Labor Arbiter even categorized Tomada's acts under "dereliction of duty and gross negligence."

Although his nearly two decades of service might generally be considered for some form of financial assistance to shield him from the effects of his termination, Tomada's acts reflect a regrettable lack of concern for his employer. If length of service justifies the mitigation of the penalty of dismissal, then this Court would be awarding disloyalty, distorting in the process the meaning of social justice and undermining the efforts of labor to cleanse its ranks of undesirables.[13]

WHEREFORE, we *DENY* the petition. We *AFFIRM* the Decision promulgated on 23 December 2003 as well as the Resolution promulgated on 19 April 2004 of the Court of Appeals in CA-G.R. SP Nos. 69901 and 70069 with the *MODIFICATION* that the grant of separation pay to Eduardo M. Tomada, Sr. is *DISALLOWED*.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Leonardo-de Castro, and *Bersamin, JJ.,* concur.

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[13] See *Aromin v. National Labor Relations Commission,* G.R. No. 164824, 30 April 2008, 553 SCRA 273.

FIRST DIVISION

[G.R. No. 164104. September 11, 2009]

PHILIPPINE NATIONAL BANK, *petitioner, vs.* **GREGORIO B. MARAYA, JR. and WENEFRIDA MARAYA,** *respondents.*

SYLLABUS

REMEDIAL LAW; SPECIAL CIVIL ACTIONS; FORECLOSURE OF MORTGAGE; ACT NO. 3135, SECTION 3 THEREOF; NON-COMPLIANCE WITH THE MANDATORY REQUIREMENT OF PUBLICATION OF THE NOTICE OF SALE RENDERS THE EXTRAJUDICIAL FORECLOSURE SALE A NULLITY. — This Court cannot bring itself to agree with PNB's position that its failure to comply with the requirement of publication is excusable because the spouses Maraya had knowledge of the extrajudicial foreclosure proceedings. In *Tambunting v. Court of Appeals*, we ruled that statutory provisions governing publication of notice of mortgage foreclosure sales must be strictly complied with, and that even slight deviations therefrom will invalidate the notice and render the sale at least voidable. Indeed, one of the most important requirements of Act No. 3135 is that the notice of the time and place of sale shall be given. If the sheriff acts without notice, or at a time and place other than that designated in the notice, the sheriff acts without warrant of law. Publication is required to give the extrajudicial foreclosure sale a reasonably wide publicity such that those interested might attend the public sale. To allow the parties to waive this jurisdictional requirement would result in converting into a private sale what ought to be a public auction. We thus find no reversible error in the ruling of the appellate court. We affirm the nullity of the extrajudicial foreclosure sale for non-compliance with the mandatory requirement of publication of the notice of sale.

APPEARANCES OF COUNSEL

Chief Legal Counsel (PNB) for petitioner.
Gregorio B. Maraya, Jr. for himself and his co-respondent.
Gerardo G. Dator for Sps. Jesus and Diosdada Cerro.

D E C I S I O N

CARPIO, *J.*:

The Case

This is a petition for review on *certiorari*[1] assailing the Decision[2] dated 4 March 2004 and the Resolution[3] dated 7 June 2004 of the Court of Appeals (appellate court) in CA-G.R. CV No. 59109. The appellate court affirmed the trial court's decision[4] in Civil Case No. R-2804 dated 12 August 1997 and declared void the extrajudicial foreclosure sale of the land of Gregorio B. Maraya, Jr. and Wenefrida Maraya (the spouses Maraya) in favor of petitioner Philippine National Bank (PNB) and the corresponding certificate of sale issued by the sheriff for failure to publish the notice of sale as required by Section 3 of Act No. 3135. The subsequent sale of the subject land by PNB to Jesus and Diosdada Cerro (the spouses Cerro) was likewise declared void.

The Facts

The appellate court stated the facts of the case as follows:

[The spouses Maraya] are the owners of a parcel of land located at Combado, Maasin, Southern Leyte covered by a Transfer Certificate of Title No. T-381 registered in the Register of Deeds of Southern Leyte in the name of Atty. Gregorio B. Maraya, Jr.

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] *Rollo*, pp. 9-15. Penned by Associate Justice Arsenio J. Magpale with Associate Justices Conrado M. Vasquez, Jr. and Bienvenido L. Reyes, concurring.

[3] *Id.* at 17.

[4] *Id.* at 47-56.

On or about June 22, 1977, [the spouses Maraya] secured a loan for ₱6,000.00 from [PNB] and constituted a real estate mortgage of their aforesaid property.

For one reason or another, [the spouses Maraya] defaulted in the payment of their loan obligation. Upon their failure to pay their obligation, defendant-appellant PNB initiated an extrajudicial foreclosure of the mortgaged property without having the intended foreclosure sale published in the newspaper of general circulation. PNB emerged as the highest bidder and was awarded the Sheriff's certificate of sale on November 27, 1990.

For failure of [the spouses Maraya] to redeem the property and their failure to buy back the same despite several periods granted by PNB after one year allowed by law, PNB decided to sell the property. On May 11, 1993, a public bidding was conducted for the said purpose with defendant appellant Jesus Cerro as the successful bidder.

On or about July 15, 1993, PNB through its Branch Manager Francisco Bangi, executed a Deed of Absolute Sale over the aforementioned land in favor of Jesus Cerro. [The spouses Maraya] were notified by PNB of the sale in favor of Jesus Cerro and were advised to vacate the premises. As they refused to vacate, Jesus Cerro was constrained to file a complaint for unlawful detainer against them on August 1993 before the Municipal Trial Court of Maasin, Southern Leyte which rendered a decision in favor of Jesus Cerro. [The spouses Maraya] appealed the said decision and it was during the pendency of the appeal that [the Spouses Maraya] filed the complaint for Annulment of Sale and Quieting of Title against [PNB and the spouses Cerro] before the Regional Trial Court of Maasin, Southern Leyte.

Issues having been joined, pre-trial ensued. Thereafter, trial proceeded. On August 12, 1997, the court *a quo* rendered its herein appealed Decision.[5]

The Ruling of the Trial Court

The trial court ruled in favor of the spouses Maraya. The trial court ruled that there was no valid extrajudicial foreclosure sale of real property because of PNB's failure to comply with

[5] *Id.* at 39-40.

the substantive requirement of Section 3, Act No. 3135 as to publication of the notice of sale once a week for at least three consecutive weeks in a newspaper of general circulation.

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

WHEREFORE, [the spouses Maraya's] prayers are heard by the Court which are:

(a) declaring the nullity and setting aside the extrajudicial foreclosure sale and the corresponding certificate issued by the sheriff, being null and void;

(b) declaring the Deed of Absolute Sale by defendant [PNB] to defendant Jesus Cerro as null and void;

(c) removing any cloud from being cast upon the title or ownership of [the spouses Maraya] on the land and building in litigation and declaring [the spouses Maraya] as true and lawful owners and possessors of the said properties;

(d) ordering the *Ex-Officio* Provincial Sheriff of the Court to conduct properly the extrajudicial foreclosure proceedings of the property of [the Spouses Maraya] this time complete with the requirements of posting, affidavit and notice, and publication as required by substantive law, Act 3135 whose compliance for being in derogation of property rights must be strictly and mandatorily enforced;

(e) ordering defendants to proportionately pay the costs.

For insufficiency of evidence and lacking in merit, both defendants' Counterclaims are DISMISSED.

SO ORDERED.[6]

The spouses Maraya filed an Urgent Motion for Execution Pending Appeal before the trial court. Before the motion could be heard, PNB and the spouses Cerro filed their respective Notices of Appeal. PNB and the spouses Cerro likewise filed their respective Oppositions to the motion filed by the spouses Maraya. The trial court approved the Notices of Appeal and directed the transmittal of the records of the present case to the

[6] *Id.* at 55-56.

appellate court. Subsequently, the trial court denied the spouses Maraya's motion for execution for lack of jurisdiction to resolve the same.

The Ruling of the Appellate Court

The spouses Maraya filed before the appellate court on 29 October 1997 an Urgent Motion for Execution of Judgment Pending Appeal. The appellate court denied this motion in a Resolution promulgated on 21 April 1998.

In its Decision[7] dated 4 March 2004, the appellate court affirmed the decision of the trial court. The pertinent portions of the appellate court's decision read as follows:

> The purpose of the publication of the Notice of Sheriff's Sale is to inform all interested parties of the date, time and place of the foreclosure sale of the real property subject thereof. Failure to comply with the statutory requirement as to publication of notice, invalidates the sale. Consequently, the sale by the PNB to appellants Cerro is likewise void and the latter do not acquire valid title to the properties. We, therefore, cannot but concur with the decision of the court *a quo*.
>
> WHEREFORE, *premises considered*, the appeal is DENIED and the Decision of the trial court is hereby AFFIRMED *in toto*.
>
> SO ORDERED.[8]

The appellate court denied PNB's motion for reconsideration in a resolution promulgated on 7 June 2004.[9]

The Issue

PNB raised only one ground in support of its petition before this Court:

> The extrajudicial foreclosure sale conducted is valid even in the absence of publication of the notice of foreclosure of mortgage as

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[7] *Id.* at 9-15.

[8] *Id.* at 14-15.

[9] *Id.* at 17.

[the] spouses Maraya who were owners of the foreclosed property had knowledge thereof and had abused legal processes.[10]

The Ruling of the Court

The petition has no merit.

Mandatory Character of the Publication of the Notice of Extrajudicial Sale

Section 3 of Act No. 3135 reads:

> Section 3. Notice shall be given by posting notices of the sale for not less than twenty (20) days in at least three public places of the municipality or city where the property is situated, and if such property is worth more than four hundred pesos, such notice shall also be published once a week for at least three consecutive weeks in a newspaper of general circulation in the municipality or city.

When the subject property was sold in the auction sale of 2 October 1990, the lot had an assessed value of ₱1,800 while the residential building had an assessed value of ₱4,500. There is no dispute that the PNB bought the spouses Maraya's property under Act No. 3135.[11] Thus, the sale of the property should be in accordance with the requirements laid out in Act No. 3135.

This Court cannot bring itself to agree with PNB's position that its failure to comply with the requirement of publication is excusable because the spouses Maraya had knowledge of the extrajudicial foreclosure proceedings.

In *Tambunting v. Court of Appeals*,[12] we ruled that statutory provisions governing publication of notice of mortgage foreclosure sales must be strictly complied with, and that even slight deviations therefrom will invalidate the notice and render the sale at least voidable. Indeed, one of the most important requirements of Act No. 3135 is that the notice of the time and place of sale shall be given. If the sheriff acts without notice, or at a time and

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[10] *Id.* at 27.

[11] Records, pp. 51-54.

[12] No. L-48278, 8 November 1988, 167 SCRA 16.

place other than that designated in the notice, the sheriff acts without warrant of law.[13] Publication is required to give the extrajudicial foreclosure sale a reasonably wide publicity such that those interested might attend the public sale. To allow the parties to waive this jurisdictional requirement would result in converting into a private sale what ought to be a public auction.[14]

We thus find no reversible error in the ruling of the appellate court. We affirm the nullity of the extrajudicial foreclosure sale for non- compliance with the mandatory requirement of publication of the notice of sale.

WHEREFORE, we *DENY* the petition. We *AFFIRM* the Decision dated 4 March 2004 and the Resolution dated 7 June 2004 of the Court of Appeals in CA-G.R. CV No. 59109.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Leonardo-de Castro, and *Bersamin, JJ.,* concur.

THIRD DIVISION

[G.R. No. 165141. September 11, 2009]

PEREGRINA MISTICA, *petitioner, vs.* **REPUBLIC OF THE PHILIPPINES,** *respondent.*

SYLLABUS

1. CIVIL LAW; LAND REGISTRATION; CONFIRMATION OF IMPERFECT TITLE; WHO MAY APPLY; REQUIREMENTS. — Section 14(1) of P.D. No. 1529 states: SEC. 14. *Who*

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[13] See *Campomanes v. Bartolome,* 38 Phil. 808 (1918).

[14] See *Ouano v. Court of Appeals,* 446 Phil. 690 (2003).

may apply. — x x x Likewise, Section 48(b) of Commonwealth Act 141, as amended by Section 4 of P.D. No. 1073, provides: x x x. In accordance with the aforesaid laws, any person, by himself or through his predecessor-in-interest, who has been in open, continuous, exclusive, and notorious possession and occupation of alienable and disposable lands of the public domain under a *bona fide* claim of ownership since June 12, 1945 or earlier, may file in the proper trial court an application for registration of title to land, whether personally or through his duly authorized representative. Being the applicant for confirmation of imperfect title, petitioner bears the burden of proving that: 1) the land forms part of the alienable and disposable land of the public domain; and 2) she has been in open, continuous, exclusive, and notorious possession and occupation of the subject land under a *bona fide* claim of ownership from June 12, 1945 or earlier. These the petitioner must prove by no less than clear, positive and convincing evidence.

2. ID.; ID.; ID.; ID.; ID.; WHILE A TAX DECLARATION BY ITSELF IS NOT ADEQUATE TO PROVE OWNERSHIP, IT MAY SERVE AS SUFFICIENT BASIS FOR INFERRING POSSESSION. — It is true that petitioner presented tax declarations of the subject lot, as well as tax receipts evidencing payment thereof. The Court notes, however, that the tax declaration was effective only in 1998, and that the tax receipts were dated 1997 and 1998. She failed to adduce in evidence any tax declaration over the property under the name of her parents and that the realty taxes for the property had been paid prior to 1998. At best, she offered a copy of a tax declaration which began in 1985 in the name of her co-heirs. While a tax declaration by itself is not adequate to prove ownership, it may serve as sufficient basis for inferring possession. The voluntary declaration of a piece of real property for taxation purposes not only manifests one's sincere and honest desire to obtain title to the property, but also announces an adverse claim against the state and all other interested parties with an intention to contribute needed revenues to the government. Such an act strengthens one's *bona fide* claim of acquisition of ownership.

3. ID.; ID.; ID.; ID.; ID.; GENERAL STATEMENTS THAT ARE MERE CONCLUSIONS OF LAW AND NOT FACTUAL

PROOF OF POSSESSION ARE UNAVAILING AND CANNOT SUFFICE. — Moreover, in her direct testimony, petitioner only stated that her parents were the owners and possessors of the subject lot since she was still very young. She added that, considering that she was 73 years old when she testified (in 1999), her parents could have owned and possessed the property for more than 50 years. Still, her testimony failed to meet the standard required by law. Petitioner failed to state the facts and circumstances evidencing the alleged ownership of the land applied for. To be sure, general statements that are mere conclusions of law and not factual proof of possession are unavailing and cannot suffice.

4. ID.; ID.; ID.; ID.; ID.; ACTUAL POSSESSION AND OCCUPATION ARE REQUIRED TO ACQUIRE TITLE TO ALIENABLE LANDS OF PUBLIC DOMAIN. — More importantly, we would like to stress that possession alone is not sufficient to acquire title to alienable lands of the public domain because the law requires ***possession and occupation***. Since these words are separated by the conjunction "and," the clear intention of the law is not to make one synonymous with the other. Possession is broader than occupation because it includes constructive possession. When, therefore, the law adds the word *occupation*, it seeks to delimit the all-encompassing effect of constructive possession. Taken together with the words open, continuous, exclusive, and notorious, the word *occupation* serves to highlight the fact that for an applicant to qualify, his possession must not be a mere fiction. Actual possession of land consists in the manifestation of acts of dominion over it of such a nature as a party would naturally exercise over his own property. With the general statements made by petitioner that she and her predecessors-in-interest have been in possession of the property, and even with the Deed of Absolute Sale allegedly executed in 1921, actual possession of the subject lot was not convincingly established.

APPEARANCES OF COUNSEL

Punzalan & Punongbayan Law Office for petitioner.
The Solicitor General for respondent.

D E C I S I O N

NACHURA, *J.*:

This is a petition for review on *certiorari* of the Court of Appeals (CA) April 2, 2004 Decision[1] in CA-G.R. CV No. 75058 and August 18, 2004 Resolution[2] denying petitioner Peregrina Mistica's motion for reconsideration.

On July 23, 1998, petitioner filed with the Municipal Trial Court (MTC) of Meycauayan, Bulacan, an Application for Registration of Title[3] over a parcel of land known as Lot 7766-D located in Malhacan, Meycauayan, Bulacan.[4]

In her application, docketed as Land Registration Case No. N-98-09, petitioner alleged that she is the owner in fee simple of the land sought to be registered. She claimed that she and her predecessors-in-interest have been in possession of the subject lot since time immemorial. She further averred that she did not know of any lien, mortgage or encumbrance affecting said lot or that any person has any claim or interest therein, legal or equitable, remainder, reversion, or expectancy.[5]

Attached to the application were the following documents: 1) the technical description of the subject lot;[6] 2) Certification in Lieu of Lost Surveyor's Certificate;[7] 3) tax declaration of Real Property No. 06075, covering the subject lot effective 1998;[8]

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[1] Penned by Associate Justice Rodrigo V. Cosico, with Associate Justices Mariano C. del Castillo and Vicente Q. Roxas, concurring; *rollo*, pp. 9-19.

[2] *Id.* at 20.

[3] Records, pp. 5-8.

[4] *Id.* at 5.

[5] *Id.* at 5-6.

[6] *Id.* at 9.

[7] *Id.* at 10.

[8] *Id.* at 13.

4) official receipts of realty tax payments;[9] and 5) blueprint/ machine copies of Subdivision Plan Csd-03-010587-D.[10]

Petitioner, thus, prayed for the registration and confirmation of her title over the subject lot.[11]

Respondent Republic of the Philippines, represented by the Director of Lands, through the Office of the Solicitor General, filed an opposition[12] to the application on the grounds that: a) neither the applicant nor her predecessors-in-interest had been in open, continuous, exclusive, and notorious possession and occupation of the land in question since June 12, 1945 or prior thereto; b) the muniments of title did not appear to be genuine and did not constitute competent and sufficient evidence of a *bona fide* acquisition of the land applied for, or of petitioner's open, continuous, exclusive, and notorious possession and occupation thereof in the concept of an owner since June 12, 1945; c) the claim of ownership in fee simple of the subject lot on the basis of a Spanish title or grant could no longer be availed of by petitioner who failed to file an appropriate application for registration within a period of six (6) months from January 16, 1976 as required by Presidential Decree (P.D.) No. 892; and d) the subject lot applied for was a portion of the public domain belonging to the Republic of the Philippines not subject to private appropriation.[13]

During trial, petitioner testified that the previous owner and possessor of the subject lot was her father. She added that her father acquired the property by virtue of a contract of sale but she could not remember the vendor's name.[14] In support thereof, she presented a photocopy of a document[15] dated May 16,

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[9] *Id.* at 16.

[10] *Id.* at 29.

[11] *Id.* at 6.

[12] *Id.* at 35-37.

[13] *Id.* at 35-36.

[14] *Rollo*, p. 11.

[15] Records, pp. 206-207.

1921, written in Spanish, which allegedly was the Deed of Sale of the subject lot, with his father as the vendee. No translation of the contents of the document, however, was offered.[16] She further said that after the death of her father, the heirs executed an extrajudicial settlement of his estate. Eventually, she acquired sole ownership over the subject property.[17]

Meanwhile, on July 20, 1999, there being no private oppositor to petitioner's application, the trial court issued an order of general default against the whole world except the government.[18]

On March 2, 2001, the MTC, upon a finding that the subject property was alienable and disposable, and that petitioner sufficiently established her right over the lot in question, granted petitioner's application for registration, thus:

> WHEREFORE, confirming the order of General Default issued by this Court on July 20, 1999, anent the instant application, this Court hereby renders judgment APPROVING the registration of Lot No. 7766-D under Plan CSD-03-010587-D, being a portion of Lot 7766 Cad. 337 Meycauayan Cadastre, located [in] Malhacan, Meycauayan, Bulacan, covered by Tax Declaration No. 06075, in favor of applicant herein Peregrina Mistica.
>
> After this decision shall become final, let the corresponding decree issue.
>
> Furnish copy of this decision, the Land Registration Authority, Quezon City; the Office of the Solicitor General, Makati City; the Land Management Bureau, Manila; and the applicant herein.
>
> SO ORDERED.[19]

With the denial of its motion for reconsideration,[20] respondent filed a Notice of Appeal[21] stating that it was appealing to the

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[16] *Rollo*, p. 12.

[17] *Id.*

[18] Records, pp. 174-175.

[19] Penned by Judge Calixtro O. Adriatico, *id.* at 238.

[20] Records, pp. 240-245.

[21] *Id.* at 250-251.

Regional Trial Court (RTC). The appeal was given due course by the MTC on July 20, 2001.[22]

Petitioner moved for the dismissal of the appeal on the ground that the case should have been elevated to the CA. She argued that since the MTC heard and decided the case in the exercise of its delegated jurisdiction, the appeal should not have been taken to the RTC.

Acting on petitioner's motion, the RTC held that it indeed had no jurisdiction over the appeal. However, it refused to dismiss the case. It instead forwarded the case to the CA considering that the appeal had already been perfected when the MTC gave due course to petitioner's notice of appeal.[23]

In the assailed decision,[24] the CA set aside the MTC decision and, consequently, dismissed petitioner's application for registration. Contrary to the conclusions of the trial court, the appellate court found that the most important requirement for granting petitioner's application for registration — that the applicant has been in open, continuous, exclusive, and notorious possession and occupation of the subject lot since June 12, 1945 — had not been adequately established.[25] Petitioner's motion for reconsideration was likewise denied on August 18, 2004.[26]

Aggrieved, petitioner comes before the Court raising the sole issue of:

WHETHER OR NOT THE PETITIONER FAILED TO PROVE THAT SHE HAS BEEN [IN] OPEN, CONTINUOUS, EXCLUSIVE AND NOTORIOUS POSSESSION AND OCCUPATION OF AN ALIENABLE AND DISPOSABLE LAND OF THE PUBLIC DOMAIN UNDER BONA FIDE CLAIM OF OWNERSHIP SINCE JUNE 12, 1945 OR EARLIER.[27]

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[22] *Id.* at 253.

[23] *Id.* at 295-297.

[24] *Supra* note 1.

[25] *Rollo,* pp. 16-18.

[26] *Id.* at 20.

[27] *Id.* at 138.

We deny the petition.

Section 14(1) of P.D. No. 1529 states:

SEC. 14. *Who may apply.* — The following persons may file in the proper Court of First Instance [now Regional Trial Court] an application for registration of title to the land, whether personally or through their duly authorized representatives:

(1) Those who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive and notorious possession and occupation of alienable and disposable lands of the public domain under a *bona fide* claim of ownership since June 12, 1945, or earlier.

Likewise, Section 48(b) of Commonwealth Act 141, as amended by Section 4 of P.D. No. 1073, provides:

Section 48. The following described citizens of the Philippines, occupying lands of the public domain or claiming to own any such lands or an interest therein, but whose titles have not been perfected or completed, may apply to the Court of First Instance [now Regional Trial Court] of the province where the land is located for confirmation of their claims and the issuance of a certificate of title therefor, under the Land Registration Act, to wit:

x x x x x x x x x

(b) Those who by themselves or through their predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of agricultural lands of the public domain, under a *bona fide* claim of acquisition of ownership, since June 12, 1945, or earlier, immediately preceding the filing of the application for confirmation of title except when prevented by war or *force majeure*. These shall be conclusively presumed to have performed all the conditions essential to a Government grant and shall be entitled to a certificate of title under the provisions of this chapter.

In accordance with the aforesaid laws, any person, by himself or through his predecessor-in-interest, who has been in open, continuous, exclusive, and notorious possession and occupation of alienable and disposable lands of the public domain under a *bona fide* claim of ownership since June 12, 1945 or earlier, may file in the proper trial court an application for registration

of title to land, whether personally or through his duly authorized representative.[28]

Being the applicant for confirmation of imperfect title, petitioner bears the burden of proving that: 1) the land forms part of the alienable and disposable land of the public domain; and 2) she has been in open, continuous, exclusive, and notorious possession and occupation of the subject land under a *bona fide* claim of ownership from June 12, 1945 or earlier.[29] These the petitioner must prove by no less than clear, positive and convincing evidence.[30]

To prove that she has been in possession of the subject lot, petitioner presented documentary evidence such as the technical description of the subject lot, Certification in Lieu of Lost Surveyor's Certificate, tax declaration of real property, official receipts of realty tax payments, blueprint/machine copies of Subdivision Plan Csd-03-010587-D, joint affidavits of her co-heirs, and Deed of Partition dated July 30, 1980. Moreover, to prove that her predecessors-in-interest had also been in possession thereof, petitioner presented a document written in Spanish which she claimed to be a Deed of Absolute Sale dated May 16, 1921. Lastly, she testified that she acquired the subject lot from her parents who had been the owners and possessors thereof since she was still very young.

As aptly held by the appellate court, these pieces of evidence, taken together, do not suffice to prove that petitioner and her predecessors-in-interest have been in open, continuous, exclusive, and notorious possession and occupation of the subject lot since

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[28] *Alfredo, Preciosa, Angelita & Crisostomo, all surnamed Buenaventura v. Amparo Pascual & Republic of the Phil.,* G.R. No. 168819, November 27, 2008.

[29] *Id.*; *In Re: Application for Land Registration of Title, Fieldman Agricultural Trading Corporation v. Republic*, G.R. No. 147359, March 28, 2008, 550 SCRA 92, 103; *Republic v. Carrasco*, G.R. No. 143491, December 6, 2006, 510 SCRA 150, 158.

[30] *Alfredo, Preciosa, Angelita & Crisostomo, all surnamed Buenaventura v. Amparo Pascual & Republic of the Phil., supra* note 28.

June 12, 1945 or earlier. The technical description, Certification in Lieu of Lost Surveyor's Certificate, and blueprint copies of the subdivision plan only prove the identity of the lot sought to be registered. The joint affidavits of her co-heirs, as well as the Deed of Partition, merely show that petitioner acquired the property through succession.

It is true that petitioner presented tax declarations of the subject lot, as well as tax receipts evidencing payment thereof. The Court notes, however, that the tax declaration was effective only in 1998, and that the tax receipts were dated 1997 and 1998. She failed to adduce in evidence any tax declaration over the property under the name of her parents and that the realty taxes for the property had been paid prior to 1998. At best, she offered a copy of a tax declaration which began in 1985 in the name of her co-heirs. While a tax declaration by itself is not adequate to prove ownership, it may serve as sufficient basis for inferring possession.[31] The voluntary declaration of a piece of real property for taxation purposes not only manifests one's sincere and honest desire to obtain title to the property, but also announces an adverse claim against the state and all other interested parties with an intention to contribute needed revenues to the government. Such an act strengthens one's *bona fide* claim of acquisition of ownership.[32]

The presentation of a document dated May 16, 1921 which, according to petitioner, was a Deed of Sale of the subject property where her father was the vendee, did not work to her advantage. In the first place, the document was written in Spanish and petitioner did not bother to have the contents thereof translated to English or to any other language that the court could understand. We cannot, therefore, determine if, indeed, the

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[31] *In Re: Application for Land Registration of Title, Fieldman Agricultural Trading Corporation v. Republic*, *supra* note 29, at 104; *Limcoma Multi-Purpose Cooperative v. Republic*, G.R. No. 167652, July 10, 2007, 527 SCRA 233, 245.

[32] *Republic v. Carrasco*, *supra* note 29, at 160; *Republic v. Jacob*, G.R. No. 146874, July 20, 2006, 495 SCRA 529, 539.

document was a Deed of Sale, and if the subject matter thereof was the property sought to be registered.

Moreover, in her direct testimony, petitioner only stated that her parents were the owners and possessors of the subject lot since she was still very young. She added that, considering that she was 73 years old when she testified (in 1999), her parents could have owned and possessed the property for more than 50 years. Still, her testimony failed to meet the standard required by law. Petitioner failed to state the facts and circumstances evidencing the alleged ownership of the land applied for. To be sure, general statements that are mere conclusions of law and not factual proof of possession are unavailing and cannot suffice.[33]

More importantly, we would like to stress that possession alone is not sufficient to acquire title to alienable lands of the public domain because the law requires ***possession and occupation***. Since these words are separated by the conjunction "and," the clear intention of the law is not to make one synonymous with the other. Possession is broader than occupation because it includes constructive possession. When, therefore, the law adds the word *occupation*, it seeks to delimit the all-encompassing effect of constructive possession. Taken together with the words open, continuous, exclusive, and notorious, the word *occupation* serves to highlight the fact that for an applicant to qualify, his possession must not be a mere fiction. Actual possession of land consists in the manifestation of acts of dominion over it of such a nature as a party would naturally exercise over his own property.[34]

With the general statements made by petitioner that she and her predecessors-in-interest have been in possession of the property, and even with the Deed of Absolute Sale allegedly executed in

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[33] *In Re: Application for Land Registration of Title, Fieldman Agricultural Trading Corporation v. Republic*, *supra* note 29, at 104-105; *The Dir., Lands Management Bureau v. Court of Appeals*, 381 Phil. 761, 770 (2000).

[34] *Ong v. Republic*, G.R. No. 175746, March 12, 2008, 548 SCRA 160, 167-168, citing *Republic v. Alconaba*, G.R. No. 155012, April 14, 2004, 427 SCRA 611; *Republic v. Jacob*, *supra* note 32, at 538-539; *Republic v. Enciso*, G.R. No. 160145, November 11, 2005, 474 SCRA 700, 712.

1921, actual possession of the subject lot was not convincingly established.

In sum, petitioner could not have acquired an imperfect title to the land in question because she has not proven possession openly, continuously and adversely in the concept of an owner since June 12, 1945, the period of possession required by law.[35] Accordingly, the CA did not err in reversing the decision of the trial court and in denying the application for registration of title over the subject lot.

WHEREFORE, premises considered, the petition is *DISMISSED* for lack of merit. The April 2, 2004 Decision and August 18, 2004 Resolution of the Court of Appeals in CA-G.R. CV No. 75058 are *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Velasco, Jr., and *Peralta, JJ.,* concur.

FIRST DIVISION

[G.R. No. 166857. September 11, 2009]

D.M. WENCESLAO & ASSOCIATES, INC., *petitioner, vs.* **FREYSSINET PHILIPPINES, INC.,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; ISSUES NOT RAISED IN THE PLEADINGS, WHEN MAY BE CONSIDERED BY THE COURT; CONDITIONS; CASE AT BAR. — In *Bank of America v. American Realty Corporation,* we stated: When

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[35] *Republic v. Carrasco, supra* note 29, at 164.

evidence is presented by one party, with the express or implied consent of the adverse party, as to issues not alleged in the pleadings, judgment may be rendered validly as regards those issues, which shall be considered as if they have been raised in the pleadings. There is implied consent to the evidence thus presented when the adverse party fails to object thereto. Clearly, a court may rule and render judgment on the basis of the evidence before it even though the relevant pleading had not been previously amended, so long as no surprise or prejudice is thereby caused to the adverse party. Put a little differently, so long as the basic requirements of fair play had been met, as where litigants were given full opportunity to support their respective contentions and to object to or refute each other's evidence, the court may validly treat the pleadings as if they had been amended to conform to the evidence and proceed to adjudicate on the basis of all the evidence before it. DMWAI faults the trial court for finding it liable to FPI for the IBRD account despite the fact that the complaint sought to collect from the NHI project. This is not accurate. While on the face of the complaint there was no specific allegation that DMWAI is liable to FPI for the IBRD account, subsequent developments, from the pre-trial conference up to the presentation of evidence and the examination of witnesses, show that FPI sought to recover DMWAI's unpaid accounts including the IBRD account. Moreover, DMWAI did not raise any objection on the issue. A careful scrutiny of the decisions of the trial court and the Court of Appeals reveals that their findings and conclusions on the matter of DMWAI's liability to FPI for the IBRD account are overwhelmingly supported by the evidence.

2. ID.; ID.; ID.; ID.; MET IN CASE AT BAR; RULING OF THE COURT OF APPEALS, AFFIRMED. — Contrary to DMWAI allegations, evidence was properly presented with full opportunity on the part of both parties to support their relative contentions and to refute each other's evidence. In this case, DMWAI was not prejudiced by the inclusion of the IBRD account as one of the controverted issues. Moreover, DMWAI had been afforded ample opportunity to refute and object to the evidence related to the IBRD account, thus, the rudiments of fair play had been properly observed. Since we have affirmed the ruling of the trial court and the Court of Appeals which held DMWAI liable to FPI for the IBRD account, we likewise

affirm the ruling of the Court of Appeals on DMWAI's liability to pay interest on the IBRD account.

APPEARANCES OF COUNSEL

Quasha Ancheta Peña & Nolasco for petitioner.
Tagoc and Tagoc Law Office for respondent.

D E C I S I O N

CARPIO, *J.*:

The Case

This is a petition for review[1] of the 10 August 2004 Decision[2] and 21 January 2005 Resolution[3] of the Court of Appeals in CA-G.R. CV No. 58093. In its 10 August 2004 Decision, the Court of Appeals affirmed the 17 April 1997 Decision[4] of the Regional Trial Court of Manila, Branch 34 (trial court), with modification that only petitioner D.M. Wenceslao & Associates, Inc. (DMWAI) shall be liable to pay respondent Freyssinet Philippines, Inc. (FPI) ₱322,413.15 with interest at 6% per annum from the date of the filing of the complaint. The Court of Appeals also deleted the awards of attorney's fees and expenses of litigation. In its 21 January 2005 Resolution, the Court of Appeals denied DMWAI's motion for reconsideration.

The Facts

Sometime in January 1989, DMWAI undertook the construction of the National Historical Institute Building (NHI project). On 6 January 1989, Delfin J. Wenceslao, Jr. (Wenceslao, Jr.) accepted the contract proposal submitted by FPI for the fabrication and

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[1] Under Rule 45 of the Rules of Court.

[2] *Rollo*, pp. 40-53. Penned by Associate Justice Marina L. Buzon, with Associate Justices Mario L. Guariña III and Santiago Javier Ranada, concurring.

[3] *Id.* at 55-56.

[4] CA *rollo*, pp. 49-59. Penned by Judge Romulo A. Lopez.

delivery of pre-stressed piles for the NHI project for ₱2,600,000.[5] The contract provided for a 30% down payment upon the signing of the contract and the balance of 70% shall be by progress payment based on work accomplished. The contract also provided for an interest rate of 18% per annum on delinquent accounts.

On 5 August 1993, FPI filed a complaint[6] against Wenceslao, Jr. doing business under the name and style of D.M. Wenceslao & Associates and/or D.M. Wenceslao Construction. According to FPI, the NHI project had been completed in November 1989 but Wenceslao, Jr. has not fully paid FPI for the pre-stressed piles. FPI prayed that Wenceslao, Jr. be ordered to pay FPI ₱322,413.15 plus interest at 18% per annum from November 1989 until full payment and 25% of the award as attorney's fees and the cost of the suit.

On 29 March 1994, FPI filed a motion with leave of court to admit amended complaint.[7] In the amended complaint,[8] FPI impleaded DMWAI as a party defendant. Wenceslao, Jr. opposed the motion on the ground that the amended complaint sought to create a new cause of action against him. In its 12 July 1994 Order,[9] the trial court admitted the amended complaint.

On 17 April 1997, the trial court rendered a decision in FPI's favor. The dispositive portion of the 17 April 1997 Decision provides:

> WHEREFORE, in view of the above findings, judgment is hereby rendered in favor of the plaintiff and against the defendants ordering the latter to jointly and severally pay the plaintiff the sum of ₱322,413.15 with interest at 18% per annum from November 1989 until full payment and to pay the sum equivalent to 25% of the principal balance as litigation expenses and attorney's fees and to pay the cost of the suit.

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[5] Exhibit "A", Folder of Exhibits, pp. 1-3.

[6] Records, pp. 1-4.

[7] *Id.* at 119-120.

[8] *Id.* at 121-125.

[9] *Id.* at 140.

The counterclaim interposed by the defendants is hereby DISMISSED for lack of merit.

SO ORDERED.[10]

DMWAI appealed to the Court of Appeals. DMWAI alleged that the trial court erred in admitting FPI's amended complaint. DMWAI also questioned the trial court's ruling that DMWAI is liable for the IBRD account and in holding Wenceslao, Jr. severally and jointly liable with DMWAI for the monetary awards. DMWAI added that the trial court erred in awarding interest at 18% per annum, attorney's fees, litigation expenses and the cost of the suit.

On 10 August 2004, the Court of Appeals affirmed with modification the trial court's 17 April 1997 Decision. The dispositive portion of the 10 August 2004 Decision provides:

WHEREFORE, the decision appealed from is MODIFIED by deleting the award of attorney's fees and expenses of litigation and holding defendant-appellant D.M. Wenceslao & Associates, Inc. solely liable to plaintiff-appellee Freyssinet Philippines, Inc. for the payment of the amount of ₱322,413.15, with interest at six percent (6%) per annum from the date of filing of the complaint. However, the interest rate shall be twelve percent (12%) per annum from the time the judgment in this case becomes final and executory and until such amount is fully paid.

SO ORDERED.[11]

DMWAI filed a motion for reconsideration. In its 21 January 2005 Resolution, the Court of Appeals denied the motion.

Hence, this petition.

The Ruling Of The Trial Court

While ruling that DMWAI had fully paid FPI for the NHI project, the trial court still found DMWAI liable to FPI for the International Bank for Reconstruction and Development (IBRD)

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[10] CA *rollo*, pp. 58-59.

[11] *Rollo*, p. 52.

account. According to the trial court, even after the excess payments from the NHI project were applied, DMWAI's statement of account showed a balance of ₱322,413.15 from the IBRD account. The trial court said that, based on Section 5, Rule 10[12] of the Rules of Court, it acquired jurisdiction over the issue of the unpaid balance on the IBRD account when FPI presented evidence to prove its claim and Wenceslao, Jr. admitted that he still had an outstanding account with FPI. The trial court added that DMWAI did not object when FPI presented evidence with respect to the IBRD account.

The Ruling Of The Court Of Appeals

The Court of Appeals stated that the trial court did not err in admitting FPI's amended complaint because the amendment was only a matter of form as it merely impleaded DMWAI as an additional defendant and did not change or add another issue in the case.

The Court of Appeals affirmed the trial court's ruling that while the NHI project has been fully paid, DMWAI is still liable to FPI for the IBRD account. The Court of Appeals noted that DMWAI did not object to FPI's Exhibit "J" showing that DMWAI has an outstanding balance of ₱618,796 for the IBRD account and even adopted the same as its Exhibit "7". According to the Court of Appeals, DMWAI's failure to object to the evidence presented by FPI on the IBRD account meant that DMWAI gave its implied consent to have the trial court pass upon the issue.

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[12] Section 5, Rule 10 of the Rules of Court provides:

SEC. 5. — *Amendment to conform to or authorize presentation of evidence*. — When issues not raised by the pleadings are tried with the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so with liberality if the presentation of the merits of the action and the ends of substantial justice will be subserved thereby. The court may grant a continuance to enable the amendment to be made.

The Court of Appeals also ruled that Wenceslao, Jr. should not be held jointly and severally liable with DMWAI because Wenceslao, Jr. signed the contract, not in his personal capacity, but as President of DMWAI.

However, the Court of Appeals modified the interest rate from 18% to 6% per annum. The Court of Appeals said that the interest rate of 18% per annum on delinquent accounts pertained only to the NHI project, which has been fully paid. Since the unpaid balance of ₱322,413.15 concerned the IBRD account and no evidence was presented to show the interest rate on the IBRD account, the Court of Appeals ruled that the interest rate should be 6% per annum pursuant to Article 2209[13] of the Civil Code to be computed from the date of the filing of the complaint. However, the interest rate shall be 12% per annum from the time the judgment becomes final and executory until it is satisfied.

The Court of Appeals deleted the awards of attorney's fees and expenses of litigation because there was no proof that DMWAI acted in gross and evident bad faith in denying its liability to FPI on the NHI project.

The Issues

DMWAI raises the following issues:

1. Whether the trial court had jurisdiction over the IBRD account; and
2. Whether DMWAI is liable to pay interest on the IBRD account.

The Ruling Of The Court

The petition has no merit.

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[13] Article 2209 of the Civil Code provides:

ART. 2209. If the obligation consists in the payment of a sum of money, and the debtor incurs in delay, the indemnity for damages, there being no stipulation to the contrary, shall be the payment of the interest agreed upon, and in the absence of stipulation, the legal interest, which is six percent per annum.

DMWAI argues that the trial court's application of Section 5, Rule 10 of the Rules of Court was misplaced. DMWAI insists that at no time during the trial did FPI present any evidence or testimony to prove DMWAI's liability for the IBRD account. DMWAI adds that it had no opportunity to fully present evidence on the matter or to refute FPI's claim. DMWAI argues that the IBRD account was "merely mentioned" during the trial to prove that an off-setting agreement existed between the parties and that it should be applied to the NHI project. DMWAI adds that it should not be made liable to pay interest on the IBRD account as this was not the issue raised in FPI's complaint.

FPI maintains that the trial court had jurisdiction over the IBRD account because it was included in the issue of off-setting of accounts.

In *Bank of America v. American Realty Corporation*,[14] we stated:

> When evidence is presented by one party, with the express or implied consent of the adverse party, as to issues not alleged in the pleadings, judgment may be rendered validly as regards those issues, which shall be considered as if they have been raised in the pleadings. There is implied consent to the evidence thus presented when the adverse party fails to object thereto.
>
> Clearly, a court may rule and render judgment on the basis of the evidence before it even though the relevant pleading had not been previously amended, so long as no surprise or prejudice is thereby caused to the adverse party. Put a little differently, so long as the basic requirements of fair play had been met, as where litigants were given full opportunity to support their respective contentions and to object to or refute each other's evidence, the court may validly treat the pleadings as if they had been amended to conform to the evidence and proceed to adjudicate on the basis of all the evidence before it.[15]

DMWAI faults the trial court for finding it liable to FPI for the IBRD account despite the fact that the complaint sought to

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[14] 378 Phil. 1279 (1999), citing *Talisay-Silay Milling Co., Inc. v. Asociacion de Agricultures de Talisay-Silay, Inc*., 317 Phil. 432 (1995).

[15] *Id.* at 1302-1303.

collect from the NHI project. This is not accurate. While on the face of the complaint there was no specific allegation that DMWAI is liable to FPI for the IBRD account, subsequent developments, from the pre-trial conference up to the presentation of evidence and the examination of witnesses, show that FPI sought to recover DMWAI's unpaid accounts including the IBRD account. Moreover, DMWAI did not raise any objection on the issue.

A careful scrutiny of the decisions of the trial court and the Court of Appeals reveals that their findings and conclusions on the matter of DMWAI's liability to FPI for the IBRD account are overwhelmingly supported by the evidence.

On this issue, the trial court stated:

> However, considering the incorporation of the statement of account (Exh. "J") the balance from the IBRD project and subtracting therefrom the excess after the payments were applied to the NHI project, this Court finds and so holds that defendant is still liable to the plaintiff. This is affirmed by the admission of D.J. Wenceslao, Jr., in his testimony. Based from the provision of Rule 10, Section 5, judgment can be rendered by this Court ordering the defendant to pay the unpaid obligation, it having acquired jurisdiction over said subject matter.
>
> Although the issue raised and upon which the complaint is predicated is the collection from the NHI project, yet the account covering the IBRD [project] of the defendant with the plaintiff was tried with the implied consent of the former. Under the rule it can be considered by the Court. Defendant's conformity is affirmed by D.J. Wencelsao's (sic) admission that they still have an outstanding balance with the plaintiff but not for the NHI project. Under Rule 10, Sec.5 [,] failure to amend does not affect the result of the trial of said issue. The defendants did not even object to the plaintiff's presentation of evidence with respect to the other account which is included in the statement of account Exh. "J". Jurisdiction therefore over [the] other issue other than that expressed in the present complaint was acquired by this Court.[16]

On the other hand, the Court of Appeals declared:

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[16] CA *rollo*, pp. 56-57.

The Pre-Trial Order dated October 26, 1995 defined the issues as follows:

"1. Whether there is an agreement or negotiation regarding the off-setting of accounts between the parties.

2. If there was, whether the plaintiff [FPI] is still entitled to collect the balance or whether there is still a balance to be collected.

3. Whether defendant Wenceslao [Jr] is personally liable."

Wenceslao, Jr. admitted that based on the statement of account, the company has a liability with Freyssinet, but not on the NHI account. The statement of account dated September 26, 1990 shows the total obligation of DMWA, Inc. to Freyssinet in the amount of ₱2,588,346.00, representing the contract amount of ₱2,969,550.00 for the NHI Project and the balance of account of ₱618,796.00 for the IBRD Project. However, the statement of account prepared by Freyssinet as of March 23, 1993 shows that the total obligation in the amount of ₱3,588,346.00 was reduced to ₱352,413.15. A check dated May 15, 1993 in the amount of ₱30,000.00 was issued by Wenceslao, Jr. to Freyssinet, further reducing the obligation of DMWA, Inc. to Freyssinet to ₱322,413.15.

Thus, when evidence is presented by one party, with the express or implied consent of the adverse party, as to issues not alleged in the pleadings, judgment may be rendered validly as regards those issues, which shall be considered as if they have been raised in the pleadings. There is implied consent to the evidence thus presented when the adverse party fails to object thereto. In the case at bench, appellants not only did not object to Freyssinet's Exhibit "J" showing that it has an outstanding balance in the amount of ₱618,796.00 for the IBRD Project, they even adopted the same as their Exhibit "7".[17] (Citations omitted)

Contrary to DMWAI allegations, evidence was properly presented with full opportunity on the part of both parties to support their relative contentions and to refute each other's evidence. In this case, DMWAI was not prejudiced by the inclusion of the IBRD account as one of the controverted issues. Moreover, DMWAI had been afforded ample opportunity to refute and object

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[17] *Rollo,* pp. 47-49.

to the evidence related to the IBRD account, thus, the rudiments of fair play had been properly observed.

Since we have affirmed the ruling of the trial court and the Court of Appeals which held DMWAI liable to FPI for the IBRD account, we likewise affirm the ruling of the Court of Appeals on DMWAI's liability to pay interest on the IBRD account.

WHEREFORE, we *DENY* the petition. We *AFFIRM* the 10 August 2004 Decision and 21 January 2005 Resolution of the Court of Appeals in CA-G.R. CV No. 58093.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Leonardo-de Castro, and *Bersamin, JJ.,* concur.

THIRD DIVISION

[G.R. No. 167995. September 11, 2009]

JULITA V. IMUAN, RODOLFO VELASQUEZ, ARTURO VELASQUEZ, ARCADIO VELASQUEZ, BETTY VELASQUEZ, ROSA V. PETUYA, FELICIDAD VELASQUEZ, RAYMUNDO IMUAN, GERARDO IMUAN, JR., and ANDONG VELASQUEZ, *petitioners, vs.* **JUANITO CERENO, FEBELINDA G. CERENO, GEMMA C. GABARDA, LEDESMA G. CERENO, BLECERIA C. SULA and SALLY G. CERENO,** *respondents.*

SYLLABUS

1. CIVIL LAW; MODES OF ACQUIRING OWNERSHIP; PRESCRIPTION; ELABORATED. — Prescription is another mode of acquiring ownership and other real rights over immovable

property. It is concerned with lapse of time in the manner and under conditions laid down by law, namely, that the possession should be in the concept of an owner, public, peaceful, uninterrupted and adverse. Possession is open when it is patent, visible, apparent, notorious and not clandestine. It is continuous when uninterrupted, unbroken and not intermittent or occasional; exclusive when the adverse possessor can show exclusive dominion over the land and an appropriation of it to his own use and benefit; and notorious when it is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood. The party who asserts ownership by adverse possession must prove the presence of the essential elements of acquisitive prescription.

2. ID.; ID.; ID.; ACQUISITIVE PRESCRIPTION; KINDS. — Acquisitive prescription of real rights may be ordinary or extraordinary. Ordinary acquisitive prescription requires possession in good faith and with just title for ten years. In extraordinary prescription, ownership and other real rights over immovable property are acquired through uninterrupted adverse possession for thirty years without need of title or of good faith. The good faith of the possessor consists in the reasonable belief that the person from whom he received the thing was the owner thereof, and could transmit his ownership. For purposes of prescription, there is just title when the adverse claimant came into possession of the property through one of the modes recognized by law for the acquisition of ownership or other real rights, but the grantor was not the owner or could not transmit any right.

3. ID.; ID.; ID.; ID.; 10-YEAR PERIOD REQUIREMENT SATISFIED IN CASE AT BAR. — Notably, one of the affiants in the joint affidavit which was executed in 1970 was Alfredo, Pablo's son by his first marriage, where he attested that the property was given by his father Pablo to Juana by donation *propter nuptias*. Not one among Alfredo's children had ever come out to assail the validity of the affidavit executed by their father. In fact, not one of Alfredo's heirs joined petitioners in this case. Moreover, not one among the children of the first marriage when they were still alive ever made a claim on their successional rights over the property by asking for its partition. Such joint affidavit could constitute a legal basis for Juana's adverse and exclusive character of the possession of the property

and would show the Spouses Cereno's good faith belief that Juana was the owner of the property. Thus, when petitioners filed the instant case, more than 29 years had already elapsed, thus, the ten-year period for acquisitive prescription has already been satisfied.

4. ID.; ID.; ID.; POSSESSION IN THE CONCEPT OF OWNER; PAYMENT OF TAXES, COUPLED WITH ACTUAL POSSESSION OF THE LAND COVERED IN THE DECLARATION, STRONGLY SUPPORTS A CLAIM OF OWNERSHIP. — Moreover, immediately after the sale of the property to the Spouses Cereno, they declared the property in their names for taxation purposes and since then religiously paid the taxes due on the property. Petitioners admitted that they knew that the Spouses Cerenos are the ones paying the taxes; yet, they never challenged the same for a long period of time which clearly establishes respondents' claim as owners of the property. Jurisprudence is clear that although tax declarations or realty tax payments of property are not conclusive evidence of ownership, nevertheless, they are good indicia of possession in the concept of owner, for no one in his right mind would be paying taxes for a property that is not in his actual or at least constructive possession. They constitute at least proof that the holder has a claim of title over the property. As is well known, the payment of taxes, coupled with actual possession of the land covered by the tax declaration, strongly supports a claim of ownership.

5. ID.; LACHES; DEFINED; PETITIONER'S CLAIM ALREADY BARRED BY LACHES. — We likewise agree with the CA when it found that petitioners are guilty of laches that would bar them from belatedly asserting their claim. Laches is defined as the failure to assert a right for an unreasonable and unexplained length of time, warranting a presumption that the party entitled to assert it has either abandoned or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. Juana sold the property to the Spouses Cereno in 1970 and since then have possessed the property peacefully and publicly without any opposition from petitioners. While petitioners claim that they knew about the sale only in 1980 yet they did not take any action to recover the same and waited until 1999 to file a suit without offering any excuse for such

delay. Records do not show any justifiable reason for petitioners' inaction for a long time in asserting whatever rights they have over the property given the publicity of respondents' conduct as owners of the property.

APPEARANCES OF COUNSEL

Public Attorney's Office for petitioners.
Fernando P. Cabrera for respondents.

D E C I S I O N

PERALTA, *J.*:

Before us is a petition for review on *certiorari* which seeks to set aside the Decision[1] dated August 24, 2004 of the Court of Appeals (CA) in CA-G.R. CV No. 69446, which reversed the Decision of the Regional Trial Court (RTC), Branch 41, Dagupan City, in Civil Case No. 99-02910-D. Also assailed is the CA Resolution[2] dated April 29, 2005 denying petitioners' motion for reconsideration.

The facts are as follows:

During his lifetime, Pablo de Guzman (Pablo) contracted two marriages. His first marriage was with Teodora Soriano (Teodora), with whom he had three children, namely, Alfredo de Guzman (Alfredo), Cristita G. Velasquez (Cristita), and Inday G. Soriano (Inday). His second marriage was in 1919 with Juana Velasquez (Juana), with whom he also had three children, namely: Nena De Guzman (Nena), Teodora de Guzman (Teodora), and Soledad G. Cereno (Soledad). All these children are now dead.

Petitioners are Pablo's grandchildren by his first marriage, while respondent Juanito Cereno (Juanito) is Soledad's husband and the other respondents are their children.

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[1] Penned by Associate Justice Arturo D. Brion (now a member of this Court), with Associate Justices Delilah Vidallon-Magtolis and Eliezer R. de los Santos, concurring; *rollo*, pp. 90-105.

[2] *Id*. at 112-114.

On July 15, 1936, Pablo died intestate leaving two parcels of land, to wit: (1) a parcel of coconut land located at Salaan Mangaldan, Pangasinan, containing an area of nine hundred eighty-six (986) square meters, more or less, declared under Tax Declaration No. 8032; and (2) a parcel of cornland located at (Inlambo) Palua, Mangaldan, Pangasinan, containing an area of three thousand three hundred thirty-four (3,334) square meters, more or less, declared under Tax Declaration No. 5155.

After Pablo's death in 1936, his second wife Juana and their children continued to be in possession of the parcel of land located at Salaan, Mangaldan, Pangasinan (the disputed property), where they lived since they were married in 1919.

On January 24, 1970, Juana executed a Deed of Absolute Sale[3] in favor of respondents-spouses, Soledad, Juana and Pablo's daughter, and her husband Juanito conveying the subject property. The deed was duly registered with the Register of Deeds of Lingayen, Pangasinan.

On January 26, 1970, a Joint Affidavit[4] was executed by Alfredo de Guzman and Teofilo Cendana attesting to the fact that Pablo ceded the property in favor of Juana on the occasion of their marriage, but the document was lost.

Subsequently, Tax Declaration No. 23803[5] was issued in the names of respondents-spouses who religiously paid the taxes due on the property. Since then respondents-spouses enjoyed exclusive, open and uninterrupted possession of the property. Later, the disputed property which originally consisted of one whole lot was traversed by a *barangay* road dividing it into two (2) lots, namely, Lot 3533, with an area of 690 square meters covered by Tax Declaration No. 21268;[6] and Lot 3559, with an area of 560 square meters covered by Tax declaration No. 21269.[7]

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[3] Exhibit "19", folder of exhibits, p. 23.

[4] Exhibit "21", *id.* at 25.

[5] Exhibit "23", *id.* at 32.

[6] Exhibit "9", *id.* at 9.

[7] Exhibit "10", *id.* at 10.

Respondents-spouses Cereno built their house on Lot 3559 and had planted fruit-bearing trees on Lot 3533. Meanwhile, the parcel of cornland in Palua, Mangaldan, Pangasinan has never been in possession of any of the parties since it eroded and was submerged under water, eventually forming part of the riverbed.

Sometime in January 1999, petitioners entered and took possession of Lot 3533 by building a small nipa hut thereon. Respondents then filed before the Municipal Trial Court (MTC) of Mangaldan, Pangasinan an ejectment case against petitioners. In an Order[8] dated December 9, 1999, the MTC dismissed the case as both parties prayed for its dismissal considering that petitioners had already left Lot 3533 immediately after the filing of the complaint.

On April 5, 1999, petitioners filed with the RTC of Dagupan City a Complaint for annulment of document, reconveyance and damages against respondents alleging that: (1) the estate of their grandfather Pablo has not yet been settled or partitioned among his heirs nor had Pablo made disposition of his properties during his lifetime; (2) it was only through their tolerance that Juana and his children constructed their house on Lot 3559; (3) the sale of the disputed property made by Juana to respondents-spouses Cereno and the issuance of tax declarations in the latter's names are null and void. Petitioners prayed for the annulment of the deed of sale, cancellation of Tax Declaration Nos. 21268 and 21269, the reconveyance of the property to them and damages.

In their Answer, respondents claimed that after the death of Pablo's first wife, Pablo partitioned his property among his children and that spouses Nicomedes and Cristita Velasquez acquired most of the properties as they were more financially capable; that at the time Pablo married Juana, the properties he had were his exclusive share in the partition; that of the two parcels of land Pablo had at that time, he donated the subject property to Juana in a donation *propter nuptias* when they married; that the deed of donation was lost during the Japanese

[8] Exhibit "34", *id*. at 68-69.

occupation and such loss was evidenced by the Joint Affidavit executed by Alfredo de Guzman and Teofilo Cendana attesting to such donation; that Juana could validly convey the property to the Spouses Cereno at the time of the sale because she was the owner; and that they have been in public and uninterrupted possession of the disputed lot since its acquisition and have been paying the realty taxes due thereon. As affirmative defense, respondents contended that petitioners' rights over the property were already barred by the statute of limitations.

After trial, the RTC rendered its Decision[9] dated November 10, 2000, the dispositive portion of which reads:

> WHEREFORE, judgment is hereby rendered in favor of the plaintiffs and against the defendants:
>
> (a) Declaring as null and void the Deed of Absolute Sale; Tax Declaration Nos. 21268 for Lot 3533 & 21269 for Lot 3559 in the names of Juanito Cereno and Soledad de Guzman;
>
> (b) Ordering the defendants (1) to reconvey the property in question to the plaintiffs and to peacefully surrender the possession of the premises to the plaintiffs; and (2) to pay plaintiffs litigation expenses in the amount of ₱10,000.00.
>
> SO ORDERED.[10]

The RTC found that Juana and her children of the second nuptial built their house on the disputed property by tolerance of Pablos' children of the first marriage; that Juana alone sold the property to respondents Spouses Cereno and such sale was not valid because she was not the owner of the property at the time she sold the same; that the estate of Pablo has not been settled among the heirs since the property was still in the name of Pablo at the time Juana sold the same; that respondents Spouses Cereno's claim that the property was donated to Juana by Pablo by way of donation *propter nuptias* was not supported by evidence; that Pablo could not have donated the property to Juana because Pablo's children were the legal heirs of his first

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[9] Penned by Judge Deodoro J. Sison; *rollo*, pp. 43-48.

[10] *Id*. at 48.

wife, and have rights and interests over the property. The RTC found the Joint Affidavit dated January 26, 1970 executed by Alfredo, Pablo's son by first marriage, and Teofilo Cendana, a former Chief of Police of Mangaldan, Pangasinan, attesting that the donation *propter nuptias* executed by Pablo in favor of Juana was lost during the Japanese occupation was inconsequential, since it cannot substitute for the donation which validity was highly questionable; that petitioners were able to prove that the property was the conjugal property of Pablo and his first wife which has not been divided between Pablo and his children of the first nuptial.

On appeal, the CA rendered its assailed Decision, the dispositive portion of which reads as follows:

> WHEREFORE, premises considered, we hereby GRANT the appeal. The assailed decision dated November 10, 2000, of the Regional Trial Court (RTC), Branch 41, Dagupan City, in Civil Case No. 99-02910-D is consequently REVERSED and SET ASIDE. Costs against the plaintiffs-appellees.
>
> SO ORDERED.[11]

While the CA agreed with the findings of the RTC that there was no evidence that Pablo undertook a partition of the properties of his first marriage before he contracted his second marriage and that the Joint Affidavit dated January 26, 1970 could not be considered as conclusive proof of the transfer of the property by Pablo to Juana, it was not a sufficient basis for Juana to validly transfer the property to respondent Spouses Cereno, however, the CA gave probative value to the joint affidavit as it was executed long before the present controversy arose. The CA found that the joint affidavit was executed by Alfredo, one of Pablo's children by his first marriage who was necessarily affected by the claimed donation *propter nuptias* and who ought to know the facts attested to; that the affidavit was evidence of the basis of Juana's own good faith belief that the property was hers to dispose of when she sold it to respondents Spouses

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[11] *Id.* at 104.

Cereno; that the same affidavit can also be the basis of respondents Spouses Cereno's good faith belief that Juana, who had undisputably been in possession of the disputed property at the time of the sale, was the owner and could transfer the property to them by sale.

The CA also gave probative value to the deed of sale executed by Juana in favor of respondents Spouses Cereno as it is still an evidence of the fact of transaction between Juana and respondents Spouses Cereno for the sale of the disputed property. The CA found that the deed of sale and the joint affidavit assumed great importance on the issue of prescription.

The CA found that Juana possessed the property in the concept of an owner, which is a sufficient basis for the belief that Juana was the owner of the property she conveyed by sale and respondents Spouses Cereno had the good faith that acquisition by prescription requires when they became the purchasers in the contract of sale with her . The CA further stated that a sale, coupled with the delivery of the property sold, is one of the recognized modes of acquiring ownership of real property and that respondents Spouses Cereno immediately took possession of the property which showed that respondent Spouses Cereno have just title to the property.

The CA further found that respondents Spouses Cereno are in peaceful possession of the property for 29 years and, thus, have satisfied the ten-year period of open, public and adverse possession in the concept of an owner that the law on prescription requires. The CA added that petitioners are now barred by laches from claiming ownership of the disputed property as they have been negligent in asserting their rights.

Petitioners' motion for reconsideration was denied in a Resolution dated April 29, 2005.

Petitioners raise the following issues for our consideration:

WHETHER THE COURT OF APPEALS ERRED IN REVERSING THE DECISION OF THE REGIONAL TRIAL COURT, BRANCH 41, DAGUPAN CITY.

WHETHER THE COURT OF APPEALS ERRED IN DISREGARDING THE NATURE OF THE PROPERTY IN ISSUE WHEN IT RENDERED ITS DECISION.

WHETHER LACHES/PRESCRIPTION BARRED HEREIN PETITIONERS FROM CLAIMING THEIR RIGHTFUL SHARE IN THE PROPERTY IN ISSUE.[12]

Petitioners contend that since the CA and the RTC found that there was no partition of the property and no valid donation *propter nuptias* was made by Pablo to Juana, the rule on co-ownership among Pablo's heirs should govern the property; that when Juana sold the property to respondents Cerenos, the rights of petitioners as co-owners should not have been affected; that the CA's finding that the joint affidavit attesting to the donation *propter nuptias* can be the basis of a belief in good faith that Juana was the owner of the disputed property is erroneous, since Juana had knowledge from the time she got married to Pablo that the property was acquired during the latter's first marriage; that respondents Spouses Cereno could not be considered in good faith since Soledad is the daughter of Juana with her marriage to Pablo and could not be considered a third party to the dispute without knowledge of the nature of the property; that being co-owners, neither prescription nor laches can be used against them to divest them of their property rights.

In their Comment, respondents argue that Juana in her own right had acquired the property by prescription; that the CA correctly considered respondents' 29 years of actual and peaceful possession of the property aside from their purchase of the property from Juana in finding them as the true owners.

Petitioners and respondents submitted their respective memoranda.

The petition has no merit.

We agree with the CA that respondents have acquired the disputed property by acquisitive prescription.

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[12] *Id*. at 17-18.

Prescription is another mode of acquiring ownership and other real rights over immovable property.[13] It is concerned with lapse of time in the manner and under conditions laid down by law, namely, that the possession should be in the concept of an owner, public, peaceful, uninterrupted and adverse.[14] Possession is open when it is patent, visible, apparent, notorious and not clandestine.[15] It is continuous when uninterrupted, unbroken and not intermittent or occasional;[16] exclusive when the adverse possessor can show exclusive dominion over the land and an appropriation of it to his own use and benefit; and notorious when it is so conspicuous that it is generally known and talked of by the public or the people in the neighborhood.[17] The party who asserts ownership by adverse possession must prove the presence of the essential elements of acquisitive prescription.[18]

Acquisitive prescription of real rights may be ordinary or extraordinary.[19] Ordinary acquisitive prescription requires possession in good faith and with just title for ten years.[20] In extraordinary prescription, ownership and other real rights over immovable property are acquired through uninterrupted adverse possession for thirty years without need of title or of good faith.[21]

The good faith of the possessor consists in the reasonable belief that the person from whom he received the thing was the

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[13] *Heirs of Marcelina Arzadon-Crisologo v. Rañon*, G.R. No. 171068, September 5, 2007, 532 SCRA 391,404, citing *Calicdan v. Cendaña*, 466 Phil. 894, 902 (2004).

[14] *Id*.

[15] *Id*., citing *Director of Lands v. Intermediate Appellate Court*, 209 SCRA 214, 224 (1992).

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] Civil Code, Art. 1117.

[20] Civil Code, Art. 1134

[21] Civil Code, Art. 1137.

owner thereof, and could transmit his ownership.[22] For purposes of prescription, there is just title when the adverse claimant came into possession of the property through one of the modes recognized by law for the acquisition of ownership or other real rights, but the grantor was not the owner or could not transmit any right.[23]

Records show that as early as 1970, when the property was sold by Juana to respondents Spouses Cereno, the latter immediately took possession of the property. Since then, respondents possessed the property continuously, openly, peacefully, in the concept of an owner, exclusively and in good faith with just title, to the exclusion of the petitioners and their predecessors-in-interest until the filing of the complaint in 1999 which is the subject of this present petition.

Notably, the property was traversed by a *barangay* road, thus, it was divided into two lots. The house of respondents is located on the eastern part of the road, while the lot on the western part of the road was planted to fruit-bearing trees by respondents.[24] It was admitted by petitioners that they saw the house of respondents constructed on the lot and yet never questioned the same.[25] It was also established that respondents are the ones gathering the fruits of the land and enjoying the same[26] to the exclusion of petitioners and yet the latter never prevented them from doing so. In fact, while petitioners learned of the sale of the property by Juana to the Spouses Cereno in 1980, they never took any action to protect whatever rights they have over the property nor raised any objection on respondents' possession of the property. Petitioners' inaction is aggravated by the fact that petitioners just live a mere 100 meters away from the property.[27]

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[22] *Calicdan v. Cendaña*, *supra* note 13, at 903, citing Civil Code, Art. 1127.

[23] *Id.*, citing Civil Code, Art. 1129.

[24] TSN, July 7, 1999, p. 4.

[25] TSN, July 21,1999, p. 16

[26] TSN, July 7, 1999 (Betty Velasquez), p. 4; TSN, August 11, 1999 (Rodolfo Velasquez), p. 5.

[27] TSN, July 21, 1999, p. 15.

Moreover, immediately after the sale of the property to the Spouses Cereno, they declared the property in their names for taxation purposes[28] and since then religiously paid the taxes[29] due on the property. Petitioners admitted that they knew that the Spouses Cerenos are the ones paying the taxes;[30] yet, they never challenged the same for a long period of time which clearly establishes respondents' claim as owners of the property. Jurisprudence is clear that although tax declarations or realty tax payments of property are not conclusive evidence of ownership, nevertheless, they are good indicia of possession in the concept of owner, for no one in his right mind would be paying taxes for a property that is not in his actual or at least constructive possession.[31] They constitute at least proof that the holder has a claim of title over the property.[32] As is well known, the payment of taxes, coupled with actual possession of the land covered by the tax declaration, strongly supports a claim of ownership.[33]

Respondent Juanito also exercised dominion over the property by mortgaging the same to Manaoag Rural Bank in 1994[34] and the mortgage was cancelled only in January 1999.[35]

While there is a question regarding the alleged donation *propter nuptias* at the time Juana executed the deed of sale in favor of the Spouses Cereno in 1970, however, the requirement of just title and good faith are still satisfied in this case. As the CA said:

x x x [T]he joint affidavit that the defendants-appellants presented, attesting to the donation *propter nuptias* of the disputed property

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[28] Exhibit "23", folder of exhibits, p. 32.

[29] Annexes "25" to "25-A to 25-P", *id*. at 34-49.

[30] TSN, July 21, 1999, p. 16.

[31] *Heirs of Marcelina Arzadon-Crisologo v. Rañon, supra* note 13, at 410, citing *Republic v. Court of Appeals*, 328 Phil. 238, 248 (1996).

[32] *Id*.

[33] *Id*., citing *Spouses Reyes v. Court of Appeals*, 393 Phil. 493 (2000).

[34] TSN, November 10, 1999, p. 18.

[35] Exhibit "24", folder of exhibits, p. 33.

by Pablo to Juana, can be the basis of the belief in good faith that Juana was the owner of the disputed property. Related to this, it is undisputed that Pablo and Juana had lived in the disputed property from the time of their marriage in 1919, and Juana continued to live and to possess this property in the concept of an owner from the time of Pablo's death in 1936 up to the time she sold it to spouses Cereno in 1970. These circumstances, in our view, are sufficient bases for the belief that Juana was the owner of the property she conveyed by sale, and leave us convinced that the spouses Cereno had the "good faith" that acquisition by prescription requires when they became the purchasers in the contract of sale with Juana.[36]

Notably, one of the affiants in the joint affidavit which was executed in 1970 was Alfredo, Pablo's son by his first marriage, where he attested that the property was given by his father Pablo to Juana by donation *propter nuptias*. Not one among Alfredo's children had ever come out to assail the validity of the affidavit executed by their father. In fact, not one of Alfredo's heirs joined petitioners in this case.[37] Moreover, not one among the children of the first marriage when they were still alive ever made a claim on their successional rights over the property by asking for its partition. Such joint affidavit could constitute a legal basis for Juana's adverse and exclusive character of the possession of the property[38] and would show the Spouses Cereno's good faith belief that Juana was the owner of the property. Thus, when petitioners filed the instant case, more than 29 years had already elapsed, thus, the ten-year period for acquisitive prescription has already been satisfied.

We likewise agree with the CA when it found that petitioners are guilty of laches that would bar them from belatedly asserting their claim.

Laches is defined as the failure to assert a right for an unreasonable and unexplained length of time, warranting a presumption that the

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[36] *Rollo,* p. 102.

[37] TSN, July 21, 1999, p. 5.

[38] See *Heirs of Segunda Maningding v. Court of Appeals*, G.R. No. 121157, July 31, 1997, 276 SCRA 601.

party entitled to assert it has either abandoned or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society.[39]

Juana sold the property to the Spouses Cereno in 1970 and since then have possessed the property peacefully and publicly without any opposition from petitioners. While petitioners claim that they knew about the sale only in 1980 yet they did not take any action to recover the same and waited until 1999 to file a suit without offering any excuse for such delay. Records do not show any justifiable reason for petitioners' inaction for a long time in asserting whatever rights they have over the property given the publicity of respondents' conduct as owners of the property.

WHEREFORE, the petition is *DENIED*. The Decision dated August 24, 2004 and the Resolution dated April 29, 2005 of the Court of Appeals in CA-G.R. CV No. 69446 are *AFFIRMED*.

SO ORDERED.

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

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[39] *Vda. de Rigonan v. Derecho,* G.R. No. 159571, July 15, 2005, 463 SCRA 627, 648, citing *Tijam v. Sibonghanoy*, 23 SCRA 29 (1968).

FIRST DIVISION

[G.R. No. 168927. September 11, 2009]

ARSENIO F. QUEVEDO, LAWRENCE CAMARILLO, ABELARDO MARQUEZ, JOSEPHINE CALINAO, CLEMENCIA COSALAN, CORAZON T. DULFO, NORMA BUDOD, ELIZABETH ANIS, MILAGROS RAMOS, JOVITA RILLERA, ERLINDA T. PABLO, JULIET SUBIDO, and WILFREDA RUIZ, *petitioners, vs.* **BENGUET ELECTRIC COOPERATIVE, INCORPORATED (BENECO) and GERARDO P. VERZOSA as Manager,** *respondents.*

SYLLABUS

1. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; TERMINATION OF EMPLOYMENT AND RETIREMENT FROM SERVICE ARE MUTUALLY EXCLUSIVE. — Petitioners do not contest their retirement from service. What they assail is the Court of Appeals' finding of its voluntariness. Thus, as the Court of Appeals found, it is inappropriate to engage in any discussion, as the NLRC did, on whether BENECO complied with the requirements for termination of employment for redundancy. While termination of employment and retirement from service are common modes of ending employment, they are mutually exclusive, with varying juridical bases and resulting benefits. Retirement from service is contractual (*i.e.* based on the bilateral agreement of the employer and employee), while termination of employment is statutory (*i.e.* governed by the Labor Code and other related laws as to its grounds, benefits and procedure). The benefits resulting from termination vary, depending on the cause. For retirement, Article 287 of the Labor Code gives leeway to the parties to stipulate above a floor of benefits.

2. ID.; ID.; ID.; RETIREMENT; VOLUNTARY RETIREMENT DISTINGUISHED FROM INVOLUNTARY RETIREMENT. — The line between voluntary and involuntary retirement is thin but it is one which this Court has drawn. Voluntary

retirement cuts employment ties leaving no residual employer liability; involuntary retirement amounts to a discharge, rendering the employer liable for termination without cause. The employee's intent is the focal point of analysis. In determining such intent, the fairness of the process governing the retirement decision, the payment of stipulated benefits, and the absence of badges of intimidation or coercion are relevant parameters. Nothing in the records offends any of these criteria. The manner by which BENECO arrived at its decision to downsize and at the same time spare petitioners the lesser benefits under Article 283 of the Labor Code by creating a more generous retirement package was regular, transparent and fully documented. x x x.

3. ID.; ID.; ID.; ID.; PETITIONERS VOLUNTARILY RETIRED FROM SERVICE AND WERE NOT DISMISSED. — Further, petitioners were afforded opportunity to seek reconsideration of BENECO's decision to downsize, albeit without success as BENECO stood pat on its management decision. Nor were petitioners here denied the stipulated benefits. It is telling, but not surprising, that petitioners kept clear of this subject. The records show that on average, the benefits each of the petitioners received under the EVR program were more than twice their statutory counterpart under Article 183. We note with approval the Labor Arbiter's observation that the marked difference between these two bundles of benefits not only factored in petitioners' decision to retire under the EVR program but also explained the lapse of nearly four months before petitioners sued BENECO. Finally, petitioners accepted BENECO's offer without reservation and received payments without protest. True, petitioners requested BENECO to reconsider its decision to abolish their positions but this is a natural inclination to keep one's livelihood. It does not rise to that level of intimidation or coercion sufficient to vitiate consent as shown in the factual milieu we detailed in *San Miguel Corporation v. National Labor Relations Commission:* x x x.

4. ID.; ID.; ID.; WAIVERS; WHEN MAY BE CONSIDERED INVALID; CASE AT BAR. — Petitioners bound themselves, in individually signed contracts, to "forever release, waive and quitclaim all causes of action or claims arising from or as a consequence" of their early retirement. Petitioners concede that this blanket stipulation bars this suit. However, they seek

to avoid compliance by again pleading vitiated consent. Although contracts executed in the context of employment are imbued with public interest, triggering closer scrutiny, they remain contracts binding the parties to their terms. To excuse petitioners from complying with the terms of their waivers, they must locate their case within any of three narrow grounds: (1) the employer used fraud or deceit in obtaining the waivers; (2) the consideration the employer paid is incredible and unreasonable; or (3) the terms of the waiver are contrary to law, public order, public policy, morals or good customs or prejudicial to a third person with a right recognized by law. The preceding discussion on the voluntariness of petitioners' retirement from service effectively removes these grounds beyond petitioners' argumentative reach. Accordingly, petitioners, by the terms of their waivers, are barred from filing this suit.

APPEARANCES OF COUNSEL

Basa Adquilen & Balagtey Law Offices for petitioners.
E.L. Gayo and Associates Law Offices for respondents.

D E C I S I O N

CARPIO, *J.*:

The Case

For review[1] is the Decision[2] of the Court of Appeals, dated 29 April 2005, dismissing petitioners' complaint for illegal termination of employment and its Resolution, dated 13 July 2005, denying reconsideration.

The Facts

Petitioners are former employees of respondent Benguet Electric Cooperative, Incorporated (BENECO). Before 1999,

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] Penned by Associate Justice Celia C. Librea-Leagogo with Associate Justices Andres B. Reyes, Jr. and Lucas P. Bersamin, concurring.

BENECO started automating its operations, rendering superfluous functions performed by some employees, including petitioners. Instead of terminating petitioners' employment outright for redundancy and paying them the statutory benefits,[3] BENECO offered petitioners the option to retire under a newly created optional retirement program (Early Voluntary Retirement [EVR]) guaranteeing petitioners bigger benefits.[4] After unsuccessfully requesting BENECO to retain their services, petitioners accepted BENECO's offer, received payments, and released BENECO from further liability in individually executed contracts.

In September 2000, nearly four months after leaving BENECO, petitioners sued BENECO at the National Labor Relations Commission (NLRC) Arbitration Branch, Cordillera Administrative Region, Baguio City for illegal dismissal.[5] Petitioners claimed that they had no intention of retiring from service but their hands were forced because BENECO would have terminated their services. Petitioners questioned the validity of BENECO's downsizing in light of BENECO's hiring of new employees shortly after petitioners left the corporation.

The Ruling of the Labor Arbiter

In a Decision dated 13 February 2001, the Labor Arbiter[6] dismissed petitioners' complaint for lack of merit. The Labor Arbiter rejected petitioners' claim of dismissal without cause, holding instead that petitioners retired from service voluntarily. The Labor Arbiter gave no credence to petitioners' claim of

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[3] Under Article 283 of the Labor Code, petitioners were entitled to receive separation benefits equivalent to at least one month pay or at least one month salary for every year of service, whichever is higher.

[4] Consisting of (1) separation pay ranging from 1.5 to 2.25 monthly salary rate for every year of service; (2) premium pay equivalent to 12 months gross salary; (3) 14th month pay; (4) grocery allowance; and (5) accumulated leave pay. (CA *rollo*, p. 5)

[5] Petitioners also sought to hold BENECO liable for unfair labor practice but this cause of action is no longer pursued here. The NLRC, at the arbiter and commission level, found no merit in this claim.

[6] Jesselito B. Latoja.

vitiated consent after noting petitioners' educational backgrounds[7] and the extent of benefits they received.[8] Contrary to petitioners' allegation, the Labor Arbiter found that the new employees BENECO hired were project employees who performed tasks unrelated to petitioners' work.

Petitioners appealed to the NLRC.

The Ruling of the NLRC

In its Decision dated 28 November 2003, the NLRC granted petitioners' appeal, set aside the ruling of the Labor Arbiter and ordered BENECO to reinstate petitioners with full backwages less benefits received.[9] The NLRC gave credence to petitioners' claim of involuntary retirement. Further, the NLRC held BENECO liable for dismissing petitioners without cause, as it failed to prove redundancy, and without due process, as BENECO failed to notify the Department of Labor of petitioners' termination.

BENECO sought reconsideration but the NLRC denied its motion.

BENECO appealed to the Court of Appeals in a petition for *certiorari* contending that the NLRC committed grave abuse

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[7] Except for petitioners Calinao and Anis who took secretarial courses, the rest of the petitioners hold degrees in accounting or economics.

[8] Petitioners received the following amounts (*Rollo*, pp. 40-41):

Arsenio Quevedo	– 367,854.86
Lawrence Camarillo	687,885.03
Erlinda T. Pablo	618,968.42
Norma U. Budod	367,854.86
Corazon T. Dulfo	497,501.04
Clemencia L. Cosalan	289,517.24
Josephine Calinao	231,854.35
Abelardo D. Marquez	662,115.31
Elizabeth B. Anis	335,812.38
Jovita G. Rillera	231,854.35
Wilfreda Ruiz	342,511.22
Juliet P. Subido	596,880.39
Milagros D. Ramos	768,402.78

[9] Alternatively, the NLRC ordered BENECO to give separation pay to petitioners should reinstatement prove not feasible.

of discretion in reversing the Labor Arbiter's finding that petitioners retired from service voluntarily. Further, BENECO invoked the terms of the waivers petitioners signed releasing BENECO from further liability.

The Ruling of the Court of Appeals

In its Decision dated 29 April 2005, the Court of Appeals granted BENECO's appeal, set aside the NLRC's ruling and reinstated the decision of the Labor Arbiter. The Court of Appeals found more in accord with the records the Labor Arbiter's finding that petitioners retired from service of their own volition, thus precluding any finding of illegal dismissal. Further, the Court of Appeals found merit in BENECO's contention that petitioners were barred under the terms of their waiver contracts from seeking further benefits from BENECO.

Petitioners sought reconsideration but the Court of Appeals denied their motion in the Resolution of 13 July 2005.

Hence, this petition. Petitioners pray for the reinstatement of the NLRC's ruling.

The Issue

The issue is whether BENECO is liable for illegal dismissal.

The Ruling of the Court

We rule in the negative. We affirm the Court of Appeals' ruling that petitioners retired from service voluntarily.

Petitioners Retired from Service and Were Not Dismissed

Petitioners do not contest their retirement from service. What they assail is the Court of Appeals' finding of its voluntariness. Thus, as the Court of Appeals found, it is inappropriate to engage in any discussion, as the NLRC did, on whether BENECO complied with the requirements for termination of employment for redundancy.[10] While termination of employment and retirement from service are common modes of ending employment, they

[10] Under Article 283 of the Labor Code.

are mutually exclusive, with varying juridical bases and resulting benefits. Retirement from service is contractual (*i.e.* based on the bilateral agreement of the employer and employee),[11] while termination of employment is statutory (*i.e.* governed by the Labor Code and other related laws as to its grounds, benefits and procedure). The benefits resulting from termination vary, depending on the cause.[12] For retirement, Article 287 of the Labor Code gives leeway to the parties to stipulate above a floor of benefits.[13]

Petitioners' Retirement from Service was Voluntary

The line between voluntary and involuntary retirement is thin but it is one which this Court has drawn. Voluntary retirement cuts employment ties leaving no residual employer liability; involuntary retirement amounts to a discharge, rendering the employer liable for termination without cause.[14] The employee's

[11] *Soberano v. Secretary of Labor*, 187 Phil. 873 (1980).

[12] For dismissals due to authorized causes under Article 283, the benefits are computed as follows: "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 (½) month pay for every year of service, whichever is higher. A fraction of at least six (6) months shall be considered one (1) whole year." For dismissal based on employee illness under Article 284, the separation pay is equivalent to "at least one (1) month salary or to one-half (½) 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." For dismissals without cause, the employer is liable to pay backwages, other applicable benefits, and damages, when appropriate.

[13] Which is "at least one-half (½) month salary for every year of service, a fraction of at least six (6) months being considered as one whole year" with the term "one-half (½) month salary" defined as "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."

[14] *San Miguel Corporation v. National Labor Relations Commission*, 354 Phil. 815 (1998); *De Leon v. National Labor Relations Commission*, 188 Phil. 666 (1980).

intent is the focal point of analysis. In determining such intent, the fairness of the process governing the retirement decision,[15] the payment of stipulated benefits, and the absence of badges of intimidation or coercion[16] are relevant parameters.[17]

Nothing in the records offends any of these criteria.

The manner by which BENECO arrived at its decision to downsize and at the same time spare petitioners the lesser benefits under Article 283 of the Labor Code by creating a more generous retirement package was regular, transparent and fully documented. As the Court of Appeals noted:

> The absence of arbitrariness and bad faith on the part of [BENECO] in its adoption and implementation of the EVRP may be gleaned from the series of discussion of x x x BENECO's Board of Directors on the Proposed Table of Organization contained in the Minutes of its Meetings x x x
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> The proposal to implement a voluntary retirement plan to the employees who were identified as holding redundant positions was formally made into a corporate act by the passage of Resolution No. 44-2000 which was amended by Resolution No. 44-2000-A. The affected employees were formally notified of the said resolutions in a letter dated 20 March 2000 and letter dated 07 April 2000.[18]

Further, petitioners were afforded opportunity to seek reconsideration of BENECO's decision to downsize, albeit without success as BENECO stood pat on its management decision.

To appreciate the regularity of what transpired here, one need only compare it with the unceremonious treatment of the employee in *De Leon v. National Labor Relations Commission*[19]

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[15] *De Leon v. National Labor Relations Commission*, *supra*.

[16] *San Miguel Corporation v. National Labor Relations Commission*, *supra*.

[17] The concept of "forced retirement" has been enlarged to cover "moral and psychological" compulsion (*Id.* at 825).

[18] *Rollo*, pp. 54, 56.

[19] *Supra* note 14.

who, despite not having applied for retirement, received notice from his employer that his "application for retirement has been accepted."[20] Worse, the employee in *De Leon*, unlike petitioners, was not afforded the chance to question his supposed retirement.

Nor were petitioners here denied the stipulated benefits. It is telling, but not surprising, that petitioners kept clear of this subject. The records show that on average, the benefits each of the petitioners received under the EVR program were more than twice their statutory counterpart under Article 183.[21] We note with approval the Labor Arbiter's observation that the marked difference between these two bundles of benefits not only factored in petitioners' decision to retire under the EVR program but also explained the lapse of nearly four months before petitioners sued BENECO.[22]

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[20] *Id.* at 669.

[21] Below are the comparative benefits (*Rollo*, p. 87):

	Under Article 283	Under the EVR Program
Arsenio Quevedo	₱137,325.00	₱ 367,854.86
Lawrence Camarillo	241,680.00	687,885.03
Erlinda T. Pablo	224,316.00	618,958.42
Norma U. Budod	137,325.00	367,854.86
Corazon T. Dulfo	178,126.00	497,501.04
Clemencia Cosalan	99,156.00	289,517.24
Josephine Calinao	75,834.00	231,854.35
Abelardo D. Marquez	232,185.00	662,115.31
Elizabeth B. Anis	119,015.00	335,812.36
Jovita G. Rillera	75,834.00	231,854.35
Juliet P. Subido	207,108.00	596,880.39
Milagros D. Ramos	269,115.00	780,402.76

For petitioner Wilfreda Ruiz, it cannot be ascertained from the records how much she was entitled to receive under Article 283 although she received ₱342,511.22 under the EVR program.

[22] The Labor Arbiter observed (*Id.*):

Considering the amounts involved, it is incredible that herein complainants involuntarily retired. They are not uneducated. Their service records and biodata show that most of them, if not all, are Commerce graduates (Annexes "6" to "6-L", Respondents' Position Paper). Respondents are correct in their assertion that complainants must have considerably deliberated on the computed amounts before accepting them. They must have known the consequences

Finally, petitioners accepted BENECO's offer without reservation[23] and received payments without protest. True, petitioners requested BENECO to reconsider its decision to abolish their positions but this is a natural inclination to keep one's livelihood. It does not rise to that level of intimidation or coercion sufficient to vitiate consent as shown in the factual milieu we detailed in *San Miguel Corporation v. National Labor Relations Commission*:

> [W]hen [complainants'] application papers for retirement were supposedly approved, the same four (4) high-ranking officials of petitioner [corporation], who met the complainants at the office of Mr. Edmundo Torres, Jr., decided to talk to the complainants individually and requested all of them, except Mr. George D. Teddy, Jr., to go out while they (petitioner's officials) would discuss important matters with them, one by one, starting with Mr. Teddy. And when the complainants signed retirement papers, petitioner corporation admitted in its petition that they (complainants) were reluctant to sign the same.[24]

Petitioners nevertheless argue that their inevitable termination forced their hands, leaving them no choice but to retire from service. Although superficially appealing, this argument rests on an unfair, but predictably biased, assumption: that petitioners'

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of their acceptance of the EVR benefit package. In fact, they have enjoyed their retirement pays almost [four (4)] months before they filed their complainants for illegal dismissal. (Emphasis in the original)

[23] In individually signed acceptance forms (CA *rollo*, pp. 75-81).

[24] 354 Phil. 815, 826 (1998). The Labor Arbiter's factual narration in *San Miguel* also detailed complainants' other allegations supporting their claim of involuntary resignation: "Complainants x x x allege that the respondent corporation had involuntarily secured their signature in conformity with their retirement from the service; that this involuntariness could be gleaned from the fact that when complainant George D. Teddy, Jr. was about to go out of the door of his office when he refused to affix his conformity with the option of the respondent to retire him from the service, one Mr. Antonio Labirua, Personnel Director of the Beer and Packaging Division of the respondent corporation blocked the door of the office; that complainant (sic) were threatened by this Mr. Labirua that whether they like it or not, the respondent company had decided to retire them from work; that in fact complainant Manuel G. Chu who did not sign any documents tendered to him by Mr. Labirua was likewise retired by the respondent corporation." (*Id.* at 819-820)

dismissal would have been, as a matter of certainty, illegal. For if one assumes the contrary, then economics, not psychology, explains petitioners' conduct — petitioners were not compelled to retire, they simply chose, between two equally valid options, the exit route offering bigger benefits.

At any rate, assuming illegality, as a general proposition, ignores the settled presumption that "the law has been obeyed."[25] Assuming causeless dismissal is graver still for it denies the employer the fair chance to prove the contrary.[26] Indeed, our observation in *Benguet Electric Cooperative v. Fianza*[27] that BENECO downsized "to address the requirements of an automated system and to streamline [its] operations" further robs petitioners' contention of any merit. We held in *Fianza*:

> [T]he abolition of a position deemed no longer necessary is a management prerogative, and this Court, absent any findings of malice and arbitrariness on the part of management, will not efface such privilege if only to protect the person holding that office.
>
> **As found by the Labor Arbiter and affirmed by the NLRC, there had been a proposed restructuring of the organization of respondent BENECO, which process began before 1999. The Labor Arbiter and the NLRC affirmed that the restructured Table of Organization of BENECO was prepared after a thorough review by management of the indispensable and unessential positions in the old plantilla. It was undertaken to address the requirements of an automated system and to streamline BENECO's operations.** Under the revamped organization, the position of Property Custodian under the Office of the General Manager had already been abolished.[28] (Emphasis supplied)

The respondent in *Fianza* was among the twenty BENECO employees whose positions, including petitioners', were rendered superfluous by the reorganization.

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[25] Section 3(m), Rule 131, Revised Rules of Evidence.

[26] Under Article 277 of the Labor Code, the burden of proving that the termination was for a valid or authorized cause rests on the employer.

[27] 468 Phil. 980 (2004).

[28] *Id.* at 994-995.

Petitioners' Waivers Bar this Suit

Petitioners bound themselves, in individually signed contracts, to "forever release, waive and quitclaim all causes of action or claims arising from or as a consequence" of their early retirement.[29] Petitioners concede that this blanket stipulation bars this suit. However, they seek to avoid compliance by again pleading vitiated consent. Although contracts executed in the context of employment are imbued with public interest, triggering closer scrutiny, they remain contracts binding the parties to their terms.[30]

To excuse petitioners from complying with the terms of their waivers, they must locate their case within any of three narrow grounds: (1) the employer used fraud or deceit in obtaining the waivers; (2) the consideration the employer paid is incredible and unreasonable; or (3) the terms of the waiver are contrary to law, public order, public policy, morals or good customs or prejudicial to a third person with a right recognized by law.[31] The preceding discussion on the voluntariness of petitioners' retirement from service effectively removes these grounds beyond petitioners' argumentative reach. Accordingly, petitioners, by the terms of their waivers, are barred from filing this suit.

WHEREFORE, we *DENY* the petition. We *AFFIRM* the Decision of the Court of Appeals dated 29 April 2005 and its Resolution dated 13 July 2005.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Leonardo-de Castro, and *Brion,*[*] *JJ.,* concur.

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[29] *Rollo*, pp. 358-369.

[30] Under Article 1315 of the Civil Code, parties to contracts "are bound to the fulfillment not only of what has been expressly stipulated but also to all the consequences which, according to their nature, may be in keeping with good faith, usage and law."

[31] See *More Maritime Agencies, Inc. v. NLRC*, 366 Phil. 646 (1999).

[*] Designated additional member per Raffle dated 8 September 2009.

FIRST DIVISION

[G.R. No. 169228. September 11, 2009]

THE ALEXANDRA CONDOMINIUM CORPORATION, *petitioner, vs.* **LAGUNA LAKE DEVELOPMENT AUTHORITY,** *respondent.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; NON-EXHAUSTION OF ADMINISTRATIVE REMEDIES; DOCTRINE; PREMATURE INVOCATION OF A COURT'S INTERVENTION RENDERS THE COMPLAINT WITHOUT CAUSE OF ACTION AND DISMISSIBLE. — The doctrine of non-exhaustion of administrative remedies requires that resort be first made with the administrative authorities in the resolution of a controversy falling under their jurisdiction before the controversy may be elevated to a court of justice for review. A premature invocation of a court's intervention renders the complaint without cause of action and dismissible.

2. ID.; ID.; ID.; ID.; PROPER REMEDY OF THE PETITIONER IS AN ADMINISTRATIVE RECOURSE BEFORE THE DENR SECRETARY PRIOR TO JUDICIAL ACTION. — EO 149 transferred LLDA from the Office of the President to the DENR "for policy and program coordination and/or administrative supervision x x x." Under EO 149, DENR only has administrative power over LLDA. Administrative power is concerned with the work of applying policies and enforcing orders as determined by proper governmental organs. However, Executive Order No. 192 (EO 192), which reorganized the DENR, mandates the DENR to "promulgate rules and regulations for the control of water, air and land pollution" and to "promulgate ambient and effluent standards for water and air quality including the allowable levels of other pollutants and radiations." EO 192 created the Pollution Adjudication Board under the Office of the DENR Secretary which assumed the powers and functions of the NPCC with respect to the adjudication of pollution cases, including NPCC's function to "[s]erve as arbitrator for the determination of reparation, or restitution of the damages and losses resulting from

pollution." Hence, TACC has an administrative recourse before the DENR Secretary which it should have first pursued before filing a petition for *certiorari* before the Court of Appeals.

3. ID.; ID.; GOVERNMENT AGENCY; LAGUNA LAKE DEVELOPMENT AUTHORITY; HAS POWER TO IMPOSE PENALTY FOR NON-COMPLIANCE WITH THE WATER AND EFFLUENT QUALITY STANDARDS. — RA 4850 specifically mandates LLDA to carry out and make effective the declared national policy of promoting and accelerating the development and balanced growth of the Laguna Lake area and the surrounding provinces of Rizal and Laguna and the cities of San Pablo, Manila, Pasay, Quezon and Caloocan with due regard and adequate provisions for environmental management and control, preservation of the quality of human life and ecological systems, and the prevention of undue ecological disturbances, deterioration and pollution. LLDA, by virtue of its special charter, has the responsibility to protect the inhabitants of the Laguna Lake region from the deleterious effects of pollutants emanating from the discharge of wastes from the surrounding areas. Under Section 4-A of RA 4850, as amended, LLDA is entitled to compensation for damages resulting from failure to meet established water and effluent quality standards x x x.

4. ID.; ID.; ID.; ID.; ID.; RESPONSIBILITY TO COMPLY WITH GOVERNMENT WATER AND EFFLUENT STANDARDS LIES WITH THE PETITIONER. — PhilRealty formally turned over the project to TACC on 31 December 1993. Thereafter, TACC managed the project. It was almost five years after, or on 24 June 1998, when LLDA advised TACC that its wastewater did not meet government effluent standards. It is clear that the responsibility to comply with government standards lies with TACC. If, as claimed by TACC, the non-compliance was due to the omission and fault of PhilRealty, TACC's recourse is to file an action, if warranted, against PhilRealty in a proper court. TACC cannot escape its liability to LLDA by shifting the blame to PhilRealty. Hence, the LLDA did not abuse its discretion in issuing its 4 September 2003 Order.

5. ID.; ID.; ID.; ID.; ID.; CONDONATION OF PENALTY; POWER TO COMPROMISE CLAIMS IS VESTED EXCLUSIVELY IN THE COMMISSION ON AUDIT OR CONGRESS. — As regards the condonation of the penalty, the power to compromise

claims is vested exclusively in the COA or Congress pursuant to Section 20 (1), Chapter IV, Subtitle B, Title I, Book V of Executive Order No. 292 (Administrative Code of 1987) xxx. In a letter dated 5 May 2004, TACC manifested its offer to compromise by paying a reduced fine of ₱500,000. In its response dated 8 July 2004, LLDA stated that the proposal would be forwarded to LLDA's Board of Directors although "it is necessary that the case be withdrawn from the court." In a letter dated 11 September 2004, TACC stated that in a regular meeting held on 6 September 2004, the members of TACC's Board of Directors unanimously agreed to withdraw the petition for *certiorari* before the Court of Appeals, provided the LLDA would agree to reduce the penalty to ₱500,000. In a letter dated 22 September 2004, LLDA referred the offer to its resident auditor Antonio M. Malit (Auditor Malit) on the ground that only the COA had the authority to compromise settlement of obligations to the State. In a letter dated 23 September 2004, Auditor Malit informed LLDA that the power to compromise claims is vested exclusively in the COA pursuant to Section 36 of Presidential Decree No. 1445. Auditor Malit stated that the request for compromise should be addressed to COA. However, since the amount of the penalty sought to be condoned is ₱1,062,000, the authority to compromise such claim is vested exclusively in Congress pursuant to Section 20 (1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987. This remedy is not administrative but legislative, and need not be resorted to before filing a judicial action.

6. ID.; ID.; ID.; ID.; REVIEW OF THE CHARTER THEREOF IS NOT WITHIN THE JURISDICTION OF THE SUPREME COURT. — Finally, TACC wants the Court to review the mandate of LLDA to help transform it from a regulatory agency into a developmental and promotional agency. However, we agree with LLDA that such a review of LLDA's charter is not within the jurisdiction of this Court.

7. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; WHEN PROPER; FILING OF MOTION FOR RECONSIDERATION, WHEN MAY BE DISPENSED WITH. — For a petition for *certiorari* under Rule 65 of the Rules of Court to prosper, TACC must show that (1) the LLDA acted without or in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction

and (2) there is no appeal or a plain, speedy and adequate remedy in the ordinary course of law. The plain and adequate remedy referred to in Section 1 of Rule 65 is a motion for reconsideration of the assailed decision. The purpose of this requirement is to enable the court or agency to rectify its mistakes without the intervention of a higher court. To dispense with this requirement, there must be a concrete, compelling, and valid reason for the failure to comply with the requirement. Petitioner may not arrogate to itself the determination of whether a motion for reconsideration is necessary or not. In the present case, TACC did not file a motion for reconsideration of the 4 September 2003 Order. TACC also failed to show sufficient compelling and valid reason to dispense with the requirement of filing a motion for reconsideration. Hence, we agree with the Court of Appeals that the petition for *certiorari* was prematurely filed before it.

APPEARANCES OF COUNSEL

Cochingyan & Peralta for petitioner.

D E C I S I O N

CARPIO, *J.*:

The Case

Before the Court is a petition for review assailing the 26 April 2005 Decision[1] and 1 August 2005 Resolution[2] of the Court of Appeals in CA-G.R. SP No. 82409.

The Antecedent Facts

Philippine Realty and Holdings, Inc. (PhilRealty) developed, established, and constructed The Alexandra Condominium Complex from 1987 to 1993. In a Deed of Conveyance dated 18 April 1988, PhilRealty transferred to The Alexandra

[1] *Rollo*, pp. 33-40. Penned by Associate Justice Arcangelita Romilla-Lontok with Associate Justices Rodrigo V. Cosico and Danilo B. Pine, concurring.

[2] *Id*. at 42.

Condominium Corporation (TACC) a parcel of land with an area of 9,876 square meters located at 29 Meralco Avenue, Pasig City as well as all the common areas of the project. The land was covered by Transfer Certificate of Title No. 64355.

The condominium project consists of the following phases:

(a) Cluster A – 3 Five Storey Buildings; A-1, A-2 and A-3;

(b) Cluster B – 2 Eleven Storey Buildings; B-1 and B-2;

(c) Cluster C – 2 Seven Storey Buildings; C-1 and C-2;

(d) Cluster D – 2 Fourteen Storey Buildings; D-a and D-2; and

(e) Cluster E – 2 Eleven Storey Buildings; E-1 and E-2.

On 2 September 1987, the Human Settlements Regulatory Commission issued a Development Permit to PhilRealty to develop Cluster A of the project. In the Development Permit, PhilRealty was required to submit its condominium plans to the Building Official of Pasig City. Architect Walter R. Perez (Architect Perez), then Building Official of Pasig City, reviewed the Site Development and Location Plan as well as the Sanitary/Plumbing Plans and Specifications of the project. On 24 September 1987, Architect Perez issued a Building Permit. On 30 September 1987, Architect Perez issued a Sanitary/Plumbing Permit acknowledging the fixtures to be installed but without indicating the System of Disposal including a Waste Water Treatment Plan. On 15 December 1988, Architect Perez issued a Certificate of Final Inspection and a Certificate of Occupancy for Buildings A-1 to A-3.

PhilRealty undertook the same process for Clusters B, C, D, and E. Building Permits and Certificates of Final Inspection and Occupancy were issued for these clusters from 1991 to 1993. On 31 December 1993, upon completion of Buildings E-1 and E-2, PhilRealty formally turned over the project to TACC. However, PhilRealty did not turn over the as-built plans for the perimeter drainage layout, the foundation, and the electrical and plumbing layout of the project. Thereafter, TACC managed the project through Century Properties Management Corporation.

On 24 June 1998, Laguna Lake Development Authority (LLDA) advised TACC that its wastewater did not meet government effluent standards provided in Sections 68 and 69 of the 1978 National Pollution Control Commission Rules and Regulations (NPCC) as amended by Department of Energy and Natural Resources (DENR) Administrative Order No. 34.[3] LLDA informed TACC that it must put up its own Sewage Treatment Plant (STP) for its effluent discharge to meet government standards.

Since a sewage treatment plant would cost approximately ₱15 million to put up, TACC experimented with a proposed solution from Larutan Resources Development Corporation, which treated the septic vault water with biological enzymes. Still, TACC's water discharge failed to meet the government standards.

On 26 March 1999, LLDA's Environmental Division collected samples of TACC's wastewater. In a report dated 6 April 1999, LLDA found two determinants in TACC's samples: (1) Chemical Oxygen Demand (COD) and (2) Oil/Grease (OG). LLDA found that TACC's samples failed to meet government standards of 150 for COD and 5 for OG.

In a Notice of Violation[4] dated 6 May 1999, LLDA directed TACC to submit corrective measures to abate or control its water effluents discharged into the Laguna de Bay. LLDA likewise imposed upon TACC a daily fine of ₱1,000 from 26 March 1999 until full cessation of pollutive wastewater discharge.

TACC entered into an agreement with World Chem Marketing for the construction of the STP for ₱7,550,000. The construction was completed by the second week of October 2001.

In an Order dated 19 July 1999, LLDA stated that the daily penalty was imposed upon TACC for the pollutive wastewater discharge, and to condone the penalty would be tantamount to tolerating the pollution of the river bodies and the Laguna de Bay which is contrary to LLDA's mandate.

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[3] Revised Water Usage and Classification/Water Quality Criteria.

[4] *Rollo,* p. 78.

On 1 April 2002, TACC requested LLDA to dismiss the water pollution case against it because of the favorable analysis undertaken by the LLDA's Pollution Control Division on 28 February 2002. LLDA conducted a hearing on 26 April 2002. In its position paper filed on 15 May 2002, TACC requested LLDA to condone the imposition of the penalty of ₱1,000 per day since March 1999 in recognition of the remedial and corrective measures it undertook to comply with government standards.

On 4 September 2003, LLDA issued an Order requiring TACC to pay a fine of ₱1,062,000 representing the penalty from 26 March 1999 to 20 February 2002.

TACC filed a petition for *certiorari* before the Court of Appeals with a prayer for the issuance of a temporary restraining order.

The Decision of the Court of Appeals

In its 26 April 2005 Decision, the Court of Appeals resolved the petition as follows:

> WHEREFORE, premises considered, instant petition is DISMISSED. Accordingly, the prayer for temporary restraining order is DENIED.
>
> SO ORDERED.[5]

The Court of Appeals sustained LLDA's contention that the petition for *certiorari* was prematurely filed. LLDA pointed out that TACC failed to file a motion for reconsideration of the 4 September 2003 Order before filing the petition before the Court of Appeals. The Court of Appeals also ruled that before a party is allowed to seek the court's intervention, he should have availed of all the means of administrative processes afforded him. The Court of Appeals ruled that the proper remedy should have been to resort to an administrative remedy before the DENR Secretary prior to judicial action. The Court of Appeals noted LLDA's allegation of TACC's offer to compromise, which LLDA countered with an advice to address the offer to the Commission on Audit (COA). Hence, the Court of Appeals found

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[5] *Id*. at 40.

that TACC had not abandoned its administrative remedies despite simultaneous resort to judicial action.

The Court of Appeals ruled that under Republic Act No. 4850[6] (RA 4850), as amended by Presidential Decree No. 813,[7] LLDA shall be compensated for the damages to the water and aquatic resources of Laguna de Bay resulting from failure to meet established water and effluent quality standards. The Court of Appeals ruled that under Section 4 of Executive Order No. 927, series of 1983,[8] LLDA is mandated to "make, alter or modify orders requiring the discontinuation of pollution specifying the conditions and the time within which such discontinuance must be accomplished." Further, the Court of Appeals ruled that Presidential Decree No. 984[9] provides for penalties for violation or non-compliance with any order, decision or regulation of the Commission for the control or abatement of pollution.

TACC filed a motion for reconsideration. In its 1 August 2005 Resolution, the Court of Appeals denied the motion.

Hence, the petition before this Court.

The Issues

TACC raises the following issues in its memorandum:

1. Whether the Court of Appeals erred in disregarding TACC's exhaustive efforts in complying with the government's standards on effluent discharge; and
2. Whether the Court of Appeals erred in finding that the petition for *certiorari* was prematurely filed.

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[6] An Act Creating The Laguna Lake Development Authority, Prescribing Its Powers, Functions And Duties, Providing Funds Therefor, And For Other Purposes.

[7] Amending Certain Sections of Republic Act Numbered Eight Hundred Fifty, Otherwise Known As The "Laguna Lake Development Authority Act of 1966." Dated 17 October 1975.

[8] Further Defining Certain Functions And Powers Of The Laguna Lake Development Authority. Dated 16 December 1983.

[9] Providing For The Revision Of Republic Act No. 3931, Commonly Known As The Pollution Control Law, And For Other Purposes.

The Ruling of this Court

The petition has no merit.

Non-Exhaustion of Administrative Remedies

The Court of Appeals ruled that due to the transfer of LLDA to the DENR under Executive Order No. 149[10] (EO 149), TACC should have first resorted to an administrative remedy before the DENR Secretary prior to filing a petition for *certiorari* before the Court of Appeals.

The doctrine of non-exhaustion of administrative remedies requires that resort be first made with the administrative authorities in the resolution of a controversy falling under their jurisdiction before the controversy may be elevated to a court of justice for review.[11] A premature invocation of a court's intervention renders the complaint without cause of action and dismissible.[12]

EO 149 transferred LLDA from the Office of the President to the DENR "for policy and program coordination and/or administrative supervision x x x."[13] Under EO 149, DENR only has administrative power over LLDA. Administrative power is concerned with the work of applying policies and enforcing orders as determined by proper governmental organs.[14]

However, Executive Order No. 192[15] (EO 192), which reorganized the DENR, mandates the DENR to "promulgate rules and regulations for the control of water, air and land pollution" and to "promulgate ambient and effluent standards for water and air quality including the allowable levels of other pollutants

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[10] Streamlining Of The Office Of The President. Dated 28 December 1993.

[11] *Estrada v. Court of Appeals,* 484 Phil. 730 (2004).

[12] *Id*.

[13] Section 3.2.

[14] See *Review Center Association of the Philippines v. Executive Secretary Ermita,* G.R. No. 180046, 2 April 2009.

[15] Providing For The Reorganization Of The Department of Environment, Energy And Natural Resources Renaming It As The Department of Environment And Natural Resources, And For Other Purposes.

and radiations."[16] EO 192 created the Pollution Adjudication Board[17] under the Office of the DENR Secretary which assumed the powers and functions of the NPCC with respect to the adjudication of pollution cases, including NPCC's function to "[s]erve as arbitrator for the determination of reparation, or restitution of the damages and losses resulting from pollution."[18] Hence, TACC has an administrative recourse before the DENR Secretary which it should have first pursued before filing a petition for *certiorari* before the Court of Appeals.

Powers of the LLDA to Impose Penalty

RA 4850 specifically mandates LLDA to carry out and make effective the declared national policy of promoting and accelerating the development and balanced growth of the Laguna Lake area and the surrounding provinces of Rizal and Laguna and the cities of San Pablo, Manila, Pasay, Quezon and Caloocan with due regard and adequate provisions for environmental management and control, preservation of the quality of human life and ecological systems, and the prevention of undue ecological disturbances, deterioration and pollution.[19] LLDA, by virtue of its special charter, has the responsibility to protect the inhabitants of the Laguna Lake region from the deleterious effects of pollutants emanating from the discharge of wastes from the surrounding areas.[20]

Under Section 4-A of RA 4850, as amended, LLDA is entitled to compensation for damages resulting from failure to meet established water and effluent quality standards, thus:

Sec. 4-A. Compensation for damages to the water and aquatic resources of Laguna de Bay and its tributaries resulting from failure

[16] Section 5 (o) and (p).

[17] Section 19.

[18] Section 6 (j) of Presidential Decree No. 984 (Providing For The Revision of Republic Act No. 3931, Commonly Known As The Pollution Control Law, And For Other Purposes).

[19] *LLDA v. Court of Appeals*, G.R. No. 110120, 16 March 1994, 231 SCRA 292.

[20] *Id*.

to meet established water and effluent quality standards and from such other wrongful act or omission of a person, private or public, juridical or otherwise, punishable under the law shall be awarded to the Authority to be earmarked for water quality control and management.

In the present case, TACC does not challenge LLDA's authority to impose the fine. However, TACC argues that since it had already exhausted efforts and substantially spent to comply with established effluent quality standards, the daily penalty imposed by the LLDA is an unwarranted financial burden to its unit owners and should thus be condoned. TACC further argues that the non-compliance with government standards was due to the omission and fault of PhilRealty.

TACC's arguments have no merit.

PhilRealty formally turned over the project to TACC on 31 December 1993. Thereafter, TACC managed the project. It was almost five years after, or on 24 June 1998, when LLDA advised TACC that its wastewater did not meet government effluent standards. It is clear that the responsibility to comply with government standards lies with TACC. If, as claimed by TACC, the non-compliance was due to the omission and fault of PhilRealty, TACC's recourse is to file an action, if warranted, against PhilRealty in a proper court. TACC cannot escape its liability to LLDA by shifting the blame to PhilRealty. Hence, the LLDA did not abuse its discretion in issuing its 4 September 2003 Order.

Condonation of Penalty and Pending Offer to Compromise

As regards the condonation of the penalty, the power to compromise claims is vested exclusively in the COA or Congress pursuant to Section 20 (1), Chapter IV, Subtitle B, Title I, Book V of Executive Order No. 292 (Administrative Code of 1987) which provides:

Section 20. *Power to Compromise Claims.* — (1) When the interest of the Government so requires, the Commission may compromise or release in whole or in part, any settled claim or liability to any government agency not exceeding ten thousand pesos

arising out of any matter or case before it or within its jurisdiction, and with the written approval of the President, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos. In case the claim or liability exceeds one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the President, with their recommendations, to the Congress[.] x x x

In a letter dated 5 May 2004,[21] TACC manifested its offer to compromise by paying a reduced fine of ₱500,000. In its response dated 8 July 2004,[22] LLDA stated that the proposal would be forwarded to LLDA's Board of Directors although "it is necessary that the case be withdrawn from the court." In a letter dated 11 September 2004,[23] TACC stated that in a regular meeting held on 6 September 2004, the members of TACC's Board of Directors unanimously agreed to withdraw the petition for *certiorari* before the Court of Appeals, provided the LLDA would agree to reduce the penalty to ₱500,000. In a letter dated 22 September 2004,[24] LLDA referred the offer to its resident auditor Antonio M. Malit (Auditor Malit) on the ground that only the COA had the authority to compromise settlement of obligations to the State. In a letter dated 23 September 2004, Auditor Malit informed LLDA that the power to compromise claims is vested exclusively in the COA pursuant to Section 36 of Presidential Decree No. 1445.[25] Auditor Malit

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[21] *Rollo,* pp. 205-206. Through TACC's counsel Anthony B. Peralta.

[22] *Id.* at 207.

[23] *Id.* at 208.

[24] *Id.* at 209.

[25] Ordaining And Instituting A Government Auditing Code of the Philippines. Section 36 provides:

> Section 36. *Power to compromise claims.*
>
> 1. When the interest of the government so requires, the Commission may compromise or release in whole or in part, any claim or settled liability to any government agency not exceeding ten thousand pesos and with the written approval of the Prime Minister, it may likewise compromise or release any similar claim or liability not exceeding one hundred thousand pesos, the application for relief therefrom shall be submitted, through the Commission and the Prime Minister, with their recommendations, to the National Assembly.

stated that the request for compromise should be addressed to COA. However, since the amount of the penalty sought to be condoned is ₱1,062,000, the authority to compromise such claim is vested exclusively in Congress pursuant to Section 20 (1), Chapter IV, Subtitle B, Title I, Book V of the Administrative Code of 1987. This remedy is not administrative but legislative, and need not be resorted to before filing a judicial action.

Moreover, the Court cannot sustain the Court of Appeals' finding that there was a pending offer to compromise when the petition for *certiorari* was filed before it. There is nothing in the records that indicates that TACC withdrew its offer of compromise. At the same time, there is also nothing to indicate that TACC submitted a compromise offer to COA, as Auditor Malit had advised. Hence, it is not proven that this petition was simultaneously availed of with the offer to compromise.

Failure to File a Motion for Reconsideration

For a petition for *certiorari* under Rule 65 of the Rules of Court to prosper, TACC must show that (1) the LLDA acted without or in excess of its jurisdiction or with grave abuse of discretion amounting to lack or excess of jurisdiction and (2) there is no appeal or a plain, speedy and adequate remedy in the ordinary course of law.

The plain and adequate remedy referred to in Section 1 of Rule 65 is a motion for reconsideration of the assailed decision.[26]

2. The respective governing bodies of government-owned or controlled corporations, and self-governing boards, commissions or agencies of the government shall have the exclusive power to compromise or release any similar claim or liability when expressly authorized by their charters and if in their judgment, the interest of their respective corporations or agencies so requires. When the charters do not so provide, the power to compromise shall be exercised by the Commission in accordance with the preceding paragraph.

3. The Commission may, in the interest of the government, authorize the charging or crediting to an appropriate account in the National Treasury, small discrepancies (average or shortage) in the remittances to and disbursements of the National Treasury, subject to the rules and regulations as it may prescribe.

[26] *Metro Transit Organization, Inc. v. Court of Appeals*, 440 Phil. 743 (2002).

The purpose of this requirement is to enable the court or agency to rectify its mistakes without the intervention of a higher court.[27] To dispense with this requirement, there must be a concrete, compelling, and valid reason for the failure to comply with the requirement.[28] Petitioner may not arrogate to itself the determination of whether a motion for reconsideration is necessary or not.[29]

In the present case, TACC did not file a motion for reconsideration of the 4 September 2003 Order. TACC also failed to show sufficient compelling and valid reason to dispense with the requirement of filing a motion for reconsideration. Hence, we agree with the Court of Appeals that the petition for *certiorari* was prematurely filed before it.

Finally, TACC wants the Court to review the mandate of LLDA to help transform it from a regulatory agency into a developmental and promotional agency. However, we agree with LLDA that such a review of LLDA's charter is not within the jurisdiction of this Court.

WHEREFORE, we *DENY* the petition. We *AFFIRM* the 26 April 2005 Decision and 1 August 2005 Resolution of the Court of Appeals in CA-G.R. SP No. 82409.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Leonardo-de Castro, and *Bersamin, JJ.,* concur.

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[27] *Id*.

[28] *Id*.

[29] *Id*.

FIRST DIVISION

[G.R. No. 169919. September 11, 2009]

B.D. LONG SPAN BUILDERS, INC., *petitioner, vs.* **R.S. AMPELOQUIO REALTY DEVELOPMENT, INC.,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; PLEADINGS AND PRACTICES; SUMMONS; EFFECT OF ABSENCE OF A VALID SERVICE OF SUMMONS. — Courts acquire jurisdiction over the plaintiffs upon the filing of the complaint. On the other hand, jurisdiction over the defendants in a civil case is acquired either through the service of summons upon them or through their voluntary appearance in court and their submission to its authority. The service of summons is a vital and indispensable ingredient of due process. As a rule, if defendants have not been validly summoned, the court acquires no jurisdiction over their person, and a judgment rendered against them is null and void.

2. ID.; ID.; ID.; SERVICE UPON DOMESTIC JURIDICAL ENTITY; SERVICE OF SUMMONS MUST BE MADE UPON AN OFFICER NAMED IN THE STATUTE; REASON. — As a rule, summons should be personally served on the defendant. In case of a domestic private juridical entity, the service of summons must be made upon an officer who is named in the statute (*i.e.*, the president, managing partner, general manager, corporate secretary, treasurer, or in-house counsel), otherwise, the service is insufficient. The purpose is to render it reasonably certain that the corporation will receive prompt and proper notice in an action against it or to insure that the summons be served on a representative so integrated with the corporation that such person will know what to do with the legal papers served on him. However, if the summons cannot be served on the defendant personally within a reasonable period of time, then substituted service may be resorted to.

3. ID.; ID.; ID.; SUBSTITUTED SERVICE; STATUTORY REQUIREMENTS MUST BE FOLLOWED STRICTLY, FAITHFULLY AND FULLY; EFFECT OF INVALID

SUBSTITUTED SERVICE. — Section 7 of Rule 14 provides: SEC. 7. *Substituted service*. — x x x Nonetheless, the impossibility of prompt personal service must be shown by stating that efforts have been made to find the defendant personally and that such efforts have failed. This is necessary because substituted service is in derogation of the usual method of service. It is a method extraordinary in character and hence may be used only as prescribed and in the circumstances authorized by statute. The statutory requirements of substituted service must be followed strictly, faithfully and fully, and any substituted service other than that authorized by statute is considered ineffective. In *Orion Security Corporation v. Kalfam Enterprises, Inc.*, this Court held that in case of substituted service, there should be a report indicating that the person who received the summons in the defendant's behalf was one with whom the defendant had a relation of confidence ensuring that the latter would actually receive the summons.

4. ID.; ID.; ID.; ID.; SERVICE OF SUMMONS ON THE CORPORATION'S STAFF MEMBER NOT SUBSTANTIAL COMPLIANCE WITH THE REQUIREMENTS OF SUBSTITUTED SERVICE. — Clearly, the summons was not served personally on the defendant (respondent) through any of the officers enumerated in Section 11 of Rule 14; rather, summons was served by substituted service on the defendant's staff member, Romel Dolahoy. Substituted service was resorted to on the server's first attempt at service of summons, and there was no indication that prior efforts were made to render prompt personal service on the defendant. Moreover, nothing on record shows that Romel Dolahoy, the staff member who received the summons in respondent's behalf, shared such relation of confidence ensuring that respondent would surely receive the summons. Thus, following our ruling in *Orion*, we are unable to accept petitioner's contention that service on Romel Dolahoy constituted substantial compliance with the requirements of substituted service.

5. ID.; DEFAULT; REMEDIES OF A DEFENDANT WHO HAS BEEN DECLARED IN DEFAULT; FILING OF NOTICE OF APPEAL DOES NOT CURE THE DEFECT IN THE SERVICE OF SUMMONS. — Petitioner's contention that respondent's filing of Notice of Appeal effectively cured any defect in the service of summons is devoid of merit. It is well-

settled that a defendant who has been declared in default has the following remedies, to wit: (1) he may, at any time after discovery of the default but before judgment, file a motion, under oath, to set aside the order of default on the ground that his failure to answer was due to fraud, accident, mistake or excusable neglect, and that he has a meritorious defense; (2) if judgment has already been rendered when he discovered the default, but before the same has become final and executory, he may file a motion for new trial under Section 1(a) of Rule 37; (3) if he discovered the default after the judgment has become final and executory, he may file a petition for relief under Section 2 of Rule 38; and (4) *he may also appeal from the judgment rendered against him as contrary to the evidence or to the law, even if no petition to set aside the order of default has been presented by him.* Thus, respondent, which had been declared in default, may file a notice of appeal and question the validity of the trial court's judgment without being considered to have submitted to the trial court's authority.

APPEARANCES OF COUNSEL

De Leon & De Leon Law Office for petitioner.
Franco L. Loyola for respondent.

D E C I S I O N

CARPIO, *J.*:

The Case

This is a petition for review[1] of the Court of Appeals' Decision[2] dated 14 July 2005 and Resolution dated 30 September 2005 in CA-G.R. CV No. 78259. The Court of Appeals reversed the Decision[3] dated 14 January 2003 of the Regional Trial Court of Muntinlupa City, Branch 206 (RTC).

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[1] Under Rule 45 of the 1997 Rules of Civil Procedure.

[2] Penned by Associate Justice Remedios A. Salazar-Fernando with Associate Justices Rosmari D. Carandang and Monina Arevalo-Zenarosa, concurring.

[3] Penned by Judge Patria A. Manalastas-De Leon.

The Antecedent Facts

Petitioner B. D. Long Span Builders, Inc. and respondent R. S. Ampeloquio Realty Development, Inc. are corporations duly organized and existing under the laws of the Republic of the Philippines.

On 31 July 1999, petitioner and respondent entered into an Agreement wherein petitioner agreed to render "rip rapping" construction services at respondent's Ampeloquio International Resort in Ternate, Cavite, for the contract price of ₱50 million. On the same day, the parties entered into a second Agreement for the same construction project, stipulating a contract price of ₱30 million, hence bringing the total contract price of the project to ₱80 million. Both Agreements required petitioner to deposit with respondent a cash bond of one percent (1%) of the contract price, to be returned to petitioner upon completion of the project. In compliance, petitioner deposited with respondent a cash bond amounting to ₱800,000.

Respondent failed to fulfill its obligations under the Agreements, resulting in the cancellation of the project. Petitioner demanded the return of the ₱800,000 cash bond, but respondent refused to do so. Petitioner's legal counsel sent two (2) demand letters dated 19 April 2002 and 10 May 2002 to respondent, but the latter still refused to return the ₱800,000 cash bond.

On 24 September 2002, petitioner (plaintiff) filed with the RTC a complaint for rescission of contract and damages against respondent (defendant). On 17 October 2002, summons and a copy of the complaint were served on respondent, through its staff member, Romel Dolahoy.[4]

Respondent failed to file an Answer or any responsive pleading to the complaint. Upon motion of petitioner, the RTC issued an Order dated 29 November 2002, declaring respondent in default, and allowing petitioner to present evidence *ex parte*.

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[4] Records, pp. 19-20.

The Trial Court's Ruling

On 14 January 2003, the RTC rendered a Decision, the dispositive portion of which reads:

WHEREFORE, finding preponderance of evidence in support of the instant complaint, the same is granted.

Judgment is rendered declaring the aforesaid contracts entered into by plaintiff with defendant, both dated July 31, 1999 for the rip rapping construction project at the Ampeloquio International Resort in Ternate, Cavite, as RESCINDED.

Moreover, defendant corporation is ordered to:

1) Return the amount of ₱800,000.00 posted by the plaintiff as cash bond with legal interest accruing thereto from the time of its demand until fully paid;

2) Pay the plaintiff the amount of ₱50,000.00 as nominal damages;

3) Pay the plaintiff the amount of ₱100,000.00 as exemplary damages;

4) Pay the plaintiff the amount of ₱50,000.00 as and by way of attorney's fees; and

5) Pay the cost of suit in the amount of ₱10,539.00.

SO ORDERED.[5]

The Court of Appeals' Ruling

Upon receipt of the RTC decision, respondent filed a Notice of Appeal dated 12 February 2003 with the Court of Appeals. After considering the pleadings filed by petitioner and respondent, the Court of Appeals rendered judgment[6] which reversed and set aside the decision of the RTC. The dispositive portion of the Court of Appeals' Decision reads:

WHEREFORE, in view of the foregoing, the decision dated January 14, 2003 of the Regional Trial Court, Branch 206,

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[5] CA *rollo*, pp. 50-51.

[6] Promulgated on 14 July 2005.

Muntinlupa City in Civil Case No. 02-217 is hereby REVERSED and SET ASIDE.

SO ORDERED.[7]

Petitioner filed a Motion for Reconsideration, but this was denied by the Court of Appeals in its Resolution of 30 September 2005.[8]

Hence, this appeal.

The Issue

The sole issue for resolution in this case is whether the Court of Appeals erred in ruling that there was invalid service of summons upon respondent, and hence the trial court did not acquire jurisdiction over said respondent.

The Court's Ruling

We find the appeal without merit.

Courts acquire jurisdiction over the plaintiffs upon the filing of the complaint. On the other hand, jurisdiction over the defendants in a civil case is acquired either through the service of summons upon them or through their voluntary appearance in court and their submission to its authority.[9] The service of summons is a vital and indispensable ingredient of due process.[10] As a rule, if defendants have not been validly summoned, the court acquires no jurisdiction over their person, and a judgment rendered against them is null and void.[11]

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[7] *Rollo,* p. 60.

[8] *Id.* at 61.

[9] *Orion Security Corporation v. Kalfam Enterprises, Inc.*, G.R. No. 163287, 27 April 2007, 522 SCRA 617, citing *Casimina v. Legaspi*, G.R. No. 147530, 29 June 2005, 462 SCRA 171, 177.

[10] *Spouses Mason v. Court of Appeals*, 459 Phil. 689, 699 (2003), citing *National Power Corporation v. NLRC*, 339 Phil. 89, 107 (1997).

[11] *Bank of the Philippine Islands v. Spouses Evangelista*, 441 Phil. 445, 453 (2002).

Section 11 of Rule 14 of the 1997 Rules of Civil Procedure states:

> SEC. 11. *Service upon domestic private juridical entity*. — When the defendant is a corporation, partnership or association organized under the laws of the Philippines with a juridical personality, service may be made on the president, managing partner, general manager, corporate secretary, treasurer, or in-house counsel.

As a rule, summons should be personally served on the defendant. In case of a domestic private juridical entity, the service of summons must be made upon an officer who is named in the statute (*i.e.*, the president, managing partner, general manager, corporate secretary, treasurer, or in-house counsel), otherwise, the service is insufficient.[12] The purpose is to render it reasonably certain that the corporation will receive prompt and proper notice in an action against it or to insure that the summons be served on a representative so integrated with the corporation that such person will know what to do with the legal papers served on him.[13] However, if the summons cannot be served on the defendant personally within a reasonable period of time, then substituted service may be resorted to. Section 7 of Rule 14 provides:

> SEC. 7. *Substituted service*. — If, for justifiable causes, the defendant cannot be served within a reasonable time as provided in the preceding section, service may be effected (a) by leaving copies of the summons at the defendant's residence with some person of suitable age and discretion then residing therein, or (b) by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof.

Nonetheless, the impossibility of prompt personal service must be shown by stating that efforts have been made to find the defendant personally and that such efforts have failed.[14] This

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[12] *Bank of the Philippine Islands v. Sps. Santiago*, G.R. No. 169116, 28 March 2007, 519 SCRA 389, 400, citing *Delta Motor Sales Corp. v. Mangosing*, 162 Phil. 804 (1976).

[13] *Santiago, Jr. v. Bank of the Philippine Islands*, G.R. No. 163749, 26 September 2008, 566 SCRA 435.

[14] *Ang Ping v. Court of Appeals*, 369 Phil. 607, 614 (1999).

is necessary because substituted service is in derogation of the usual method of service. It is a method extraordinary in character and hence may be used only as prescribed and in the circumstances authorized by statute.[15] The statutory requirements of substituted service must be followed strictly, faithfully and fully, and any substituted service other than that authorized by statute is considered ineffective.[16]

In *Orion Security Corporation v. Kalfam Enterprises, Inc.*,[17] this Court held that in case of substituted service, there should be a report indicating that the person who received the summons in the defendant's behalf was one with whom the defendant had a relation of confidence ensuring that the latter would actually receive the summons.

In this case, the Return by Process Server provides:

> This is to certify that:
>
> On October 17, 2002 at about 11:00 o'clock in the morning, undersigned tried to cause the service of the Summons together with the attached complaint & its annexes in the above-entitled case to the defendant at his given address on record. Mr Romel Dalahoy, (sic) a staff of said Realty received the said Summons with the attached complaint & its annexes as evidenced by the former's signature as appearing on the original copy of the aforesaid Summons.
>
> Henceforth, the said Summons with the attached complaint & its annexes to Atty. Evangeline V. Tiongson, Clerk of Court V, this Court, is respectfully returned, DULY SERVED, by substituted service.
>
> October 17, 2002, Muntinlupa City
>
> Angelito C. Reyes
> Process Server[18]

Clearly, the summons was not served personally on the defendant (respondent) through any of the officers enumerated

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[15] *Id.*

[16] *Id.*

[17] *Supra* note 9 at 623.

[18] Records, p. 21.

in Section 11 of Rule 14; rather, summons was served by substituted service on the defendant's staff member, Romel Dolahoy. Substituted service was resorted to on the server's first attempt at service of summons, and there was no indication that prior efforts were made to render prompt personal service on the defendant.

Moreover, nothing on record shows that Romel Dolahoy, the staff member who received the summons in respondent's behalf, shared such relation of confidence ensuring that respondent would surely receive the summons. Thus, following our ruling in *Orion*, we are unable to accept petitioner's contention that service on Romel Dolahoy constituted substantial compliance with the requirements of substituted service.

Petitioner's contention that respondent's filing of Notice of Appeal effectively cured any defect in the service of summons is devoid of merit. It is well-settled that a defendant who has been declared in default has the following remedies, to wit: (1) he may, at any time after discovery of the default but before judgment, file a motion, under oath, to set aside the order of default on the ground that his failure to answer was due to fraud, accident, mistake or excusable neglect, and that he has a meritorious defense; (2) if judgment has already been rendered when he discovered the default, but before the same has become final and executory, he may file a motion for new trial under Section 1(a) of Rule 37; (3) if he discovered the default after the judgment has become final and executory, he may file a petition for relief under Section 2 of Rule 38; and (4) *he may also appeal from the judgment rendered against him as contrary to the evidence or to the law, even if no petition to set aside the order of default has been presented by him.*[19] Thus, respondent, which had been declared in default, may file a notice of appeal and question the validity of the trial court's judgment without being considered to have submitted to the trial court's authority.

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[19] *Talsan Enterprises, Inc. v. Baliwag Transit, Inc.*, 369 Phil. 409, 421 (1999).

WHEREFORE, we *DENY* the petition. We *AFFIRM* the Court Appeals' Decision dated 14 July 2005 and Resolution dated 30 September 2005 in CA-G.R. CV No. 78259. Let the case be *REMANDED* to the trial court for further proceedings upon valid service of summons to respondent.

SO ORDERED.

Puno, C.J. (Chairperson), Corona, Leonardo-de Castro, and *Bersamin, JJ.,* concur.

THIRD DIVISION

[G.R. No. 171018. September 11, 2009]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **ELLY NAELGA,** *accused-appellant.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; FACTUAL FINDINGS OF THE TRIAL COURT, ITS CALIBRATION OF THE TESTIMONIES OF THE WITNESSES, AND ITS CONCLUSIONS ANCHORED ON ITS FINDINGS ARE ACCORDED HIGH RESPECT. — At the outset, it should be pointed out that prosecutions involving illegal drugs largely depend on the credibility of the police officers who conducted the buy-bust operation. Considering that this Court has access only to the cold and impersonal records of the proceedings, it generally relies upon the assessment of the trial court. This Court will not interfere with the trial court's assessment of the credibility of witnesses except when there appears on record some fact or circumstance of weight and influence which the trial court has overlooked, misapprehended, or misinterpreted. This rule is consistent with the reality that the trial court is in a better position to

decide the question, having heard the witnesses themselves and observed their deportment and manner of testifying during the trial. Thus, factual findings of the trial court, its calibration of the testimonies of the witnesses, and its conclusions anchored on its findings are accorded by the appellate court high respect, if not conclusive effect, more so when affirmed by the Court of Appeals, as in this case.

2. CRIMINAL LAW; ILLEGAL SALE OF DANGEROUS DRUGS; ELEMENTS; ESTABLISHED IN CASE AT BAR. — A successful prosecution for the illegal sale of dangerous/ prohibited drugs must establish the following elements: (1) identities of the buyer and seller, the object, and the consideration; and (2) the delivery of the thing sold and the payment therefor. As correctly found by the trial court, accused-appellant was caught in a buy-bust operation. He was caught *in flagrante delicto* selling a dangerous drug, methamphetamine hydrochloride or *shabu*, to PO2 Noe Sembran on 15 July 2003 at the public market of Rosales, Pangasinan, established not only by the clear, straightforward, and convincing testimony of poseur-buyer PO2 Noe Sembran and corroborated by PO1 Rosauro Valdez, but also by accused-appellant's testimony.

3. ID.; ID.; INSTIGATION; MERE DECEPTION BY THE DETECTIVE IS NOT A SHIELD WHERE THE OFFENSE WAS COMMITTED BY THE DEFENDANT FREE FROM THE INFLUENCE OR THE INSTIGATION OF THE DETECTIVE. — We find no instigation in this case. The general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done upon the "decoy solicitation" of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. This is particularly true in that class of cases where the offense is of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct. Mere deception by the detective will not shield defendant, if the offense was committed by him free from the influence or the instigation of the detective.

4. ID.; ID.; ID.; ENTRAPMENT DISTINGUISHED FROM INSTIGATION. — Here, the law enforcers received a report from their confidential informant that accused-appellant was engaged in illegal drug trade in the public market of Rosales.

Poseur-buyer PO2 Sembran then pretended to be engaged in the drug trade himself and, with the help of his fellow buy-bust operatives, arrested accused-appellant in the act of delivering the *shabu* to him. In an entrapment, ways and means are resorted to for the purpose of trapping and capturing the lawbreakers in the execution of their criminal plan. In instigation, the instigator practically induces the would-be defendant into the commission of the offense, and himself becomes a co-principal. Entrapment is no bar to prosecution and conviction; in instigation, the defendant would have to be acquitted.

5. ID.; ID.;ENTRAPMENT; THE IDEA OF COMMITTING A CRIME ORIGINATES FROM THE OFFENDER, WITHOUT ANYBODY INDUCING OR PRODDING HIM TO COMMIT THE OFFENSE. — A buy-bust operation is a form of entrapment, which in recent years has been accepted as a valid and effective mode of arresting violators of the Dangerous Drugs Law. In a buy-bust operation, the idea of committing a crime originates from the offender, without anybody inducing or prodding him to commit the offense. In the case at bar, the buy-bust operation was formed by the police officers precisely to test the veracity of the tip and in order to apprehend the perpetrator. While accused-appellant claims that it was PO2 Sembran who approached and asked him to buy *shabu* for him, the same cannot be considered as an act of instigation, but an act of "feigned solicitation." Instigation is resorted to for purposes of entrapment, based on the tip received from the police informant that accused-appellant was peddling illegal drugs in the public market of Rosales. In fact, **it was accused-appellant who suggested to PO2 Sembran to use *shabu;*** and, despite accused-appellant's statement that he did not know anybody selling *shabu*, he still took the money from PO2 Sembran and directly went to Urdaneta, where he claimed to have bought the illegal drug. Then he returned to the Rosales public market and gave the drug to PO2 Sembran.

6. ID.; REPUBLIC ACT NO. 9165; ARTICLE II, SECTION 21 (1) OF THE IMPLEMENTING RULES; FAILURE OF THE BUY-BUST TEAM TO STRICTLY COMPLY WITH THE PROVISIONS THEREOF WILL NOT PREVENT THE APPLICATION OF THE PRESUMPTION OF REGULARITY IN THE PERFORMANCE OF DUTY. —

Contrary to appellant's claim, there is no broken chain in the custody of the seized items, later on determined to be *shabu*, from the moment of its seizure by the entrapment team, to its delivery to the investigating officer, to the time it was brought to the forensic chemist at the PNP Crime Laboratory for laboratory examination. It was duly established by documentary, testimonial, and object evidence, including the markings on the plastic sachet containing the *shabu* indicating that the substance tested by the forensic chemist, whose laboratory tests were well-documented, was the same as that taken from accused-appellant. Failure of the buy-bust team to strictly comply with the provisions of said section did not prevent the presumption of regularity in the performance of duty from applying.

7. ID.; ID.; ID.; NON-COMPLIANCE WITH THE PROVISION FOR THE CUSTODY AND DISPOSITION OF CONFISCATED DANGEROUS DRUGS IS, BY ITSELF, NOT FATAL TO THE PROSECUTION'S CASE AND WILL NOT DISCHARGE ACCUSED-APPELLANT FROM HIS CRIME. — The procedure for the custody and disposition of confiscated, seized and/or surrendered dangerous drugs, among others, is provided under Section 21(1), Article II of Republic Act No. 9165: x x x Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, which implements said provision, reads: x x x The above provision further states that non-compliance with the stipulated procedure, under justifiable grounds, shall not render void and invalid such seizures of and custody over said items, for as long as the integrity and evidentiary value of the seized items are properly preserved by the apprehending officers. The evident purpose of the procedure provided for is the preservation of the integrity and evidentiary value of the seized items, as the same would be utilized in the determination of the guilt or the innocence of the accused. Its absence, by itself, is not fatal to the prosecution's case and will not discharge accused-appellant from his crime. What is of utmost importance is the preservation of the integrity and the evidentiary value of the seized items, as the same would be utilized in the determination of the guilt or innocence of the accused. In the instant case, the integrity of the drugs seized remained intact, and the crystalline substance contained therein was later on determined to be positive for methamphetamine hydrochloride (*shabu*).

8. ID.; ID.; ID.; BUY-BUST TEAM'S NON-COMPLIANCE WITH THE PROCEDURAL REQUIREMENT IS IRRELEVANT TO THE CRIMINAL PROSECUTION; PRESUMPTION OF REGULARITY IN THE PERFORMANCE OF OFFICIAL DUTY APPLIES. — Before the enactment of Republic Act No. 9165, the requirements contained in Section 21(1) were already present, per Dangerous Drugs Board Regulation No. 3, Series of 1979. Despite such regulation and the non-compliance therewith by the buy-bust team, the Court still applied the presumption of regularity, holding: The failure of the arresting police officers to comply with said DDB Regulation No. 3, Series of 1979 is a matter strictly between the Dangerous Drugs Board and the arresting officers and is totally irrelevant to the prosecution of the criminal case for the reason that the commission of the crime of illegal sale of a prohibited drug is considered consummated once the sale or transaction is established x x x and the prosecution thereof is not undermined by the failure of the arresting officers to comply with the regulations of the Dangerous Drugs Board.

9. ID.; ID.; ID.; ID.; NON-APPLICATION OF THE PRESUMPTION OF REGULARITY IN THE PERFORMANCE OF OFFICIAL DUTY WILL NOT AUTOMATICALLY EXONERATE THE ACCUSED. — Assuming *arguendo* that the presumption of regularity in the performance of official duty will not apply due to the failure to comply with Section 21(a), the same will not automatically lead to the exoneration of the accused. Accused-appellant's conviction was based not solely on said presumption, but on the documentary and real evidence; and, more importantly, on the oral evidence of prosecution witnesses, whom we found to be credible. One witness is sufficient to prove the *corpus delicti* - that there was a consummated sale between the poseur-buyer and the accused - there being no quantum of proof as to the number of witnesses to prove the same. ***To emphasize, accused-appellant himself verified in his testimony that the said transaction took place.***

10. ID.; ID.; ID.; ID.; THE INTEGRITY OF THE EVIDENCE IS PRESUMED TO BE PRESERVED, UNLESS THERE IS A SHOWING OF BAD FAITH, ILL WILL, OR PROOF THAT THE EVIDENCE HAS BEEN TAMPERED WITH. — PO2 Sembran positively identified the plastic sachet containing

shabu, which he had bought from accused-appellant in the buy-bust operation. Thus, the identity of the *shabu* taken from accused-appellant had been duly preserved and established by the prosecution. Besides, the integrity of the evidence is presumed to be preserved, unless there is a showing of bad faith, ill will, or proof that the evidence has been tampered with. The accused-appellant in this case bears the burden of making some showing that the evidence was tampered or meddled with to overcome the presumption of regularity in the handling of exhibits by public officers and the presumption that public officers properly discharged their duties. There is no doubt that the sachet marked "EN," which was submitted for laboratory examination and found to be positive for *shabu*, was the same one sold by accused-appellant to the poseur-buyer PO2 Sembran during the buy-bust operation.

11. ID.; ID.; DEFENSE OF FRAME-UP IS VIEWED WITH DISFAVOR BY THE COURT. — Finally, accused-appellant's claim that he is a victim of a frame-up is viewed by this Court with disfavor, because being a victim can easily be feigned and fabricated. There being no proof of ill motive on the part of the police operatives to falsely accuse him of such a grave offense, the presumption of regularity in the performance of official duty and the findings of the trial court with respect to the credibility of witnesses shall prevail over the claim of the accused-appellant. While the presumption of regularity in the performance of official duty by law enforcement agents should not by itself prevail over the presumption of innocence, for the claim of frame-up to prosper, the defense must be able to present clear and convincing evidence to overcome this presumption of regularity, which the defense was not able to proffer.

12. ID.; ID.; UNAUTHORIZED SALE AND DELIVERY OF A DANGEROUS DRUG; IMPOSABLE PENALTY. — Accused-appellant was charged with the unauthorized sale and delivery of a dangerous drug in violation of the provisions of Section 5, Article II of Republic Act No. 9165. Under Section 5, Article II of Republic Act No. 9165, the penalty of life imprisonment to death and a fine ranging from ₱500,000.00 to ₱1,000,000.00 shall be imposed upon any person, who, unless authorized by law, shall sell, trade, administer, dispense, deliver, give away to another, distribute, dispatch in transit or transport any

dangerous drug, including any and all species of opium poppy regardless of the quantity and purity involved. Thus, the trial court, as affirmed by the Court of Appeals, correctly imposed the penalty of life imprisonment and a fine of ₱500,000.00.

13. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; INCONSISTENCY IMMATERIAL TO THE COMMISSION OF THE OFFENSE CANNOT AFFECT THE OVERALL CREDIBILITY OF THE PROSECUTION WITNESSES. — The inconsistencies pointed out by the defense pertaining to whether or not he was already inside the public market of Rosales at the time the operatives returned, or if the buy-bust team saw him alighting from a tricycle, is an inconsistency immaterial to the commission of the offense and, thus, cannot affect the overall credibility of the prosecution witnesses. The records of the case indicate that after his arrest, accused-appellant was taken into police custody. After the arrest, the seized item, which had the marking "EN" and alleged to contain *shabu,* was brought to the PNP crime laboratory for examination. The request for laboratory examination and transfer of the confiscated sachet to the PNP crime laboratory was prepared by Chief of Police Policarpio C. Cayabyab, Jr. The request indicated that the seized item was delivered by PO3 Resuello, Jr. and received by Forensic Chemist P/Insp. Emelda Besarra Roderos, the same person who conducted laboratory tests on the substance. The transparent plastic sachet containing a white crystalline substance was later on determined to be positive for methylamphetamine hydrochloride or *shabu*.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

D E C I S I O N

CHICO-NAZARIO, *J.*:

For Review under Rule 45 of the Revised Rules of Court is the Decision[1] dated 30 November 2005 of the Court of Appeals in CA-G.R. CR No. 00304 entitled *People of the Philippines v. Elly Naelga*, affirming the Decision[2] rendered by the Regional Trial Court (RTC) of Rosales, Pangasinan, Branch 53, in Criminal Case No. 4649-R, finding Elly Naelga guilty of the illegal sale of methamphetamine hydrochloride, more popularly known as *shabu*.

By virtue of a Criminal Complaint, accused-appellant Elly Naelga *y* Bongay (accused-appellant) was indicted before the RTC of Rosales, Pangasinan, Branch 53, for violation of Sections 5[3] and 11(3),[4] Article II of Republic Act No. 9165, otherwise

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[1] Penned by Associate Justice Bienvenido L. Reyes with Associate Justices Godardo A. Jacinto and Arturo D. Brion (now a member of this Court), concurring; *rollo*, pp. 2-15.

[2] Penned by Judge Teodorico Alfonso P. Bauzon; records, pp. 49-57.

[3] Sec. 5. *Sale, Trading, Administration, Dispensation, Delivery, Distribution and Transportation of Dangerous Drugs and/or Controlled Precursors and Essential Chemicals.* — The penalty of life imprisonment to death and a fine ranging from Five hundred thousand pesos (₱500,000.00) to Ten million pesos (₱10,000,000.00) shall be imposed upon any person, who, unless authorized by law, shall *sell*, trade, administer, dispense, deliver, give away to another, distribute, dispatch in transit or transport any dangerous drug, including any and all species of opium poppy regardless of the quantity and purity involved, or shall act as a broker in any of such transactions.

[4] SEC. 11. *Possession of Dangerous Drugs.* — The penalty of life imprisonment to death and a fine ranging from Five hundred thousand pesos (₱500,000.00) to Ten million pesos (₱10,000,000.00) shall be imposed upon any person, who, unless authorized by law, shall possess any dangerous drug in the following quantities, regardless of the degree of purity thereof:

x x x x x x x x x

Otherwise, if the quantity involved is less than the foregoing quantities, the penalties shall be graduated as follows:

x x x x x x x x x

known as the Comprehensive Dangerous Drugs Act of 2002, the accusatory portion of which reads:

> That on or about 3:00 o'clock in the afternoon of July 15, 2003, in Poblacion, Municipality of Rosales, Province of Pangasinan, Philippines and within the jurisdiction of this Honorable Court, the above-named accused, did then and there willfully, unlawfully and feloniously have in his possession, control and custody the following, to wit: one (1) piece of small transparent plastic containing "*Shabu*" weighing more or less 0.4 grams which he sold to a poseur-buyer designated by the police, and without having the necessary permit or license to possess the same.
>
> Contrary to Article II, Sec. 5 and Sec. 11(3) of R.A. 9165.[5]

Upon arraignment on 27 August 2003, accused-appellant pleaded not guilty.[6]

A pre-trial conference was held on 16 September 2003 in the presence of the government prosecutor, the accused and his counsel. Based on the pre-trial order issued by the trial court on 16 September 2003, the defense only admitted to the identity of the accused-appellant and the fact of his apprehension, but denied any knowledge of the existence of a buy-bust operation. The defense limited its testimonial evidence to that of accused-appellant himself. On the other hand, the prosecution limited its testimonial evidence to the stipulations of Police Officer (PO) 2 Noe Sembran, PO1 Rosauro Valdez, and Forensic Chemist Emelda Besarra Roderos. The prosecution's documentary

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(3) Imprisonment of twelve (12) years and one (1) day to twenty (20) years and a fine ranging from Three hundred thousand pesos (₱300,000.00) to Four hundred thousand pesos (₱400,000.00), if the quantities of dangerous drugs are less than five (5) grams of opium, morphine, heroin, cocaine or cocaine hydrochloride, marijuana resin or marijuana resin oil, methamphetamine hydrochloride or "*shabu*," or other dangerous drugs such as, but not limited to, MDMA or "ecstasy," PMA, TMA, LSD, GHB, and those similarly designed or newly introduced drugs and their derivatives, without having any therapeutic value or if the quantity possessed is far beyond therapeutic requirements; or less than three hundred (300) grams of marijuana.

[5] Records, p. 1.

[6] *Id.* at 15.

evidence included the following: (a) Affidavit executed by PO2 Sembran who acted as poseur-buyer; (b) the marked money/ ₱100 bill with Serial No. GW877766 recovered from accused-appellant; (c) confiscation receipt; (d) Chemistry Report; and (e) sachet of *shabu* handed by accused-appellant to PO2 Sembran. Thereafter, trial on the merits ensued.

The prosecution supported its version of the events through documentary evidence and the testimonies of its two witnesses from the Rosales Police Station in Rosales, Pangasinan, namely: PO2 Noe Sembran and PO1 Rosauro Valdez.

PO2 Noe Sembran testified that upon receiving information from a civilian asset that the accused Elly Naelga was peddling illegal drugs at the public market of Rosales, Pangasinan, Police Chief Inspector Policarpio Cayabyab, Jr. hatched a plan to conduct a buy-bust operation to apprehend the accused. PO2 Sembran was tasked to act as poseur-buyer, with PO1 Danilo Asis, Senior Police Officer (SPO) 1 Jesus Caspillo, and PO1 Rosauro Valdez as backup operatives. The money used for the buy-bust operation was provided by the Rosales Treasurer's Office and affixed thereto were his signature and that of the municipal treasurer of Rosales.

In his testimony, PO2 Sembran narrated that on 15 July 2003, he was informed by an asset that accused-appellant Elly Naelga was selling illegal drugs at the Rosales Public Market in Pangasinan. Thereafter, at about three o'clock in the afternoon of the same day, PO2 Sembran went inside the public market and approached accused-appellant. PO2 Sembran was familiar with accused-appellant, because the police's confidential agent had been monitoring accused-appellant's activities for several weeks. PO2 Sembran talked to accused-appellant, who asked the former if he was a security guard, to which he replied in the affirmative. While engaged in this conversation, PO2 Sembran asked the accused-appellant what he could use to keep him awake while on duty as a security guard. Accused-appellant suggested that he drink Red Bull. PO2 Sembran replied that he already did, but this did not work, and that he was caught sleeping on his post. Accused-appellant then declared that he knew something

more effective, as he passed his index finger under his nose as if sniffing something. When asked what he meant, accused-appellant told PO2 Sembran that he was referring to *bato* or *shabu*. PO2 Sembran said he was willing to try this and to buy Five Hundred Pesos (₱500.00) worth of *shabu*. Accused-appellant told PO2 Sembran to give him the money and committed to return with the *shabu*. PO2 Sembran gave appellant four One Hundred Pesos (₱400.00) in marked bills. Upon receiving the money, accused-appellant left. PO2 Sembran went back to the police station to plan the arrest of accused-appellant.

Police Chief Inspector Policarpio C. Cayabyab, Jr. instructed PO2 Sembran to act as a poseur-buyer and the other members of the team as backup. PO2 Sembran and his fellow police officers returned to the public market almost an hour later. They waited for accused-appellant until he finally arrived, alighting from a tricycle. PO2 Sembran followed him in an alley. There were people sleeping on bamboo tables in the alley, and PO2 Sembran expressed apprehension at being noticed. Accused-appellant reassured him that they would not be disturbed and immediately asked for the balance of One Hundred Pesos (₱100.00). PO2 Sembran gave accused-appellant the marked money. Thereupon, accused-appellant took out a sachet containing white granules and handed it to PO2 Sembran, who then revealed that he was a policeman. Accused-appellant tried to run, but PO2 Sembran held on to the former's belt. They struggled and fell to the pavement. PO1 Valdez came to help PO2 Sembran arrest accused-appellant. PO2 Sembran was able to recover the One-Hundred-Peso (₱100.00) bill from accused-appellant, who had used the Four Hundred Pesos (₱400.00) he earlier received to buy *shabu*. Accused-appellant was taken into custody, and PO2 Sembran executed an affidavit of arrest. The plastic sachet containing 0.04 gram of white crystalline substance purchased from accused-appellant for ₱500.00 was marked "EN" and taken to the Philippine National Police (PNP) Regional Crime Laboratory Office in Camp Florendo, San Fernando, La Union, for laboratory examination.[7] The four marked One-

[7] Records, p. 40.

Hundred-Peso bills earlier given to accused-appellant were no longer with him, but the last ₱100.00 marked bill later paid to him was recovered.

PO1 Rosauro Valdez corroborated PO2 Sembran's testimony, narrating how he acted as backup in connection with the buy-bust operation that led to the arrest of accused-appellant.

The parties agreed to dispense with the testimony of the Chemist, Police Inspector Emelda Besarra Roderos, who conducted the laboratory examination of the subject drug, considering that the defense admitted the existence, authenticity and due execution of Chemistry Report Number D-260-2003-U dated 16 July 2003, showing that the laboratory examination of the drug confiscated from accused-appellant yielded a positive result for methamphetamine hydrochloride or *shabu*, a dangerous drug.[8]

For the defense, accused-appellant took the witness stand.

Accused-appellant denied the accusations against him. He testified that he was employed by a Muslim named Khadi to sell compact discs (CDs) in a stall located inside the public market of Rosales, Pangasinan. PO2 Sembran, who introduced himself as a security guard, had previously been buying CDs from him. One Saturday, the exact date of which he could not recall, PO2 Sembran came at around 8:30 in the morning and bought a battery worth ₱5.00. On Tuesday of the following week or on 15 July 2003, PO2 Sembran returned and asked accused-appellant to buy *shabu* for him saying, "We need that this evening." He told PO2 Sembran that he did not know anybody selling *shabu*; nonetheless, PO2 Sembran left ₱400.00, which was placed beside him. He took the money, because it might get lost. At around 3:00 o'clock in the afternoon of the same day, PO2 Sembran came back to the stall and waited for him. When he arrived, he gave to PO2 Sembran what he bought. Accused-appellant admitted, although not certain, that what he bought was *shabu*, which he gave to PO2 Sembran. After accused-appellant handed over the *shabu* and while he was leaving the

[8] *Id.* at 39.

place, PO2 Sembran called him back uttering, "*Pare*, come here," and then handcuffed him. PO2 Sembran told him, "*Pare*, I am a policeman" (*pulis ako*). On cross examination, accused-appellant admitted buying the subject *shabu* in Urdaneta City.

After hearing, the trial court rendered judgment on the merits. Finding that the prosecution had proven accused-appellant's guilt beyond reasonable doubt, the RTC promulgated its Decision on 21 June 2004 convicting him of the offense charged, sentencing him to Life Imprisonment, and imposing on him a fine of ₱500,000.00, disposing as follows:

> WHEREFORE, the Court hereby finds the accused Elly Naelga guilty beyond reasonable doubt of the crime of illegal sale of Methamphetamine Hydrochloride or "*shabu*" as charged, defined and penalized under Article II, Section 5 of Republic Act (RA) No. 9165. Accordingly, he is sentenced to suffer life imprisonment; to pay a fine of Five Hundred Thousand Pesos (₱500,000.00); and, to pay the costs of suit.[9]

Accused-appellant appealed the decision of the RTC to the Court of Appeals. On 30 November 2005, the Court of Appeals rendered a Decision affirming the challenged decision of the trial court, reasoning thus:

> [T]here is no rigid or textbook method of conducting buy-bust operations. The choice of effective ways to apprehend drug dealers is within the ambit of the police authority – police officers have the expertise to determine which specific approaches are necessary to enforce their entrapment operations. The court's duty in these cases is to ensure that the rights of the accused have not been violated during buy-bust operations.
>
> The failure of the police authorities to comply strictly with the Dangerous Drugs Board's Resolution on the chain of custody of the seized *shabu* and its preservation, by itself, is not fatal to the prosecution's case. What is essential or necessary is that after the subject *shabu* was seized, the same was duly identified, marked or preserved, and duly submitted to the crime laboratory for examination. x x x.

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[9] *Id.* at 57.

x x x x x x x x x

x x x We always adhere to the well-entrenched doctrine in our jurisdiction that the findings of facts of the trial court, its calibration of the collective testimonies of the witnesses, its assessment of the probative weight of the evidence of the parties as well as its conclusions anchored on said findings are accorded by the appellate court high respect. In the absence of any showing that a judge's factual findings were reached arbitrarily or without sufficient basis, these findings are to be received with great respect by the Supreme Court, and indeed are binding upon it.

Prescinding therefrom, We hold that the court *a quo* had sufficiently and clearly established both the factual and legal basis that led to the verdict of conviction of accused-appellant Naelga. The Court *a quo*'s findings and pronouncement that the police officers who conducted the buy-bust operation against accused-appellant Naelga, did so pursuant to their lawful exercise of police functions should gain respect from Us. This is so because the defense miserably failed to produce any contrary evidence that would show even how remotely it was, that police officers Sembran and Valdez were motivated with grudge or ill-will to allow injustice to be committed against the person of accused-appellant if their accusation was fabricated.[10]

Via a Notice of Appeal,[11] accused-appellant elevated the case to this Court, which thereafter resolved to require the parties to simultaneously file their respective supplemental briefs, if they so desired, within 30 days from notice.[12] Both the prosecution and the defense opted to adopt their respective supplemental briefs filed before the Court of Appeals for purposes of expediency.[13]

In its brief, the defense raises the following issues for resolution by this Court:

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[10] *Rollo,* pp. 1-18.

[11] Pursuant to Section 13, Rule 124 of the Revised Rules on Criminal Procedure, as amended by A.M. No. 00-5-03-SC.

[12] *Rollo,* p. 16.

[13] *Id.* at 17-21.

I.

THE LOWER COURT GRAVELY ERRED IN GIVING CREDENCE TO THE INCONSISTENT AND INCREDIBLE TESTIMONIES OF THE PROSECUTION WITNESSES.

II.

THE LOWER COURT GRAVELY ERRED IN FINDING THE ACCUSED-APPELLANT GUILTY BEYOND REASONABLE DOUBT OF THE CRIME CHARGED BASED ON THE DISPUTABLE PRESUMPTION THAT THE POLICE OFFICERS REGULARLY PERFORMED THEIR OFFICIAL FUNCTIONS.

We sustain accused-appellant's conviction.

Accused-appellant denies the charges against him and attacks the credibility of the prosecution witnesses.

The core issue for resolution is the issue of the credibility of the witnesses.

Accused-appellant questions the trial court's reliance on the credibility of the two prosecution witnesses in convicting him on several grounds. First, material inconsistencies and gross contradictions in the testimonies of the police officers destroyed their credibility. Second, accused-appellant alleges that the police officers failed to observe the proper guidelines in securing the chain of custody of the prohibited drugs; this alleged failure to follow proper procedure raises doubts as to whether the specimen examined by the forensic chemist and presented in court was indeed the one retrieved from accused-appellant. Thus, there can be no presumption of regularity.

On the other hand, the Office of the Solicitor General is for sustaining accused-appellant's conviction, arguing that the alleged inconsistencies are minor and inconsequential and, in fact, do not negate the occurrence of the buy-bust operation and accused-appellant's involvement.

The instant controversy involves no less than the liberty of accused-appellant. The presumption of innocence of an accused in a criminal case is a basic constitutional principle, fleshed out by procedural rules that place on the prosecution the burden of

proving that the accused is guilty of the offense charged by proof beyond reasonable doubt. This being an appeal of a criminal case, opening the entire case up for review, we have carefully reviewed and evaluated the records and the decisions of the RTC and the Court of Appeals and find no reason to deviate from their rulings.

At the outset, it should be pointed out that prosecutions involving illegal drugs largely depend on the credibility of the police officers who conducted the buy-bust operation. Considering that this Court has access only to the cold and impersonal records of the proceedings, it generally relies upon the assessment of the trial court.[14] This Court will not interfere with the trial court's assessment of the credibility of witnesses except when there appears on record some fact or circumstance of weight and influence which the trial court has overlooked, misapprehended, or misinterpreted.[15] This rule is consistent with the reality that the trial court is in a better position to decide the question, having heard the witnesses themselves and observed their deportment and manner of testifying during the trial.[16] Thus, factual findings of the trial court, its calibration of the testimonies of the witnesses, and its conclusions anchored on its findings are accorded by the appellate court high respect, if not conclusive effect, more so when affirmed by the Court of Appeals, as in this case.

A successful prosecution for the illegal sale of dangerous/ prohibited drugs must establish the following elements:

(1) identities of the buyer and seller, the object, and the consideration; and

(2) the delivery of the thing sold and the payment therefor.[17]

As correctly found by the trial court, accused-appellant was caught in a buy-bust operation. He was caught *in flagrante*

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[14] *People v. Sy*, 438 Phil. 383, 397 (2002).

[15] *People v. Corpuz*, 442 Phil. 405, 415 (2002).

[16] *People v. Julian-Fernandez*, 423 Phil. 895, 910 (2001).

[17] *People v. Novilinio*, G.R. No. 177220, 24 April 2009.

delicto selling a dangerous drug, methamphetamine hydrochloride or *shabu*, to PO2 Noe Sembran on 15 July 2003 at the public market of Rosales, Pangasinan, established not only by the clear, straightforward, and convincing testimony of poseur-buyer PO2 Noe Sembran and corroborated by PO1 Rosauro Valdez, but also by accused-appellant's testimony.

Accused-appellant himself confirmed and admitted to the occurrence of said transaction. Following his testimony, he admitted to taking the ₱400.00 left by PO2 Sembran for the purchase of *shabu*, thereafter going to his alleged source in Urdaneta City, and then returning with the *shabu* to the Rosales Public Market, and handing the sachet over to PO2 Sembran. The foregoing were not only undisputed but were, in fact, admitted by accused-appellant himself in his testimony. Thus, there is no denying that the said transaction indeed took place.

Desperate to get himself absolved from culpability, accused-appellant submits in the alternative that the facts as presented by the prosecution reveal that the law enforcers, specifically PO2 Sembran, instigated him to sell *shabu*. Accused-appellant claims that it was PO2 Sembran who approached and asked him to buy *shabu*, leaving the money even if he said he did not know anybody selling *shabu*.

We find no instigation in this case. The general rule is that it is no defense to the perpetrator of a crime that facilities for its commission were purposely placed in his way, or that the criminal act was done upon the "decoy solicitation" of persons seeking to expose the criminal, or that detectives feigning complicity in the act were present and apparently assisting in its commission. This is particularly true in that class of cases where the offense is of a kind habitually committed, and the solicitation merely furnishes evidence of a course of conduct. Mere deception by the detective will not shield defendant, if the offense was committed by him free from the influence or the instigation of the detective.[18]

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[18] *People v. Lua Chu and Uy Se Tieng*, 56 Phil. 44, 53 (1931), quoting 16 Corpus Juris, p. 88, Sec. 57.

Here, the law enforcers received a report from their confidential informant that accused-appellant was engaged in illegal drug trade in the public market of Rosales. Poseur-buyer PO2 Sembran then pretended to be engaged in the drug trade himself and, with the help of his fellow buy-bust operatives, arrested accused-appellant in the act of delivering the *shabu* to him. In an entrapment, ways and means are resorted to for the purpose of trapping and capturing the lawbreakers in the execution of their criminal plan. In instigation, the instigator practically induces the would-be defendant into the commission of the offense, and himself becomes a co-principal. Entrapment is no bar to prosecution and conviction; in instigation, the defendant would have to be acquitted.

A buy-bust operation is a form of entrapment, which in recent years has been accepted as a valid and effective mode of arresting violators of the Dangerous Drugs Law. In a buy-bust operation, the idea of committing a crime originates from the offender, without anybody inducing or prodding him to commit the offense.[19] In the case at bar, the buy-bust operation was formed by the police officers precisely to test the veracity of the tip and in order to apprehend the perpetrator.

While accused-appellant claims that it was PO2 Sembran who approached and asked him to buy *shabu* for him, the same cannot be considered as an act of instigation, but an act of "feigned solicitation." Instigation is resorted to for purposes of entrapment, based on the tip received from the police informant that accused-appellant was peddling illegal drugs in the public market of Rosales. In fact, **it was accused-appellant who suggested to PO2 Sembran to use *shabu;*** and, despite accused-appellant's statement that he did not know anybody selling *shabu*, he still took the money from PO2 Sembran and directly went to Urdaneta, where he claimed to have bought the illegal drug. Then he returned to the Rosales public market and gave the drug to PO2 Sembran.

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[19] *People v. Yumang*, G.R. No. 94977, 17 May 1993, 222 SCRA 119, 123; citing *People v. Ramos Jr.*, G.R. No. 88301, 28 October 1991, 203 SCRA 237, 242.

The records of the case disclose that PO2 Noe Sembran, the designated poseur-buyer in the buy-bust operation, positively identified accused-appellant as the seller of the confiscated *shabu*. His testimony was corroborated by PO1 Rosauro Valdez. The object of the *corpus delicti* was duly established by the prosecution. The sachet confiscated from accused-appellant was positively identified, marked and preserved as evidence, and upon laboratory examination yielded positive for *shabu*.

Accused-appellant's assertion that the police operatives failed to comply with the proper procedure in the chain of custody of the seized drugs is premised on the idea that non-compliance with the procedure in Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165 creates an irregularity and overcomes the presumption of regularity accorded police authorities in the performance of their official duties.

The argument fails.

Contrary to appellant's claim, there is no broken chain in the custody of the seized items, later on determined to be *shabu*, from the moment of its seizure by the entrapment team, to its delivery to the investigating officer, to the time it was brought to the forensic chemist at the PNP Crime Laboratory for laboratory examination. It was duly established by documentary, testimonial, and object evidence, including the markings on the plastic sachet containing the *shabu* indicating that the substance tested by the forensic chemist, whose laboratory tests were well-documented, was the same as that taken from accused-appellant.

Failure of the buy-bust team to strictly comply with the provisions of said section did not prevent the presumption of regularity in the performance of duty from applying.[20]

The procedure for the custody and disposition of confiscated, seized and/or surrendered dangerous drugs, among others, is provided under Section 21(1), Article II of Republic Act No. 9165:

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[20] *People v. Naquita*, G.R. No. 180511, 28 July 2008, 560 SCRA 430, 446; *People v. Concepcion*, G.R. No. 178876, 27 June 2008, 556 SCRA 421, 439; *People v. Del Monte*, G.R. No. 179940, 23 April 2008, 552 SCRA 627, 637.

(1) The apprehending team having initial custody and control of the drugs shall, immediately after seizure and confiscation, physically inventory and photograph the same in the presence of the accused or the person/s from whom such items were confiscated and/or seized, or his/her representative or counsel, a representative from the media and the Department of Justice (DOJ), and any elected public official who shall be required to sign the copies of the inventory and be given a copy thereof.

Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, which implements said provision, reads:

(a) The apprehending officer/team having initial custody and control of the drugs shall, immediately after seizure and confiscation, physically inventory and photograph the same in the presence of the accused or the person/s from whom such items were confiscated and/or seized, or his/her representative or counsel, a representative from the media and the Department of Justice (DOJ), and any elected public official who shall be required to sign the copies of the inventory and be given a copy thereof; x x x Provided, further, that non-compliance with these requirements under justifiable grounds, as long as the integrity and the evidentiary value of the seized items are properly preserved by the apprehending officer/team, shall not render void and invalid such seizures of and custody over said items.

The above provision further states that non-compliance with the stipulated procedure, under justifiable grounds, shall not render void and invalid such seizures of and custody over said items, for as long as the integrity and evidentiary value of the seized items are properly preserved by the apprehending officers. The evident purpose of the procedure provided for is the preservation of the integrity and evidentiary value of the seized items, as the same would be utilized in the determination of the guilt or the innocence of the accused. Its absence, by itself, is not fatal to the prosecution's case and will not discharge accused-appellant from his crime. What is of utmost importance is the preservation of the integrity and the evidentiary value of the seized items, as the same would be utilized in the determination of the guilt or innocence of the accused. In the instant case, the integrity of the drugs seized remained intact, and the crystalline

substance contained therein was later on determined to be positive for methamphetamine hydrochloride (*shabu*).

Before the enactment of Republic Act No. 9165, the requirements contained in Section 21(1) were already present, per Dangerous Drugs Board Regulation No. 3, Series of 1979. Despite such regulation and the non-compliance therewith by the buy-bust team, the Court still applied the presumption of regularity, holding:

> The failure of the arresting police officers to comply with said DDB Regulation No. 3, Series of 1979 is a matter strictly between the Dangerous Drugs Board and the arresting officers and is totally irrelevant to the prosecution of the criminal case for the reason that the commission of the crime of illegal sale of a prohibited drug is considered consummated once the sale or transaction is established x x x and the prosecution thereof is not undermined by the failure of the arresting officers to comply with the regulations of the Dangerous Drugs Board.[21]

Assuming *arguendo* that the presumption of regularity in the performance of official duty will not apply due to the failure to comply with Section 21(a), the same will not automatically lead to the exoneration of the accused. Accused-appellant's conviction was based not solely on said presumption, but on the documentary and real evidence; and, more importantly, on the oral evidence of prosecution witnesses, whom we found to be credible. One witness is sufficient to prove the *corpus delicti* — that there was a consummated sale between the poseur-buyer and the accused — there being no quantum of proof as to the number of witnesses to prove the same. ***To emphasize, accused-appellant himself verified in his testimony that the said transaction took place.***

The inconsistencies pointed out by the defense pertaining to whether or not he was already inside the public market of Rosales at the time the operatives returned, or if the buy-bust team saw him alighting from a tricycle, is an inconsistency immaterial to the commission of the offense and, thus, cannot affect the overall credibility of the prosecution witnesses.

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[21] *People v. De los Reyes*, G.R. No. 106874, 21 January 1994, 229 SCRA 439, 447.

The records of the case indicate that after his arrest, accused-appellant was taken into police custody. After the arrest, the seized item, which had the marking "EN" and alleged to contain *shabu*, was brought to the PNP crime laboratory for examination.[22] The request for laboratory examination and transfer of the confiscated sachet to the PNP crime laboratory was prepared by Chief of Police Policarpio C. Cayabyab, Jr.[23] The request indicated that the seized item was delivered by PO3 Resuello, Jr. and received by Forensic Chemist P/Insp. Emelda Besarra Roderos,[24] the same person who conducted laboratory tests on the substance. The transparent plastic sachet containing a white crystalline substance was later on determined to be positive for methylamphetamine hydrochloride or *shabu*.

PO2 Sembran positively identified the plastic sachet containing *shabu*, which he had bought from accused-appellant in the buy-bust operation. Thus, the identity of the *shabu* taken from accused-appellant had been duly preserved and established by the prosecution. Besides, the integrity of the evidence is presumed to be preserved, unless there is a showing of bad faith, ill will, or proof that the evidence has been tampered with. The accused-appellant in this case bears the burden of making some showing that the evidence was tampered or meddled with to overcome the presumption of regularity in the handling of exhibits by public officers and the presumption that public officers properly discharged their duties. There is no doubt that the sachet marked "EN," which was submitted for laboratory examination and found to be positive for *shabu*, was the same one sold by accused-appellant to the poseur-buyer PO2 Sembran during the buy-bust operation.

Finally, accused-appellant's claim that he is a victim of a frame-up is viewed by this Court with disfavor, because being a victim can easily be feigned and fabricated. There being no proof of ill motive on the part of the police operatives to falsely

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[22] Records, p. 11.

[23] *Id.* at 7.

[24] *Id.*

accuse him of such a grave offense, the presumption of regularity in the performance of official duty and the findings of the trial court with respect to the credibility of witnesses shall prevail over the claim of the accused-appellant.[25] While the presumption of regularity in the performance of official duty by law enforcement agents should not by itself prevail over the presumption of innocence, for the claim of frame-up to prosper, the defense must be able to present clear and convincing evidence to overcome this presumption of regularity, which the defense was not able to proffer.

Accused-appellant was charged with the unauthorized sale and delivery of a dangerous drug in violation of the provisions of Section 5, Article II of Republic Act No. 9165.

Under Section 5, Article II of Republic Act No. 9165, the penalty of life imprisonment to death and a fine ranging from ₱500,000.00 to ₱1,000,000.00 shall be imposed upon any person, who, unless authorized by law, shall sell, trade, administer, dispense, deliver, give away to another, distribute, dispatch in transit or transport any dangerous drug, including any and all species of opium poppy regardless of the quantity and purity involved.

Thus, the trial court, as affirmed by the Court of Appeals, correctly imposed the penalty of life imprisonment and a fine of ₱500,000.00.

WHEREFORE, premises considered, the Decision of the Court of Appeals in CA-G.R. CR No. 00304 convicting accused-appellant ELLY NAELGA of violation of Section 5, Article II of Republic Act No. 9165, and sentencing him to suffer the penalty of life imprisonment and to pay a fine of ₱500,000.00 is hereby *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Velasco, Jr., Peralta, and *Abad,*[*] *JJ.,* concur.

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[25] *People v. Bongalon*, 425 Phil. 96, 116 (2002).

[*] Associate Justice Roberto A. Abad was designated to sit as additional member replacing Associate Justice Antonio Eduardo B. Nachura per Raffle dated 2 September 2009.

THIRD DIVISION

[G.R. No. 171260. September 11, 2009]

AMPARO ROBLES CABREZA, *petitioner, vs.* **CEFERINO S. CABREZA, JR., JUDGE PABLITO ROXAS, SHERIFF RONBERTO VALINO, REGIONAL TRIAL COURT BRANCH 70 PASIG CITY,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW ON *CERTIORARI;* QUESTION OF FACT NOT PROPER SUBJECT THEREOF. — Anent petitioner's allegation that there is another conjugal property other than that covered by TCT No. 17460, the same is a question of fact which should not be the proper subject of a petition under Rule 45 of the Rules of Court. *J.R. Blanco v. Quasha* is instructive, to wit: To begin with, this Court is not a trier of facts. It is not its function to examine and determine the weight of the evidence supporting the assailed decision. In *Philippine Airlines, Inc. vs. Court of Appeals* (275 SCRA 621 [1997]), the Court held that factual findings of the Court of Appeals which are supported by substantial evidence are binding, final and conclusive upon the Supreme Court. **So also, well-established is the rule that "factual findings of the Court of Appeals are conclusive on the parties and carry even more weight when the said court affirms the factual findings of the trial court."** Moreover, well entrenched is the prevailing jurisprudence that only errors of law and not of facts are reviewable by this Court in a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court, **which applies with greater force to the Petition under consideration because the factual findings by the Court of Appeals are in full agreement with what the trial court found**.

2. ID.; EVIDENCE; NO REASON TO REVERSE THE FACTUAL FINDINGS OF THE COURT OF APPEALS PARTICULARLY WHERE THE SAME IS IN ACCORDANCE WITH THE FINDINGS OF THE REGIONAL TRIAL COURT. — In the case at bar, the RTC in its August 4, 2004 Order found: x x x In the instant case, there is only one (1) piece of property

> involved which is the real property covered by TCT No. 17460 located at No. 20 United St., Bo. Capitolyo, Pasig City. x x x Likewise, the CA in its December 7, 2005 Decision found: x x x It is not disputed that the conjugal dwelling in question (Transfer Certificate of Title No. 17460) was the only asset of the conjugal partnership that was the subject of partition between the spouses. Based on the foregoing, this Court finds no reason to reverse the findings of fact made by the CA, more so, since the same is in accordance with the findings of fact of the RTC.

APPEARANCES OF COUNSEL

Oliver O. Lozano for petitioner.
Rivera Santos & Maranan for Ceferino S. Cabrera, Jr.

D E C I S I O N

PERALTA, *J.*:

Before this Court is a Petition for Review on *Certiorari*[1] under Rule 45 of the Rules of Court, seeking to set aside the December 7, 2005 Decision[2] and February 7, 2006 Resolution[3] of the Court of Appeals (CA) in CA-G.R. SP No. 86770.

The facts of the case are as follows:

Ceferino S. Cabreza, Jr. (respondent) filed with the Regional Trial Court (RTC), Branch 70, of Pasig City, a petition for the declaration of nullity of his marriage to Amparo Robles Cabreza (petitioner). The same was docketed as JDRC Case No. 3705.

On January 3, 2001, the RTC rendered a Decision[4] granting the petition, the dispositive portion of which reads:

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[1] *Rollo*, pp. 3-21.

[2] Penned by Associate Justice Lucas P. Bersamin, with Associate Justices Renato C. Dacudao and Celia C. Librea-Leagogo, concurring; *id.* at 102-108.

[3] *Id.* at 115-116.

[4] *Rollo*, pp. 22-28.

WHEREFORE, the Court hereby grants the instant petition and declares the marriage of petitioner and respondent a nullity pursuant to Art. 36 of the Family Code.

Further, the conjugal partnership is hereby dissolved and must be liquidated in accordance with Art. 129 of the Family Code, without prejudice to the prior rights of known and unknown creditors of the conjugal partnership.

Let copies of this decision be furnished the Local Civil Registrars of Cainta, Rizal and Pasig City and the Registry of Deeds of Pasig City, for record purposes.

SO ORDERED.[5]

Said Decision is final and executory.

On March 7, 2003, respondent filed with the RTC a Motion for Execution (Re: Dissolution of Conjugal Partnership). In said motion, respondent sought to implement the order for the liquidation of the conjugal partnership, which consisted solely in the real property located at No. 20 United Street, Bo. Capitolyo, Pasig City, covered by Transfer Certificate of Title No. 17460. For this purpose, he moved that said property be sold and the proceeds be divided and distributed.[6]

On May 26, 2003, the RTC issued an Order[7] granting respondent's motion, the dispositive portion of which reads:

WHEREFORE, **the Court hereby orders that the property covered by Transfer Certificate of Title No. 17460 be sold** and the proceeds thereof be divided and distributed, as follows:

a) ½ or 50% of the total proceeds shall be delivered to the common children of the petitioner and the respondent as their presumptive legitime;

b) the other half or 50% of the proceeds shall be equally divided between the petitioner and the respondent. From the share of the respondent should be deducted the total amount

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[5] *Id.* at 28. (Emphasis Supplied.)

[6] CA *rollo*, p. 21.

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

of PHP 1,500,000.00 which was earlier advanced by petitioner to respondent, but which was adjudged to be returned to the former by the latter pursuant to the Resolution of the Court of Appeals dated November 14, 1994 (Exh. "F") and reiterated in the final and executory Decision in this case by this Court.

All of the foregoing are subject to the claim of creditors of the conjugal partnership or of the petitioner and respondent, if any.

SO ORDERED.[8]

On July 30, 2003, the RTC issued an order granting respondent's motion to allow prospective buyers to inspect the property.[9]

On October 2, 2003, the RTC issued another order granting respondent's motion which prayed for the approval of the deed of absolute sale, for the authorization for respondent to sign said deed in behalf of petitioner, and for an order requiring the occupants to vacate the property.[10]

Petitioner filed a motion for reconsideration questioning the October 2, 2003 Order which was however denied by the said court in an Order dated November 4, 2003.[11]

On May 12, 2004, the RTC issued another order granting respondent's prayer for the issuance of a writ of possession, thus:

The Decision in this case having attained finality, petitioner's motion (for issuance of Writ of Possession) is impressed with merit and is hereby GRANTED.

However, before the Court issues the said Writ of Possession, the buyer, BJD Holdings Corporation, is first directed to comply with its undertaking to submit to the Court a Certificate of Bank Deposit in the amount of Ten Million Pesos (PHP 10,000,000.00), representing the total purchase price for the property as contained

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[8] *Id.* at 22.

[9] As stated in the whereas clause of the Writ of Possession issued by the RTC dated June 30, 2004, *rollo,* pp. 37-41, 38.

[10] *Rollo,* p. 39.

[11] *Id.*

in the Deed of Absolute Sale which was approved by this Court in its Order dated October 2, 2003.

SO ORDERED.[12]

On June 25, 2004, the RTC issued an Order[13] granting a writ of possession in favor of the buyer of the property, BJD Holdings Corporation. Thereafter, on June 30, 2004, a writ of possession[14] was issued. On July 5, 2004, a Notice to Vacate[15] was served on petitioner.

On July 8, 2004, petitioner filed a Motion to Hold in Abeyance the Writ of Possession and Notice to Vacate,[16] arguing that Article 129(9) of the New Civil Code provides that, in the partition of the properties, the conjugal dwelling and lot on which it is situated shall be adjudicated to the spouse with whom majority of the children choose to remain. Hence, since the majority of the children, albeit of legal age, opted to stay with petitioner, she asserted that the family home should be given to her.

On August 4, 2004, the RTC issued an Order[17] denying the motion of petitioner, the pertinent portions of which read:

> The Decision in this case having long become final and executory — the appeals before the Court of Appeals, as well as with the Supreme Court were dismissed with finality — there is noting (sic) more to be done other than to have the Decision implemented.
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> x x x x x x x x x
>
> It is evident from Article 129 of the Family Code that the same presupposes a situation where there are other properties aside from the property subject of the motion that constitute the conjugal partnership. In the instant case, there is only one (1) piece of property involved which is the real property covered by TCT No. 17460 located

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[12] As stated in respondent's memorandum, pp. 241-258, 243.

[13] *Rollo*, p. 30.

[14] *Id.* at 37-41

[15] *Id.* at 43.

[16] *Id.* at 44-46.

[17] *Id.* at 58-59.

at No. 20 United St., Bo. Capitolyo, Pasig City. Pursuant to the order of this Court dated 26 May 2003, granting the Motion for Execution of the Decision, said property was ordered to be sold and the proceeds distributed, x x x.

x x x x x x x x x

It will be noted from the foregoing sequence of events that there is nothing more that remains to be done, but to enforce the final and executory Decision, as well as its implementing orders.

WHEREFORE, the Motion to Hold in Abeyance Writ of Possession and Motion to Vacate is hereby DENIED, for lack of merit.

SO ORDERED.[18]

On August 6, 2004, petitioner filed a Motion for Reconsideration which was however denied by the RTC in an order dated August 27, 2004.

On September 2, 2004, the Sheriff issued a Final Notice to Vacate.[19]

On October 4, 2004, petitioner filed with the CA a Petition for *Certiorari*[20] assailing the order of possession, writ of possession and notice to vacate.

On December 7, 2005, the CA rendered a Decision[21] denying the petition for *certiorari*. The CA ruled in the wise:

We do not agree, to begin with, that the assailed issuances were tainted by lack of jurisdiction or grave abuse of discretion. Instead, we consider the contention of the respondent husband, that Art. 129 (9), Family Code, *supra*, is applicable only when the spouses had other assets to be divided between them, to be correct. Indeed Art. 129(9), Family Code, *supra*, obviously refers to "partition of the properties." Hence, the respondent Judge was not guilty of any arbitrariness, whimsicality or capriciousness in issuing the assailed

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[18] *Id.*

[19] *Id.* at 73.

[20] *Id.* at 74-85.

[21] *Id.* at 102-108.

orders and writ. It is not disputed that the conjugal dwelling in question (Transfer Certificate of Title No. 17460) was the only asset of the conjugal partnership that was the subject of partition between the spouses.

The more decisive fact is, however, the finality of the RTC judgment dated May 26, 2003.

The petitioner wife wants to change the final judgment, insisting that the conjugal dwelling should be awarded exclusively to her because the common children of the spouses, *albeit* of legal age, have chosen to live with her. **We cannot permit what petitioner wants because it does not (sic) accord with the decree of the final judgment dated May 26, 2003, which specifically and plainly directed that the property was to be sold and the proceeds of the sale was divided and distributed,** x x x[22]

Petitioner then filed a Motion for Reconsideration which was however denied by the CA in a Resolution[23] dated February 7, 2006.

Hence, herein petition, with petitioner raising the following issues, to wit:

ARE THE ORDER OF POSSESSION, WRIT OF EXECUTION/ POSSESSION AND NOTICE TO VACATE THAT VARY THE TERMS OF THE DISPOSITIVE PORTION OF THE DECISION IN ACCORDANCE WITH SUPREME COURT DECISIONS?

IS THE COURT OF APPEALS DECISION IN ACCORDANCE WITH SUPREME COURT DECISION?[24]

The petition is bereft of merit.

Petitioner argues in the main that the order of possession, writ of possession and notice to vacate vary the terms of the dispositive portion of the January 3, 2001 RTC Decision, because the same authorize the sale of the family home. Specifically, petitioner anchors her petition on Article 129 (9) of the Civil Code, which reads:

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[22] *Id.* at 106. (Emphasis supplied.)

[23] *Rollo*, pp. 115-116.

[24] *Id.* at 14.

In the partition of the properties, the conjugal dwelling and lot on which it is situated shall be adjudicated to the spouse with whom the majority of the common children choose to remain.

Petitioner also argues against the contention of respondent that Article 129(9) does not apply because of the lack of other properties. She points out that there is another property, the same covered by TCT No. 17461, which she alleges was presented and forms part of the record.[25]

Respondent, for his part, contends that the petition must be dismissed because the same raises a question of fact, and it raises an issue that has already been resolved with finality.

For clarity, the pertinent portion of the final and executory January 3, 2001 RTC decision reads:

Further, the conjugal partnership is hereby dissolved and must be liquidated in accordance with Art. 129 of the Family Code, without prejudice to the prior rights of known and unknown creditors of the conjugal partnership.[26]

In addition, the pertinent portion of the May 26, 2003 RTC Order granting respondent's motion for execution reads:

WHEREFORE, **the Court hereby orders that the property covered by Transfer Certificate of Title No. 17460 be sold**[27] and the proceeds thereof be divided and distributed, as follows: x x x[28]

Before anything else, this Court shall address the procedural issue raised by respondent. He argues that the May 26, 2003 Order is already final and executory; hence, he contends that petitioner can no longer question the order that the property covered by Transfer Certificate of Title No. 17460 be sold.[29]

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[25] *Rollo,* p. 16.

[26] *Id.* at 28. (Emphasis supplied.)

[27] Emphasis supplied.

[28] *Rollo,* p. 22.

[29] *Rollo,* p. 254.

It is this Court's finding that petitioner is not candid, as she omits certain facts that are pertinent to the petition at bar. Quite noticeably, her narration of facts begins from the January 3, 2001 Decision of the RTC and then suddenly jumps to its June 25, 2004 Order of Possession. She would impress upon this Court that nothing significant happened between January 3, 2001 and June 25, 2004, when on the contrary, the events that transpired during the said interval are material and important for a just resolution of the case at bar.

After a perusal of the records, this Court takes note of the following events that occurred between January 3, 2001 and June 25, 2004:

On June 12, 2003, petitioner filed with the CA a Petition for Review[30] assailing the May 26, 2003 Order of the RTC, which ordered the sale of the family home. The same was docketed as CA-G.R. SP No. 77506.

On July 31, 2003, the CA issued a Resolution[31] dismissing the petition for review, the dispositive portion of which reads:

ACCORDINGLY, the petition is DENIED DUE COURSE and DISMISSED.

SO ORDERED.[32]

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[30] CA *rollo*, pp. 109-116.

[31] Penned by Associate Justice Ruben T. Reyes (now a retired member of this Court), with Associate Justices Elvi John S. Asuncion and Lucas P. Bersamin (now a member of this Court), concurring; *id.* at 117-118. Said petition was denied on the following grounds:

1. It is a wrong mode of remedy. Since the assailed order is an order of execution for the sale of a conjugal property, the proper remedy is a petition for *certiorari*.
2. Even if we treat the petition as one for *certiorari*, it is still dismissible for lack of showing of a motion for reconsideration filed in the lower court.
3. The Decision of the Regional Trial Court in JDRC Case No. 3705, dated 03 January 2001, had long become final and executory, per Order dated May 26, 2003.
4. No copy of the said relevant Decision nor of the motion for execution is attached to the petition.

[32] *Id.* at 118.

On March 30, 2004, petitioner filed a Petition for *Certiorari*[33] before this Court assailing the CA Resolution. The same was docketed as G.R. No. 162745.

On May 24, 2004, this Court issued a Resolution[34] denying the petition. Accordingly, on July 23, 2004, an Entry of Judgment[35] was issued rendering the May 24, 2004 Resolution final and executory.

In addition, this Court also takes note that there is another case filed by petitioner with the CA, docketed as CA-G.R. CV No. 8651,[36] questioning the validity of the Deed of Sale between respondent and BJD Holdings Corporation. The CA granted said petition and ordered that the case be remanded to the RTC for further proceedings.

In summary, the three cases including herein petition, are the following:

G.R. No. 162745, *Amparo R. Cabreza v. Court of Appeals, et al.*, questioning the May 26, 2003 RTC Order granting respondent's motion to sell the family home. Said petition was denied by this Court and an Entry of Judgment was issued on July 23, 2004.

G.R. No. 171260, *Amparo R. Cabreza v. Ceferino Cabreza, et al.*, herein petition, questioning the writ of execution/possession

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[33] *Id.* at 119-122.

[34] *Id.* at 123. Said petition was denied for the following reasons:

(a) failure to state the material dates showing when the assailed decision of the Court of Appeals was promulgated, when a motion for new trial or reconsideration, if any, was filed and when notice of the denial thereof was received in violation of Secs. 4(b) and 5, Rule 45 in relation to Sec. 5(d) Rule 56; and

(b) failure to accompany the petition with a clearly legible duplicate original, or certified true copy of the judgment/final order/resolution certified by the Clerk of Court of the court *a quo*, in violation of Secs. 4(d) and 5, Rule 45 in relation to Sec. 5(d), Rule 56.

[35] *Rollo*, p. 124.

[36] *Id.* at 270-280.

and notice to vacate because they allegedly varied the terms of the dispositive portion of the January 3, 2001 judgment of the RTC.

CA-G.R. CV No. 86511, *Amparo R. Cabreza v. Ceferino S. Cabreza, et al.,* questioning the Deed of Sale between respondent and BJD Holdings Corporation, allegedly because of petitioners lack of consent thereto. The petition was granted by the CA, which ordered for the remand of the case to the RTC for further proceedings.

Based on the foregoing, herein petition must fail.

Petitioner cannot hide from the fact that the May 26, 2003 Order of the RTC is already final and executory as a necessary consequence of the Entry of Judgment dated July 23, 2004. Said Order categorically authorized the sale of the family home. Although the CA may have mistakenly denominated the May 26, 2003 Order as a "judgment," the same does not detract from the fact that the said order should be considered final and executory, as petitioners' attempt to question the same has already been denied by this Court.

Inescapably, this Court must consider, in the event herein petition is granted, will the same change or vary the final May 26, 2003 RTC Order which ordered that the family home be sold and the proceeds be divided? This Court finds that it does.

In her Memorandum,[37] petitioner maintains that it is not true that "the issues regarding the sale of the subject property has long been settled by the Court of Appeals and the Supreme Court,"[38] and thus she argues in this wise:

> The Order to Sell the subject property is questioned before this Honorable Court on the ground that the same varies the dispositive portion of the final decision of the court *a quo*. The dispositive portion of the final decision does not decree sale but the lower court *a quo* ordered sale of the family home.

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[37] *Rollo,* pp. 207-235.

[38] *Id.* at 225.

Likewise, it is judicially admitted by the private respondent that a Complaint to Annul the Deed of Sale is pending appeal in the Court of Appeals (Comment, par. 2.7, p. 5) based of lack of consent to and signature of herein petitioner in the Deed of Sale. This Complaint for Annulment of Sale is different from the instant case that seeks to annul the Order to Sell and to vacate which varies the dispositive portion of the final decision.

Premises considered, it is not true that the challenged Order to Sell has become final and executory.

Assuming, *arguendo*, that the Order to Sell is valid, the Deed of Sale is void due to lack of consent to and signature of the herein petitioner thereon. Assuming further, without admitting, the sale was valid, the Order to vacate is not valid for lack of delivery of price.[39]

It is very apparent that petitioner tries to hide from the fact that the January 3, 2001 Decision was implemented by the RTC in its May 26, 2003 Order. She also tries to hide from the fact that this Court has denied her earlier petition, which questioned the May 26, 2003 Order.

In CA-G.R. CV No. 77506, petitioner already questioned the sale of the family home, as can be gleaned from her allegations, as follows:

"1.4 The Court erred in ordering that the property covered by Transfer Certificate of Title No. 17460 be sold, in violation of Provision of Article 102 (6) of the Family Code of the Philippines, which stipulates that:

> "Unless otherwise agreed upon by the parties, in the partition of the properties, the conjugal dwelling and the lot shall be adjudicated to the spouse with whom the majority of the common children choose to remain."[40]

In addition, petitioner alleges: "FURTHERMORE, HER FAMILY DOMICILE IS ORDERED BY THE COURT TO BE SOLD."[41] Lastly, petitioner prays that x x x the Order dated

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[39] *Id.* at 225-226.

[40] CA *rollo* at 113.

[41] *Id.* at 114.

May 26, 2003 in the instant case be set aside and reversed x x x."[42]

Thus, the issue in herein petition of whether or not the sale of the property varies the January 3, 2001 Decision should no longer be litigated anew. To allow so, would permit petitioner to indirectly reopen its failed petition in G.R. No. 162745 (CA G.R. CV No. 77506).

The May 26, 2003 Order was the first order that "varied" the January 3, 2001 Decision, as it categorically decreed the sale of the property. The order of possession, writ of possession and notice to vacate, which are now assailed by petitioner, were all implemented after the May 26, 2003 Order. Hence, petitioner should have already raised herein argument in its first petition in CA-G.R. SP No. 77506, as the facts on which she anchors her argument were already operative then. She did not raise the same in CA-G.R. SP No. 77506, and it would be unfair to allow her to raise said argument in this petition in the guise of questioning the subsequent implementing orders of the RTC.

There is also no compelling reason for this Court to exercise its equity jurisdiction in the case at bar. It is of notice that in her failed petition in CA-G.R. SP No. 77506, petitioner filed the same on her behalf and without the services of a lawyer. Thus, the same was dismissed by the CA on procedural grounds; among the reasons given was that petitioner had availed herself of the wrong remedy, and that she had failed to attach the necessary documents.

Petitioner then sought redress in this Court through a petition which was docketed as G.R. No. 162745. As in her petition before the CA, petitioner again did not avail herself of the services of a lawyer. Thus, the petition before this Court suffered the same fate, as it dismissed the same *via* a resolution *again* on technicalities.

While there is no prohibition for private parties to file a petition on their own behalf, it necessarily follows that they take the

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[42] *Id.*

risk of not having a lawyer who is well-versed in appellate practice. After her failed petition in the CA, petitioner already had the opportunity to rectify the situation by engaging the services of a lawyer when she filed her petition before this Court; yet for some reason, she chose not to do so. Thus, she has no one else to blame but herself.

Based on the foregoing, this Court finds no compelling reason to entertain petitioner's argument, which should have been timely raised in her petition before the CA in CA-G.R. SP No. 77506.

Moreover, in her effort to salvage her petition, petitioner contends that the deed of sale between respondent and the BJD Holdings Corporation is not valid because of her lack of consent thereto. Such argument, however, deserves scant consideration, as petitioner herself manifested that there is a pending case involving the validity of the deed of sale pursuant to the CA's ruling in CA-G.R CV No. 86511. The same therefore cannot be the proper subject of herein petition.

Anent petitioner's allegation that there is another conjugal property other than that covered by TCT No. 17460, the same is a question of fact which should not be the proper subject of a petition under Rule 45 of the Rules of Court.

J.R. Blanco v. Quasha[43] is instructive, to wit:

To begin with, this Court is not a trier of facts. It is not its function to examine and determine the weight of the evidence supporting the assailed decision. In *Philippine Airlines, Inc. vs. Court of Appeals* (275 SCRA 621 [1997]), the Court held that factual findings of the Court of Appeals which are supported by substantial evidence are binding, final and conclusive upon the Supreme Court. **So also, well-established is the rule that "factual findings of the Court of Appeals are conclusive on the parties and carry even more weight when the said court affirms the factual findings of the trial court."** Moreover, well entrenched is the prevailing jurisprudence that only errors of law and not of facts are reviewable by this Court in a petition for review on *certiorari* under Rule 45 of the Revised Rules of Court, **which applies with greater force to the Petition**

[43] 376 Phil. 480 (1990).

under consideration because the factual findings by the Court of Appeals are in full agreement with what the trial court found.[44]

In the case at bar, the RTC in its August 4, 2004 Order found:

x x x In the instant case, there is only one (1) piece of property involved which is the real property covered by TCT No. 17460 located at No. 20 United St., Bo. Capitolyo, Pasig City. x x x[45]

Likewise, the CA in its December 7, 2005 Decision found:

x x x It is not disputed that the conjugal dwelling in question (Transfer Certificate of Title No. 17460) was the only asset of the conjugal partnership that was the subject of partition between the spouses.[46]

Based on the foregoing, this Court finds no reason to reverse the findings of fact made by the CA, more so, since the same is in accordance with the findings of fact of the RTC.

WHEREFORE, premises considered, the petition is *DENIED* for lack of merit. The December 7, 2005 Decision and February 7, 2006 Resolution of the Court of Appeals in CA-G.R. SP No. 86770 are *AFFIRMED*.

Costs against petitioner.

SO ORDERED.

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

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[44] *Id.* at 491, citing *Bagawili v. People*, 304 SCRA 252 (1999). (Emphasis supplied.)

[45] *Rollo*, p. 59.

[46] *Id.* at 106.

EN BANC

[G.R. No. 171340.* September 11, 2009]

GLORIA G. HALLASGO, Municipal Treasurer of Damulog, Bukidnon, *petitioner, vs.* **COMMISSION ON AUDIT (COA) Regional Office No. X,** ***ELIEZER ASOMBRADO, the former vice-mayor of the Municipality of Damulog, Bukidnon, ALEJANDRO S. BERDERA, a former member of Sangguniang Bayan and ULYSES TIRADO and ARMANDO AYCO, members of the Sangguniang Bayan of the Municipality of Damulog, Bukidnon,******* *respondents.*

SYLLABUS

1. POLITICAL LAW; ADMINISTRATIVE LAW; ADMINISTRATIVE PROCEEDINGS; THE COMPLAINANT IS A MERE WITNESS; OFFENSE IS COMMITTED AGAINST THE GOVERNMENT. — There is no merit in the OSG's claim that private complainants — Eliezer Asombrado, Alejandro Berdera, Ulyses Tirado, and Armando Ayco — were denied due process when petitioner failed to implead them as indispensable parties before the CA. A review of the records indicates that even during the proceedings before the Office of the Ombudsman, the case was re-docketed as *Commission on Audit Regional Office No. X v. Gloria Hallasgo and Emiterio D. Luis*, after the COA audit team executed a Complaint-Affidavit against petitioner for gross misconduct. Furthermore, the private complainants cannot be considered indispensable parties, such that the case cannot be resolved without their participation. In administrative cases, the complainant is a mere witness; no private interests are involved as any offense is committed against the government. In any event, the private complainants were not denied due process.

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* This case was inherited by the *ponente* from his immediate predecessor, now retired Associate Justice Ma. Alicia Austria-Martinez on 6 August 2009.

** The names of respondents in italics are included in the Petition for Review on *Certiorari* filed before this Court although they are not indispensable parties to this case.

Although not named in the petition, the private complainants were furnished copies of the pleadings and did, in fact, participate in the proceedings before the CA, arguing vigorously against the petitioner.

2. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW ON *CERTIORARI*; THE SUPREME COURT IS NOT A TRIER OF FACTS. — On the other hand, the OSG correctly argues that questions of fact are not proper in a petition brought under Rule 45 of the Rules of Court. Put simply, the Supreme Court is not a trier of facts, and cannot be tasked to analyze, assess, and weigh the facts presented by the parties before the Ombudsman and the CA in order to ascertain if their appreciation of the evidence is correct. Although there are recognized exceptions to this rule, none of them apply to the present case. Nonetheless, in the interest of justice, we have carefully examined all the evidence in this case, but still find that there is no sufficient reason to overturn the findings of the CA and the Office of the Ombudsman.

3. POLITICAL LAW; ADMINISTRATIVE LAW; CIVIL SERVICE RULES; GROSS MISCONDUCT; EXPLAINED; PETITIONER WAS FOUND GUILTY OF GROSS MISCONDUCT. — Misconduct generally means wrongful, improper or unlawful conduct motivated by a premeditated, obstinate or intentional purpose. It is a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty. Qualified by the term "gross," it means conduct that is "out of all measure beyond allowance; flagrant; shameful; such conduct as is not to be excused." We find that the evidence on record demonstrates a pattern of negligence and gross misconduct on the part of the petitioner that fully satisfies the standard of substantial evidence. Substantial evidence is such amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Petitioner's failure to keep current and accurate records, repeated withdrawal of funds without the appropriate disbursement vouchers, failure to ensure the timely liquidation of her cash advances even after the lapse of over a year, and failure to account for funds in her custody not only constitute violations of applicable laws, but also reflect poorly on the government and provide ripe opportunity for fraud and corruption.

4. ID.; ID.; LOCAL GOVERNMENT CODE; LOCAL OFFICIALS; MUNICIPAL TREASURER; MUST EXERCISE THE HIGHEST DEGREE OF CARE OVER CUSTODY, MANAGEMENT, AND DISBURSEMENT OF MUNICIPAL FUNDS. — As treasurer of the municipality, it is petitioner's duty to perform her responsibilities diligently, faithfully, and efficiently. It behooves her to exercise the highest degree of care over the custody, management, and disbursement of municipal funds. Even if petitioner may have justified some of the transactions, these explanations were belatedly done, effected only after being directed to do so by the audit team. This purported atonement, undertaken as an afterthought accompanied by neither shame nor remorse, cannot exonerate her from liability.

5. ID.; ID.; ID.; ID.; FAILURE THEREOF TO ENSURE THAT DISBURSEMENTS ARE PROPERLY DOCUMENTED AND THAT CASH ADVANCES GRANTED TO HER ARE PROPERLY AND TIMELY LIQUIDATED DESERVES ADMINISTRATIVE SANCTION. — We are not convinced that the anomalies complained of are the result of mere inadvertence, or that responsibility can so easily be shifted by petitioner to her subordinates. On the contrary, her actions demonstrate her wanton and deliberate disregard for the demands of public service. Petitioner's failure to ensure that disbursements are properly documented or that cash advances granted to her are properly and timely liquidated certainly deserves administrative sanction. In particular, we wish to denounce petitioner's practice of having the municipality issue checks in her name, ostensibly to get cash immediately and avoid a three day clearing period, only to discover that petitioner never actually deposited the cash in the municipality's bank account. This is a highly pernicious practice that this Court condemns in the strongest possible terms.

6. ID.; ID.; CIVIL SERVICE RULES; GROSS MISCONDUCT; A GRAVE OFFENSE PUNISHABLE WITH DISMISSAL FOR THE FIRST OFFENSE. — It bears stressing that petitioner never bothered to explain what took place with respect to the funds subject of LBP Check Nos. 15627907 (for ₱350,000.00) and 15627921 (for ₱380,000.00). In stark contrast with the staunch defense she launched for other matters, she never thought to account for these checks, whether before

> the Office of the Ombudsman, the CA, or this Court. She cannot abdicate responsibility for the checks by claiming that it was the audit team's duty to undertake forensic analysis to uncover how these funds were spent. Rather, as treasurer, she should have deposited the funds as she was tasked to do, and subsequently accounted for the use of said funds. All these collectively constitute gross misconduct. Pursuant to Section 52, Rule IV of the Civil Service Rules, gross misconduct is a grave offense punishable with dismissal for the first offense, without prejudice to the Ombudsman's right to file the appropriate criminal case against the petitioner or other responsible individuals. We are, of course, aware that in several administrative cases, this Court has refrained from strictly imposing the penalties provided by the law, in light of mitigating factors such as the offending employee's length of service, acknowledgment of his or her infractions and feeling of remorse, family circumstances, advanced age, and other equitable considerations. However, we find that petitioner's recalcitrant refusal to explain the use (or misuse) of the more than ₱700,000.00 in cash placed in her possession makes her unworthy of such humanitarian consideration, and merits the most serious penalty provided by law.

APPEARANCES OF COUNSEL

Liza Galicia Galicia and Associates Law Office for petitioner.
Dominguez Paderna and Tan Law Office and *Law Firm of Uy Cruz Lo and Associates* for respondents.

D E C I S I O N

DEL CASTILLO, *J.*:

The oft-repeated phrase, "public office is a public trust"[1] is not — and should not be — mere hortatory cliché. A public servant is expected to exhibit, at all times, the highest degree of honesty and integrity, and is accountable to all those he or she serves. Public officers — particularly those in custody of public

[1] CONSTITUTION, Art. 11, Sec. 1.

funds — are held to the highest standards of ethical behavior in both their public and private conduct, and are expected to uphold the public interest over personal interest at all times. It is in this spirit that we convey our deep disdain for all those whose actions betray the trust and confidence reposed in public officers, and those who attempt to conceal wrongdoing through misdirection and blatantly belated explanations.

This is a Petition for Review on *Certiorari* filed by petitioner Gloria Hallasgo, Municipal Treasurer of Damulog, Bukidnon, assailing the Decision[2] dated 9 September 2004 of the Court of Appeals (CA) in CA-GR SP No. 77522, affirming the 22 October 2002 Decision[3] of the Deputy Ombudsman for Mindanao. Said Decision of the Ombudsman found petitioner guilty of grave misconduct and ordered her dismissal from the service. Also assailed in this petition is the Resolution[4] dated 19 January 2006 of the CA denying petitioner's Motion for Reconsideration.

Petitioner was the Municipal Treasurer of the Municipality of Damulog, Bukidnon. On 15 June 2001, she was accused before the Office of the Deputy Ombudsman for Mindanao of "unauthorized withdrawal of monies of the public treasury amounting to malversation of public funds" by outgoing and incumbent officials of the municipality, namely, Messrs. Eliezer N. Asombrado, Alejandro S. Berdera, Ulyses T. Tirado, and Armando L. Ayco.[5] Also named in the Affidavit-Complaint were Emma T. Badic and Emiterio D. Luis, the municipality's disbursing officer and municipal mayor from 1980 to 1998, respectively. The case was docketed as *Eliezer N. Asombrado, et al. v. Gloria Hallasgo, Emma Badic, and Emiterio Luis*, for malversation (OMB-MIN-01-0329) and gross misconduct (OMB-MIN-ADM-01-192).

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[2] *Rollo*, pp. 8-18; penned by Associate Justice Edgardo A. Camello and concurred in by Associate Justices Estela M. Perlas-Bernabe and Arturo G. Tayag.

[3] *Id.* at 48-57.

[4] *Id.* at 19-20; penned by Associate Justice Edgardo A. Camello and concurred in by Associate Justices Normandie B. Pizarro and Ricardo R. Rosario.

[5] *Id.* at 71-89.

In brief, the Affidavit-Complaint claimed that petitioner, Badic and Luis were liable for the following acts: (1) making unrecorded withdrawals from the municipality's bank account totaling ₱360,000.00 without the required supporting documents; and (2) failing to liquidate cash advances despite the lapse of over a year, in the amount of ₱171,256.00.

On 9 August 2001, petitioner, Badic and Luis filed their Joint Counter-Affidavit[6] alleging that: (1) all disbursements were supported by vouchers and recorded in the Treasurer's Cash Book and Journal of Checks; and (2) all the required documentation to liquidate the cash advances were received by the Municipal Accountant on 26 December 2000. In addition, Luis declared that he had since retired from the service, and that all his accounts were cleared prior to his retirement.

After a preliminary review of the documents, the Office of the Ombudsman for Mindanao determined that it could not make a complete evaluation of the issues without conducting an extensive audit. Thus, it requested the Commission on Audit (COA), Region X, Cagayan de Oro City, to audit the records of the alleged anomalous transactions. On 16 October 2001, in accordance with COA Regional Office Order No. 2001-X-297L, the COA created a Special Audit Team (the audit team) to verify the transactions referred to in the Affidavit-Complaint. The audit team submitted its report to the COA Regional Office on 12 December 2001; said results were then referred to the Office of the Ombudsman for Mindanao on 11 February 2002.

The salient points of the audit team's findings[7] are summarized as follows:

A. Alleged Unrecorded Withdrawals of ₱360,000.00 through three (3) checks made without supporting vouchers.

1. Land Bank of the Philippines (LBP) Check No. 15106143 for ₱100,000.00 dated 2 August 1996 in favor of Emma T. Badic, Disbursing Officer.

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[6] *Id.* at 90-105.

[7] *Id.* at 106-147.

The audit team found that this transaction was officially recorded.

2. LBP Check No. 15627928 for ₱250,000.00 dated 15 August 1997 in favor of petitioner.

   LBP Check No. 15627928 amounting to ₱250,000.00 was withdrawn and encashed by the petitioner on 15 August 1997 without the required disbursement voucher. No evidence existed to show that the amount withdrawn was deposited in any of the municipality's depositary banks.

   Petitioner first claimed that she deposited this amount in the municipality's Philippine National Bank (PNB) account. However, no evidence of a cash deposit in the amount of ₱250,000.00 could be found. Instead, it appeared that what was actually deposited by the petitioner were checks that were intended to fund separate transactions.

   Petitioner later claimed that, after going over her records, the ₱250,000.00 was kept in her safe as reserve fund, so this amount was included in her accountabilities. The audit team however noted that no evidence was presented to show that the ₱250,000.00 was really accounted for, aside from petitioner's statement that this was included in the funds under her accountability. Further, a verification of the general ledger account as of 31 December 1997 revealed that the cash in treasury amounted to only ₱239,741.65.

   The audit team recommended that petitioner be made to account for the withdrawal; otherwise, the appropriate action should be instituted against her for failure to account for the amount withdrawn.

3. LBP Check No. 26719253 for ₱10,000.00 dated 27 February 1998 issued to Emiterio D. Luis.

   There was no disbursement voucher found on file from the Office of the Provincial Auditor of Bukidnon, nor was there any record of this transaction taken up either in the Treasurer's Journal of Checks, the General Ledger Book, or the Treasurer's Cashbook. Petitioner explained that the check was actually issued as the municipality's

contribution to the Department of Education Culture and Sports (DECS) regional competition, but a mistake was made in effecting payment. However, the audit team found that this check was deposited on 17 July 1998 in the LBP-Maramag branch, returned, and then re-deposited in the trust fund account of the municipality. Evidently, it took four months and 16 days for the former Mayor, Luis, to return the check. The audit team also noted that if the check was really intended as contribution to the DECS, then the DECS, not the mayor, would have been the designated signatory.

The audit team recommended that petitioner and Luis should be made to account for the withdrawal of the fund without the appropriate documentation; otherwise, the appropriate action should be instituted against them for failure to account for the amount withdrawn. In addition, they recommended that the municipality should stop the practice of disbursing money of the local treasury without complete documentation.

B. Alleged Unliquidated Cash Advances of ₱171,256.00.

1. The COA audit revealed that of the ₱171,256.00 cash advances listed, the amount of ₱30,161.90 had already been previously liquidated.

2. As for the remaining ₱141,094.10, these constituted cash advances granted to petitioner which remained unliquidated for over one year. Indeed, a review of the dates showed that the cash advances remained unliquidated for a period ranging from one year and six months to two years and five months.

   The audit team recommended that all officials be required to process the liquidation of vouchers of cash advances submitted by the former Municipal Treasurer in accordance with Section 5 of COA Circular No. 97-02 so that unliquidated cash advances could be settled. Otherwise, appropriate administrative actions should be instituted against those who fail to settle their cash advances accordingly.

3. Additional cash advances had been granted to petitioner, even if previous cash advances remained unsettled, thus

exposing the funds to possible misuse and misappropriation. Consequently, the audit team recommended that the municipality should stop the practice of granting additional cash advances to officials who have not yet liquidated their previous cash advances.

4. Cash advances totaling ₱171,256.00 were granted to the former Municipal Treasurer under her own accountability, in violation of COA-MOF Joint Memorandum Circular No. 02-81 dated 15 November 1981. As such, the audit team recommended that the municipality stop the practice of granting cash advances to the Municipal Treasurer under her own accountability except upon prior approval from the Department of Finance.

C. Alleged Unrecorded Withdrawals of ₱700,000.00 encashed by petitioner on 16 June 1997 under PNB Check No. 586577-W for ₱350,000.00 and LBP Check No. 15627907 for ₱350,000.00.

The audit team found that these transactions totaling the amount of ₱700,000.00 were all recorded in the books of accounts as of June 1997.

Nonetheless, in the course of the audit, the audit team noted that on two separate occasions, the Disbursing Officer failed to timely record the cash advances in her cashbook at the time the transactions were incurred, in violation of Section 19(a) of COA Memorandum 84-373, thus precluding early detection of errors and discrepancies. The delays in recording ranged from 26 – 30 days. The audit team recommended that the municipality direct the Disbursing Officer to record promptly all cash advances received in the cashbook at the time the transaction is incurred, to avoid mishandling of cash and to detect errors and discrepancies without delay.

D. Petitioner failed to remit intact and promptly the amounts she received in cash totaling ₱980,000.00, thus exposing government funds to probable misuse/misapplication.

It was shown that on separate occasions in 1997, petitioner withdrew a total of ₱980,000.00 from the Municipal Treasury, allegedly for fund transfer to the PNB, as follows:

Date of Check	Payee	Check No.	Amount	Date encashed
15 August 1997	G. Hallasgo	LBP15627928[8]	PhP250,000.00	15 August 1997
16 June 1997	G. Hallasgo	LBP15627907	PhP350,000.00	16 June 1997
29 July 1997	G. Hallasgo	LBP15627921	PhP380,000.00	29 July 1997

Petitioner explained that she had the checks issued in her name, instead of depositing them in the municipality's account, in order to avoid the three or four day clearing period. However, in the course of the audit, it was shown that even the cash was never deposited to the municipality's PNB account. Rather, petitioner deposited different checks to fund the PNB account; stated otherwise, checks were used to cover up cash withdrawals for the same purpose. It was thus unclear what the funds under LBP Check Nos. 15627907 and 15627921 were utilized for.

The audit team recommended that (1) petitioner be required to explain the final status of cash withdrawn totaling ₱980,000.00; (2) the municipality end the practice of encashing checks for the purpose of withdrawal by the depositary for fund transfer to another bank; (3) responsible officers deposit intact and promptly the full amount so received and collected to the treasury and credit it to particular accounts to which said money belongs to avoid misuse/misapplication of the same.

On 12 April 2002, the audit team, composed of State Auditors Concepcion Guanzon and Leonido Pajo, executed a Joint Affidavit summarizing their findings against petitioner and Luis.[9] The case was re-docketed as *Commission on Audit (COA) Regional Office No. X v. Gloria Hallasgo & Emiterio D. Luis*, but the same docket numbers were retained. Petitioner filed her Counter-Affidavit dated 17 June 2002, essentially reiterating the defenses made before the COA Audit Team.[10] After the parties filed their respective position papers, the case was submitted for resolution.[11]

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[8] As indicated in A2, above, Petitioner alleged that the first check (LBP15627928) was not actually deposited in the municipality's PNB account, but rather, was kept in Petitioner's safe as reserve fund.

[9] *Rollo*, pp. 150-152.

[10] *Id.* at 153-156.

[11] *Id.* at 158-192.

On 22 October 2002, the Deputy Ombudsman for Mindanao issued a Decision[12] finding petitioner guilty of GRAVE MISCONDUCT. The charge against Luis was dismissed. Pertinent portions thereof read as follows:

> This Office finds that there is sufficient evidence to support a finding of grave misconduct against respondent [Hallasgo]. Misconduct in office implies a wrongful intention and not a mere error of judgment. In the instant case, the respondent appears to have used her expertise in financial management to obfuscate the subject transactions for the purposes of concealing financial anomalies. Her acts cannot be considered as done in good faith or constituting only errors of judgment. It is to be emphasized that the tasks and functions of a treasurer is highly fiduciary in nature. Public office is a public trust. In the case of the respondent, a higher degree of standard is expected from her and this Office finds that she has abjectly failed to live up to that standard. In grave misconduct, as distinguished from simple misconduct, the elements of corruption, clear intent to violate the law, or flagrant disregard of established rule must be manifest. All of these are evident in the instant case.
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> WHEREFORE, PREMISES CONSIDERED, this Office finds respondent GLORIA HALLASGO, GUILTY OF GRAVE MISCONDUCT. Pursuant to Resolution No. 991936, otherwise known as the Uniform Rules on Administrative Cases in the Civil Service, the respondent is hereby meted the corresponding penalty of DISMISSAL FROM THE SERVICE, together with all the accessory penalties appurtenant thereto, effective upon the finality hereof. The charge against co-respondent Emeterio D. Luis is hereby DISMISSED.[13]

Petitioner filed a Motion for Reconsideration,[14] which was denied by the Office of the Ombudsman in an Order[15] dated 8

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[12] *Id.* at 48-57.

[13] *Id.* at 55-56.

[14] *Id.* at 59-61.

[15] *Id.* at 68-69.

April 2003. Petitioner then appealed the Decision to the CA under Rule 43 of the Rules of Court.

In the herein assailed Decision[16] dated 9 September 2004, the CA dismissed petitioner's appeal for lack of merit. Petitioner's Motion for Reconsideration[17] dated 27 September 2004 was likewise dismissed in a Resolution[18] dated 19 January 2006.

Before this Court, petitioner now claims that:

1. The CA did not decide the case in accordance with applicable law and jurisprudence.
2. The CA failed to appreciate the conclusions of the COA as found in the audit report, and thus departed from the accepted and usual course of judicial proceedings, that justifies the exercise of supervision by the Supreme Court.
3. The CA failed to appreciate that there was no substantial evidence to warrant the meting out of the extreme penalty of dismissal from service.
4. The penalty of DISMISSAL from the service imposed by the Ombudsman and affirmed by the CA is not commensurate to their findings since no substantial evidence exists.

In its Comment[19] dated 28 June 2006, the Office of the Solicitor General (OSG), representing the COA, argued that:

1. All indispensable parties should have been impleaded in the proceedings before the Ombudsman and made parties to the Petition filed before the CA.
2. A Petition for Review under Rule 45 of the 1997 Rules of Civil Procedure must raise only questions of law.
3. The totality of the evidence must be considered in determining petitioner's liability for grave misconduct, as what was correctly done by the Ombudsman.

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[16] *Supra* note 2.

[17] *Rollo*, pp. 203-205.

[18] *Supra* note 4.

[19] *Rollo*, pp. 219-238.

4. Petitioner's dismissal from service is warranted by law and the evidence on record.

We affirm the ruling of the CA and DENY the petition for lack of merit.

Procedural Matters

There is no merit in the OSG's claim that private complainants — Eliezer Asombrado, Alejandro Berdera, Ulyses Tirado, and Armando Ayco — were denied due process when petitioner failed to implead them as indispensable parties before the CA.[20]

A review of the records indicates that even during the proceedings before the Office of the Ombudsman, the case was re-docketed as *Commission on Audit Regional Office No. X v. Gloria Hallasgo and Emiterio D. Luis*, after the COA audit team executed a Complaint-Affidavit against petitioner for gross misconduct. Furthermore, the private complainants cannot be considered indispensable parties,[21] such that the case cannot be resolved without their participation. In administrative cases, the complainant is a mere witness; no private interests are involved as any offense is committed against the government.[22] In any event, the private complainants were not denied due process. Although not named in the petition, the private complainants were furnished copies of the pleadings and did, in fact, participate in the proceedings before the CA, arguing vigorously against the petitioner.[23]

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[20] Rule 43 of the Rules of Court provides that a Petition for Review before the Court of Appeals shall state "the full names of the parties to the case, without impleading the courts or agencies either as petitioners or respondents."

[21] Rule 3, Section 7 of the Rules of Court provides:

Section 7. *Compulsory joinder of indispensable parties.* — Parties in interest without whom no final determination can be had of an action shall be joined either as plaintiffs or defendants.

[22] *Navarro v. Civil Service Commission*, G.R. Nos. 107370-71, September 16, 1993, 226 SCRA 522, 526, citing *Paredes v. Civil Service Commission*, G.R. Nos. 88177 & 89530, December 4, 1990, 192 SCRA 84.

[23] *Rollo*, pp. 256-266.

On the other hand, the OSG correctly argues that questions of fact are not proper in a petition brought under Rule 45 of the Rules of Court.[24] Put simply, the Supreme Court is not a trier of facts,[25] and cannot be tasked to analyze, assess, and weigh the facts presented by the parties before the Ombudsman and the CA in order to ascertain if their appreciation of the evidence is correct.[26] Although there are recognized exceptions to this rule,[27] none of them apply to the present case. Nonetheless, in the interest of justice, we have carefully examined all the evidence in this case, but still find that there is no sufficient reason to overturn the findings of the CA and the Office of the Ombudsman.

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[24] Section 1 of Rule 45 is quite clear in that the petition "shall raise only questions of law which must be distinctly set forth."

[25] *Andrada v. National Labor Relations Commission,* G.R. No. 173231, December 28, 2007, 541 SCRA 538.

There is a "question of fact" when the doubt or controversy arises as to the truth or falsity of the alleged facts. This is distinguished from a question of law when the doubt or difference arises as to what the law is on a certain state of facts, and does not call for an examination of the probative value of the evidence presented by the parties-litigants. See *Cucueco v. Court of Appeals*, G.R. No. 139278, October 25, 2004, 441 SCRA 290, 298.

[26] *La Union Cement Workers Union & Almonte v. National Labor Relations Commission*, G.R. No. 174621, January 30, 2009; *JMM Promotions and Management, Inc. v. Court of Appeals*, 439 Phil. 1, 10 (2002).

[27] In *Sampayan v. Court of Appeals*, G.R. No. 156360, January 14, 2005, 448 SCRA 220, 229, this Court held:

"[I]t is a settled rule that in the exercise of the Supreme Court's power of review, the Court is not a trier of facts and does not normally undertake the re-examination of the evidence presented by the contending parties during the trial of the case considering that the findings of facts of the CA are conclusive and binding on the Court. However, the Court had recognized several exceptions to this rule, to wit: (1) when the findings are grounded entirely on speculation, surmises or conjectures; (2) when the inference made is manifestly mistaken, absurd or impossible; (3) when there is grave abuse of discretion; (4) when the judgment is based on a misapprehension of facts; (5) when the findings of facts are conflicting; (6) when in making its findings the Court of Appeals went beyond the issues of the case, or its findings are contrary to the admissions of both the appellant and the appellee; (7) when the findings are contrary to the trial court; (8) when the findings are conclusions without citation of specific evidence on which they are based; (9) when the

Our Finding of Gross Misconduct

Misconduct generally means wrongful, improper or unlawful conduct motivated by a premeditated, obstinate or intentional purpose. It is a transgression of some established and definite rule of action, a forbidden act, a dereliction of duty. Qualified by the term "gross," it means conduct that is "out of all measure beyond allowance; flagrant; shameful; such conduct as is not to be excused."[28]

We find that the evidence on record demonstrates a pattern of negligence and gross misconduct on the part of the petitioner that fully satisfies the standard of substantial evidence. Substantial evidence is such amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion.[29]

Petitioner's failure to keep current and accurate records, repeated withdrawal of funds without the appropriate disbursement vouchers, failure to ensure the timely liquidation of her cash advances even after the lapse of over a year, and failure to account for funds in her custody not only constitute violations

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facts set forth in the petition as well as in the petitioner's main and reply briefs are not disputed by the respondent; (10) when the findings of fact are premised on the supposed absence of evidence and contradicted by the evidence on record; and (11) when the Court of Appeals manifestly overlooked certain relevant facts not disputed by the parties, which, if properly considered, would justify a different conclusion.

[28] *Rodriguez v. Eugenio*, A.M. No. RTJ-06-2216, April 20, 2007, 521 SCRA 489, 505-506; *Malabanan v. Metrillo*, A.M. No. P-04-1875, February 6, 2008, 544 SCRA 1.

[29] RULES OF COURT, Rule 133, Section 5; *Mendoza v. Buo-Rivera*, A.M. No. P-04-1784, April 28, 2004, 428 SCRA 72, 76. Administrative proceedings are governed by the substantial evidence rule. Stated otherwise, a finding of guilt in an administrative case may be sustained if it is supported by substantial evidence that the respondent has committed acts stated in the complaint. See *Dadulo v. Court of Appeals*, G.R. No. 175451, April 13, 2007, 521 SCRA 357; *Menor v. Guillermo*, A.M. No. P-08-2587, December 18, 2008. The standard of substantial evidence is satisfied when there is a reasonable ground to believe that respondent is responsible for the conduct complained of, even if such evidence is not overwhelming. See *Liguid v. Camano, Jr.*, A.M. No. RTJ-99-1509, August 8, 2002, 387 SCRA 1, 11.

of applicable laws,[30] but also reflect poorly on the government and provide ripe opportunity for fraud and corruption.

Petitioner presented these arguments to exonerate herself from liability: *first*, any anomalous transactions are merely the product of human error, and do not constitute misconduct so grave as to warrant dismissal from the service; *second*, as regards the failure to liquidate cash advances, it is the accountant that failed to obligate all cash advances; thus, petitioner should not be held liable; *third*, unless a thorough audit is done, she should not have been adjudged to have committed gross misconduct. In particular, she claims that since the audit team could not determine the final status of the cash withdrawn for the purpose

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[30] Such laws include:

Section 344 of Republic Act No. 7160, which provides that no money shall be disbursed unless the **local budget officer certifies to the existence of the appropriation that has been legally made for the purpose, the local accountant has obligated said appropriation, and the local treasurer certifies to the availability of the funds for the purpose.**

Section 69 of Presidential Decree No. 1445, which provides that public officers authorized to receive and collect money arising from taxes, revenues, or receipts of any kind **shall remit intact the full amounts so received and collected by them to the treasurer of the agency concerned and credited to the particular accounts to which the said money belong.**

Section 89 of Presidential Decree No. 1445, which provides that no cash advance shall be given unless for a legally authorized public purpose. **A cash advance shall be reported on and liquidated as soon as the purpose for which it was given has been served. No additional cash advance shall be allowed to any official or employee unless the previous cash advance given to him is first settled or a proper accounting thereof is made.**

COA-MOF Joint Memorandum Circular No. 2-81 dated 15 October 1981 provides that cash advances shall be granted only to duly designated paymaster, property officers, and supply officers of the local government unit concerned, for the payment of salaries and wages and other petty operating expenses, except when the grant of the cash advance is authorized by special law or competent authority, or is extremely necessary as determined by the chief executive and/or the heads of offices of the local government unit, as hereinafter provided. **In no case shall the Treasurer or his cashier be granted a cash advance under his own accountability except for his foreign travel or such other official purpose as the ministry of finance may authorize.**

of fund transfer to PNB, her dismissal is not warranted until a full-blown audit is conducted.

We are not persuaded.

As treasurer of the municipality, it is petitioner's duty to perform her responsibilities diligently, faithfully, and efficiently. It behooves her to exercise the highest degree of care over the custody, management, and disbursement of municipal funds.[31] Even if petitioner may have justified some of the transactions, these explanations were belatedly done, effected only after being directed to do so by the audit team. This purported atonement, undertaken as an afterthought accompanied by neither shame nor remorse, cannot exonerate her from liability.[32]

We are not convinced that the anomalies complained of are the result of mere inadvertence, or that responsibility can so easily be shifted by petitioner to her subordinates. On the contrary, her actions demonstrate her wanton and deliberate disregard for the demands of public service. Petitioner's failure to ensure that disbursements are properly documented or that cash advances granted to her are properly and timely liquidated certainly deserves administrative sanction. In particular, we wish to denounce petitioner's practice of having the municipality issue checks in her name, ostensibly to get cash immediately and avoid a three day clearing period, only to discover that petitioner never actually deposited the cash in the municipality's bank account. This is a highly pernicious practice that this Court condemns in the strongest possible terms.

It bears stressing that petitioner never bothered to explain what took place with respect to the funds subject of LBP Check Nos. 15627907 (for ₱350,000.00) and 15627921 (for ₱380,000.00). In stark contrast with the staunch defense she launched for other matters, she never thought to account for these checks, whether before the Office of the Ombudsman, the CA, or this

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[31] LOCAL GOVERNMENT CODE OF THE PHILIPPINES, Section 470.

[32] *Judiciary Planning Dev't. and Implementation Office v. Calaguas,* A.M. No. P-95-1155, May 15, 1996, 256 SCRA 690, 694.

Court. She cannot abdicate responsibility for the checks by claiming that it was the audit team's duty to undertake forensic analysis to uncover how these funds were spent. Rather, as treasurer, she should have deposited the funds as she was tasked to do, and subsequently accounted for the use of said funds.

All these collectively constitute gross misconduct. Pursuant to Section 52, Rule IV of the Civil Service Rules, gross misconduct is a grave offense punishable with dismissal for the first offense,[33] without prejudice to the Ombudsman's right to file the appropriate criminal case against the petitioner or other responsible individuals. We are, of course, aware that in several administrative cases, this Court has refrained from strictly imposing the penalties provided by the law, in light of mitigating factors such as the offending employee's length of service, acknowledgment of his or her infractions and feeling of remorse, family circumstances, advanced age, and other equitable considerations.[34] However, we find that petitioner's recalcitrant refusal to explain the use (or misuse) of the more than ₱700,000.00 in cash placed in her possession makes her unworthy of such humanitarian consideration, and merits the most serious penalty provided by law.

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[33] Under CSC Resolution No. 99-1936 dated 31 August 1999 (the "Uniform Rules in Administrative Cases in the Civil Service"), which took effect on 27 September 1999, the penalty of dismissal shall carry with it the cancellation of eligibility, forfeiture of retirement benefits, and perpetual disqualification from reemployment in the government service. Similarly, Section 10, Rule III of the Rules of Procedure of the Office of the Ombudsman, as amended by Administrative Order No. 17, provides that "the penalty of dismissal from the service shall carry with it that of cancellation of eligibility, forfeiture of retirement benefits, and perpetual disqualification from reemployment in the government service, unless otherwise provided in the decision."

[34] *Tan v. Sermonia*, A.M. No. P-08-2436, August 4, 2009, citing *In Re*: *Administrative Case for Dishonesty Against Elizabeth Ting, Court Secretary I, and Angelita C. Esmerio, Clerk III, Office of the Division Clerk of Court, Third Division*, A.M. No. 2001-7-SC & 2001-8-SC, July 22, 2005, 464 SCRA 1; *Concerned Taxpayer v. Doblada, Jr.*, A.M. No. P-99-1342, September 20, 2005, 470 SCRA 218; *Civil Service Commission v. Belagan*, G.R. No. 132164, October 19, 2004, 440 SCRA 578; *Buntag v. Pana*, G.R. No. 145564, March 24, 2006, 485 SCRA 302.

WHEREFORE, the Petition is hereby *DENIED for LACK OF MERIT*. The Court of Appeals' Decision in CA-GR SP No. 77522 dated 9 September 2004 and Resolution dated 19 January 2006 are *AFFIRMED*. Petitioner is hereby found *GUILTY of GRAVE MISCONDUCT* and is ordered *DISMISSED* from service with forfeiture of all retirement benefits except accrued leave credits, with prejudice to reemployment in any branch or instrumentality of the government, including government-owned and controlled corporations. The Office of the Ombudsman is *DIRECTED* to take appropriate action against herein petitioner.

SO ORDERED.

Puno, C.J., Ynares-Santiago, Carpio, Corona, Carpio Morales, Chico-Nazario, Velasco, Jr., Nachura, Leonardo-de Castro, Brion, Peralta, Bersamin, and *Abad, JJ.,* concur.

Quisumbing, J., on official leave.

THIRD DIVISION

[G.R. No. 171681. September 11, 2009]

KEI MARIE and BIANCA ANGELICA, all surnamed ABRERA, minors and represented by their parent EVELYN C. ABRERA; ASTRID NOELLE S. ALMEDA, minor, represented by his parent MA. ROMINA FRANCHESCA S. ALMEDA; JOHN KENNETH P. ANDALIS, minor, represented by his parent ELSA P. ANDALIS; RONALD B. ANG, minor, represented by his parent MA. JUDY B. ANG; MARIEL ANGELES, minor, represented by her parent ENRIQUE E. ANGELES; JEREMIAH M. ANTONIO, minor, represented by his parent ELSA M. ANTONIO; LESTER C. ARAO, minor, represented by his parent ROSALINA

C. ARAO; MA. LIRIO A. AROMIN, minor, represented by his parent FREDERICK A. AROMIN; ELDY S. AZURIN, minor, represented by her parent ELSA S. AZURIN; MARION JANINE J. AZURIN, minor, represented by her parent MA. THERESA J. AZURIN; PIOLO MIGUEL G. BARLETA, minor, represented by his parent HENRY LUIS E. BARLETA; VIANCA SOPHIA, VINCE PATRICK and VOLTAIRE BYRONE, all surnamed BASAS, minors, and represented by their parents NERIO and MARIBEL D. BASAS; LAWRENCE CARLOS and LUIS PAULO, all surnamed BATAC, minors, and represented by their parent RAQUEL C. BATAC; DARREL L. BAUTISTA, minor, represented by his parent NILDA L. BAUTISTA; JUAN CARLOS and MARIA ANGELA, all surnamed BAUZA, minors, and represented by their parent NESTOR A. BAUZA; MARK GERALD and LUIGI, all surnamed BENTULAN, minors, and represented by their parent FLORENCIO M. BENTULAN; PIERRE ANGELI M. BLASCO, minor, represented by her parent NARDA A. BLASCO; SARAH CATHERINE A. CABACES, minor, represented by her parent LUZ A. CABACES; KIRK ANTHONY and JOHN MICHAEL, all surnamed CAMUS, minors, represented by their parent MABEL B. CAMUS; PRECIOUS JOY V. CAPISTRANO, minor, represented by her parent JOSEPH F. CAPISTRANO; SHELLAH MAE P. CARINO, minor, represented by her parent RUPERTO L. CARINO; JOHN LAWRENCE A. CATAN, minor, represented by his parent BERNARDINO O. CATAN, JR.; CZARINA ROSE S. CHAN, minor, represented by her parent LUCILA S. CHAN; ANTHONY S. CHAN, minor, represented by his parent WILLY L. CHAN; ADRIAN CHRISTIAN S. CHUA, minor, represented by his parent VINSON G. CHUA; CHRISTOFFER RYAN and CARL BENEDICT, all surnamed CHUA, minors, represented by their parent EDGARDO A. CHUA; SHIELA CERNIAS, minor, represented by her parent YOLANDA CERNIAS; GENE LOUISE B. COMENDADOR, minor,

represented by his parent HERMOGENES A. COMENDADOR; JOHN KENNETH and MICHAEL ANGELO, all surnamed CRUZ, minors, and represented by their parent AIDA L. CRUZ; WENDELL JAKE D. CRUZ, minor, represented by his parent EDWIN I. CRUZ; SYMON GABRIEL M. DAVID, minor, represented by his parent ARSENIO P. DAVID; JENNILYN M. DE JESUS, minor, represented by her parent MARCIAL S. DE JESUS; DYLEEN MAY M. DELA ROSA, minor, represented by her parent ANALEN M. DELA ROSA; MA. ANGELIKA B. DELA ROSA, minor, represented by her parent ROMULO R. DELA ROSA; MARK KEVIN H. DELA TORRE, minor, represented by his parent LEONORA H. DELA TORRE; ALVIN MERCK C. DE LEON, minor, represented by his parent MERCEDITA C. DE LEON; RICHARD ANTHONY B. DELIZO, minor, represented by his parent RICHMOND JOHN DELIZO; REYNOLD JOHN A. DEMIN, minor, represented by his parents MERLIN and HERNANDO A. DEMIN; MIRCO M. DESPABELADERA, minor, represented by his parent ELINITA M. DESPABELADERA; CARLO D. DIALA, minor, represented by his parent LEONOR D. DIALA; PATRICK JEROME and FRANCIS, all surnamed DIAZ, minors, represented by their parents ESMERALDO and CARMENCITA DIAZ; HILTELYN C. DOMINGUIANO, minor, represented by her parent HILTON D. DOMINGUIANO; ROGIELYN G. EBETO, minor, represented by his parent ROGER R. EBETO; ERIN and EINRE, all surnamed ERMINO, minors, and represented by their parent EVA H. ERMINO; ARRON LEVIN G. ESGUERRA, minor, represented by his parent RICHARD MARTIN G. ESGUERRA; MA. ANGELICA GRACIA C. ESTRADA, minor, represented by her parent CHARITA C. ESTRADA; FEDERICO C. FAUSTINO, JR., minor, represented by his parent SALVACION C. FAUSTINO; MIA RUTH M. FERNANDEZ, minor, represented by her parent MILAGROS M. FERNANDEZ; FAITH and CHARITY,

all surnamed GABRIEL, minors, and represented by their parent FE G. GABRIEL; C JAY and ELAINE JOY, all surnamed GAHUMAN, minors, and represented by their parents JOSEPHINE and CASTOR V. GAHUMAN, JR.; MARY KAYCY N. GALLARDO, minor, represented by her parent GRIZELA N. GALLARDO; DALRU MARPIN C. GAVIOLA, minor, represented by his parent DALIA C. GAVIOLA; MARIEL CARLA and JONALYN, all surnamed GEPULLANO, minors, and represented by their parent MANUELA A. GEPULLANO; JOEL ROY D. GONZALES, minor, represented by his parent ENELIA D. GONZALES; KIM ARRIZA P. HENSON, minor, represented by her parent MERCEDITA G. PASTRANA; EFFIE FIELLE and GIUSEPPE LORENZO, all surnamed IGNACIO, minors, and represented by their parent GEMMA M. IGNACIO; HANS CHRISTIAN C. GOLONG, minor, represented by his parent BENSON C. GOLONG; JOSEPHINE V. JORGE, minor, represented by her parent ELEUTERIO C. JORGE; MARY JUDE C. LOMARDA, minor, represented by her parent BENJAMIN A. LOMARDA; JERLIN and JERUSALEM, all surnamed LOPEZ, minors, and represented by their parents MERLINDA and JERUSALEM P. LOPEZ, SR.; DHAN COLINS, MA. LIANA, MARIA VIRGINIA and RIZALDY, all surnamed MABBORANG, minors, represented by their parents MERCELITA and DANIEL T. MABBORANG, JR.; OSCAR R. MACHICA, minor, represented by his parent ROSE R. MACHICA; NERSON and NERIEL, all surnamed MADRIAGA, minors, and represented by their parent NOEL B. MADRIAGA; MOISES M. MADRID, minor, represented by his parent, FEDERICO S. MADRID II; CHRISTINE ALYSSA A. MARQUEZ, minor, represented by her parent BERNARDO T. MARQUEZ, JR.; CATHLEEN R. MARQUEZ, minor, represented by her parent CARMELITA P. MARQUEZ; KRISTEL CANE A. MARQUEZ, minor, represented by her parent FILOMENA A. MARQUEZ; CHRYL

BHEFER M. MARTINEZ, minor, represented by ESPERANZA M. MARTINEZ; JESSICA J. MARTINEZ, minor, represented by her parent DAISY J. MARTINEZ; IVAN GERARD G. MASILUNGAN, minor, represented by his parent LILIAN G. MASILUNGAN; MONA JAMYLA and KARLA VENICE, all surnamed MENDOZA, minors, and represented by their parents LILIBETH and OSCAR U. MENDOZA; MARY JOYCE O. MONTEVERDE, minor, represented by her parent MANUELITO C. MONTEVERDE; CHRISTIAN PAULO O. MORALES, minor, represented by his parent ELY O. MORALES; JOHN ADRIAN M. DADOR and KRIZIA ARRA G. MUNCAL, minors, and represented by their parent LOLITA C. MUNCAL; KENNETH R. MUYA, minor, represented by his parent EMILY R. MUYA; JACOB YSRAEL C. NUCUM, minor, represented by his parent MARIA VICI C. NUCUM; JERIEL JAMES S. NG, minor, represented by his parent JAIME RAMON J. NG; JOHN MARVIN and JOHN MICHAEL, all surnamed NORADA, minors, and represented by their parents NORMA and RODEL P. NORADA; KERVIN M. OCAMPO, minor, represented by his parent JESUS V. OCAMPO; MARIA ANA and ANGELO LEO, all surnamed OLANDAY, minors, and represented by their parent ROLANDO P. OLANDAY; PHOEBE GAYLE Y. ONG, minor, represented by her parent PEPITO C. ONG; MARTIN JOHN and MARC JASON, all surnamed ORIBIANA, minors, and represented by their parents MYRNA and JOSE JERRY G. ORIBIANA; MARY ANN M. ORTEGA, minor, represented by her parent VIRGILIO L. ORTEGA; PHILLIP JULIUS, PHILLIP JOBILL, all surnamed PARANE and HAYLEY G. SABANGAN, minors, and represented by their parent and guardian ANNABELLE G. PARANE; RAY BERNARD and REYNEDEN, all surnamed PAYUYO, minors, represented by their parent EDEN A. PAYUYO; JUSTIN GODFRED B. PERALTA, minor, represented by his parent MA. TERESA B. PERALTA; PATRICK JOHN C. PEREZ, minor, represented by his parent

ROSILYN C. PEREZ; RAMON MIGUEL C. PINEDA, minor, represented by his parent MELINA C. PINEDA; ERIKA R. PRADO, minor, represented by her parent VIRGILIO C. PRADO; LAARNI YVETTE M. QUIJANO, minor, represented by her parent ARNELSON R. QUIJANO; JOSEPH DAVID Q. SERRANO, minor, represented by his parents MA. AIDA F. QUINIT; SHAYNE ANNE and SHEENA APRIL, all surnamed RABIT, minors, and represented by their parent MILA S. RABIT; JELYNNE and JENNIFER, all surnamed REYES, minors, and represented by their parents FE and JUANITO G. REYES; PAULA KATE ROCABERTE, minor, represented by her parent MA. KATHRYN A. ROCABERTE; EDRIANE JAMES E. ROMERO, minor, represented by his parent RIZALITA E. ROMERO; CHRISTOPHER NEIL B. SACLOLO, minor, represented by his parent ROBERTO C. SACLOLO; FRANZ HENDRIX FELIX G. SALCEDO, minor, represented by his parent ROXANIETTE G. SALCEDO; JOHN EDWARD F. SANTOS, minor, represented by his parent ANITA F. SANTOS; DAVID T. SANTOS, minor, represented by his parent ESTRELLA T. SANTOS; MARK ANTHONY E. SINOHIN, minor, represented by his parents DOLORES and MAMERTO M. SINOHIN; FRANCIS ADRIAN and FRANCIS DAVID, all surnamed SUMULONG, minors, represented by their parent FRANCISCO M. SUMULONG; SEAN LAWRENCE A. SY, minor, represented by his parent ERLANI S. SY; JOSEPH MAR G. TALAG, minor, represented by his parent JOSE MARCIAL P. TALAG; KIM ANDREW D. TAMPO, minor, represented by her parent FRANCISCO S. TAMPO, JR.; LANCE MICHAEL S. TIU, minor, represented by his parent GIRLIELYN S. TIU; JULIAN BERNARDO FERICO TORRALBA, minor, represented by his parent FEDERICO C. TORRALBA; JENAVEE A. VALENZUELA, minor, represented by her parent EDNA A. VALENZUELA; MYSTICA R. VARGAS, minor, represented by her parent ROSA R. VARGAS; DIANE V. VERGARA,

minor, represented by her parent VILMA VERGARA; KRISTOFER LORENZ J. VICEDO, minor, represented by his parent CESAR M. VICEDO; MERRY GRACE and MIZZAH-MYRRH, all surnamed VILLALON, minors, and represented by their parent MYRNA M. VILLALON; BILLY JOE P. VILLAREAL, minor, represented by his parent ANITA P. VILLAREAL; REGINE A. VINA; minor, represented by her parent MA. ERMINDA A. VINA, ROWAME LAR, DING BERNALD and KAMILLE SHANE, all surnamed WAJE, minors, and represented by their parent ZOILA M. WAJE; KRISTINE RAY O. ZAPANTA, represented by her parent CRISTINA O. ZAPANTA; JEANAFE ABELARDE, represented by her guardian FE LILIA M. ABELARDE; JOHN JASPER C. ABRERA, represented by his parent EVELYN C. ABRERA; AILEEN and ALLAN, all surnamed ACIELO, represented by their parent ALBERTO P. ACIELO; MARJORIE, MARK DAVE, OLIVE MARIE, all surnamed ADANZA and LUIS EDISON RANA, represented by their guardian/parents MYRNA and ORESTE P. ADANZA; JOSEL AMOR E. AGUILAR, represented by his parent JOSE L. AGUILAR; JOSUELLE A. ALCANTARA, represented by her parent ALICIA A. ALCANTARA; ELINOR JOY J. ANTONIO, represented by her parent TERESITA J. ANTONIO; DESIREE CLARRISSE K. ARANZASO, represented by her parent GERMELYN GRACE K. ARANZASO; MARK JEREMIAH J. AZURIN, represented by his parent MA. THERESA J. AZURIN; ADAMSON S. BAETA, represented by his parent ADAM Q. BAETA; LEO A. BALACUIT; SYDNEY ADRIANE C. BALOD, represented by her parent ANDRES P. BALOD, SR.; ANTONIO A. BALTAZAR; JAY-R B. BANOGON, represented by his parent EDUARDO E. BANOGON; SHARYLEN C. BARLIN, represented by her parent MAXIMA C. BARLIN; JAYZON S. BAUTISTA, represented by his parent ESTER S. BAUTISTA; ROSALITA B. BENIG, represented by her parent

LILLOSA B. BENIG; ROSIELYN and REMILYN, all surnamed BERMUDEZ, represented by their parent MARINA C. BERMUDEZ; JUDITH L. BERNAL; JOELIE LELAINE D. BOCAR, represented by her parent JOSEPH G. BOCAR; JEAN CARLO BUENO, represented by her guardian JEMMA G. TERRADO; JANINA S. BUSTOS, represented by her parent CRISTINA S. BUSTOS; DOMINADOR D. CAMACHO; EVA CAMERO, represented by her parent MERLINDA C. CAMERO; DENNIS ANGELO C. CANLAS, represented by his parent ARMANDO L. CANLAS; EZRA P. CANLAS, represented by her parent ROMULO T. CANLAS; MARIA VICTORIA B. CARLOS; VISAMINDA Z. CARLOS, represented by her parent MA. JOSEFINA Z. CARLOS; RHENY FRANCES F. CATIMBANG, represented by her parent HENRY T. CATIMBANG; ADDISON S. CHAN, represented by his parent WILLY CHAN; ACE PAREJA CHUMACERA, represented by his parent YOLANDA PAREJA CHUMACERA; ELLAN MARIE P. CIPRIANO, represented by her parent MARIZA P. CIPRIANO; JASON CARLO U. CONCEPCION, represented by his parent FEDERICO A. CONCEPCION; MARK SHERWIN A. CREUS, represented by his parent MEDENCIA A. CREUS; IMELDA V. CRUZ; ARVILYNNE L. DALANGIN, represented by her parent EVA L. DALANGIN; DENNIS and KATHRYN, all surnamed DE JESUS, represented by their parent MARCIAL S. DE JESUS; RHODA PIA B. DELIZO; RANIER SAN JOSE DEL ROSARIO, represented by his parent CEFERINO S. DEL ROSARIO; FRANCIS J. DIAZ, represented by his parent ESMERALDO G. DIAZ; MEDYLEN P. DIMDIMAN, represented by her parent DANILO D. DIMDIMAN; ARMAND ARNEL MILLAN T. DIVINAGRACIA, represented by his parent MARIETTA T. DIVINAGRACIA; ROBERTO NEIL DIZON, represented by his parent ROBERTO V. DIZON; CATHERINE DONES, represented by her parent TERESITA L. DONES; SHERYL BUDIONGAN

ESQUILLA, represented by her parent EUSEBIA B. ESQUILLA; RUEL A. FERNANDO, represented by his parent REMEDIOS C. FERNANDO; RAYES, RYAN and RICHARD, all surnamed FRIAS, represented by their parent ESTELLA P. FRIAS; KATRINA GRACE R. GALANG, represented by her parent MA. VICTORIA R. GALANG; JIMMY and JOANNE MARIE, all surnamed GO, represented by their parent MIRIAM MARGARETTE M. GO; JUNALIN B. AQUINO, represented by her guardian SUSANA B. GOLOCINO; HANS CHRISTIAN C. GOLONG, represented by his parent BENSON C. GOLONG; KRISTINE GONZALES, represented by her parent EDNA L. GONZALES; AGNES L. GUIANG; LOURDES JOY and ERIK MARKUS, all surnamed HERNAL, represented by their parent NORMAN HERNAL; MARK TIMOTHY A. HERNANDEZ, represented by his parent MARIO G. HERNANDEZ; RACHEL JOY M. IBANEZ, represented by her parent BRENDA M. IBANEZ; CARLO MIGUEL A. IBARRA, represented by his parent MARY CLAIR A. IBARRA; SHALIMAR S. ICABANDI, represented by his parent LADISLAO I. ICABANDI; DANILO IDOS; EDISON O. INGALLA, represented by his parent EDUARDO I. INGALLA; JOMARI M. JAVILINAR, represented by his parent MILAGROS M. JAVILINAR; JOSEPHINE S. JOVES; VICTORIA P. JUMANOG; ANNA CAMILLE R. LALATA, represented by her parent CORAZON R. LALATA; LAWRENCE CHRISTIAN LAM, represented by his parent MILA DE LEON LAM; KATHERINE and JULIE ANN, all surnamed CABALLA, represented by their guardian CECILIA C. LUBBERTS; DANICA MAE M. MABBORANG, represented by her parent DANIEL T. MABBORANG, JR.; GRACE, ROBERTO JOSHUE and JOSEPH, all surnamed MALAZARTE, represented by their parent LUCAS L. MALAZARTE, JR.; ADAM LESTER E. MANALANG, represented by his parent MARISSA E. MANALANG; CHIARA A. MARASIGAN, represented by her parent EUFROSINA

A. MARASIGAN; ROSE E. MARQUEZ, represented by her parent FEDERICO T. MARQUEZ; RICHARD J. MARTINEZ, represented by his parent DAISY J. MARTINEZ; IVAN ISRA and EXEQUIEL, all surnamed MASILUNGAN, represented by their parent LILIAN G. MASILUNGAN; KENO A. MENDEZ, represented by his parent MA. CLARA A. MENDEZ; LIGAYA J. MENESES; RIA and RUBY, all surnamed MIRASOL, represented by their parent MARILOU S. MIRASOL; EMMANUEL L. MISA, represented by his parent LETICIA L. MISA; MA. KATRINA M. MAYO; NATHANIEL and MARVIN NOEL, all surnamed MURILLO, represented by their parent NERISSA T. MURILLO; ERIC and MICHAEL, all surnamed MUYA, represented by their parent EMILY R. MUYA; IDA AYESAW. NECIA, represented by her parent ROBERTO P. NECIA; JETHRO FRANCIS S. NG, represented by his parent PRISCILLA S. NG; MARY ANN G. MERCADO, represented by her guardian CYNTHIA M. NOVENCIDO; MA. KATRINA M. OCAMPO, represented by her parent JESUS V. OCAMPO; KATHLEEN KAY and RUFFA, all surnamed OLIMAN, represented by their parent ANGELES L. OLIMAN; RAYMOND JOSEPH R. OLIVERA; RONA M. OPULENCIA, represented by her parent GLORIA M. OPULENCIA; JESSICA MAE G. ORIBIANA, represented by her parent JOSE JERRY G. ORIBIANA; JOSE CONRADO T. OROPILLA, represented by his parent REBECCA T. OROPILLA; ANN FRANCIS M. ORTIZ, represented by her parent ANTONIO S. ORTIZ; JOHN PETER PALENCIA, represented by his parent TSG. PETER K. PALENCIA; DOM DANIEL M. PATERNO, represented by his parent MYRNA M. PATERNO; AUSTIN RAINER M. PEREZ, represented by his parent FE M. PEREZ; FRANCISCO and ANGELICA, all surnamed POBOCAN, represented by their parent MEDALLA T. POBOCAN; DIANA and CARMELA, all surnamed PRADO, represented by their parents ARCELI and VIRGILIO C. PRADO; FELIX

and SAHARA, all surnamed RABIT, represented by their parent MILA S. RABIT; MA. CRISTINA PAULA A. RAMIREZ, represented by her parent ISMAEL M. RAMIREZ; GLENN JOSEPH R. ARBOLEDA, represented by his guardian NANETTE S. RAMIREZ; RICARDO R. ONG, represented by his guardian CARMEN R. RAMOS; GIAN FRANCIS B. RAMOS, represented by his parent ELIZABETH B. RAMOS; CHRISTIAN REY G. RAMOS, represented by his parent IRINEO B. RAMOS, JR.; PRINCESS RUTH L. RAYNERA, represented by her parent PURISIMA L. RAYNERA; MARISSA TESSA Y. REDOR, represented by her parent FLORDELIZA Y. REDOR; PAULO and DENNIS, all surnamed ROMERO, represented by their parents LERMA and EDUARDO C. ROMERO; JILLIAN ROSE L. ROSARIO, represented by her parent LYDIA L. ROSARIO; VALERIE C. RUBIALES, represented by her parent DELFIN A. RUBIALES; ANITA S. SAAVEDRA; GIAN CARLO L. SALAZAR, represented by his parent VIRGILIO B. SALAZAR; TROT ZARDOZ and GAIA KASSIOPEIA, all surnamed SALCEDO, represented by their parent ROXANIETTE G. SALCEDO; RICHARD D. SANTOS, represented by his parent ELENA D. SANTOS; TWINKLE I. SAQUITAN, represented by her parent DOLORES I. SAQUITAN; ROCKY and JENNIFER, all surnamed SARDUAL, represented by their parent JEFFERSON SARDUAL; MARIA LOURDES SARMIENTO, represented by her parent MA. EVELYN L. SARMIENTO; OINECA LOVE Q. MANUEL, represented by her guardian GRACE Q. SHARIEM; JOHN RUSSELL I. SUAREZ, represented by his parent SONIA I. SUAREZ; KRESTA J. SUICO, represented by her parent MARISSA J. SUICO; ANNA MICHELLE and MAY JOANNA, all surnamed SUMULONG, represented by their parent FRANCISCO M. SUMULONG; MA. ELAINE TALOSIG, represented by her parent AURORA A. TALOSIG; CHARLENE AIKA TAN, represented by her parent ENG KUI C.

TAN; KENO B. TIMPUG, represented by his parent JAIME A. TIMPUG; MA. KATRINA M. TOLENTINO, represented by her parent ASTERIA M. TOLENTINO; ROMMEL JOHN PAUL and ROLANDO, all surnamed TORRES, represented by their parent DOMINGA TORRES; KIM CHARLES R. TRINIDAD, represented by his parent MELCHOR S. TRINIDAD; LIBERY ANNE A. TICZON, represented by LIBRADO D. TICZON; CINDY ANNE T. UMAGUING, represented by her parent ZENAIDA T. UMAGUING; APRIL ABIGAIL A. VALENZUELA, represented by her parent EDNA A. VALENZUELA; ORLANDO and EVELINA, all surnamed VERGARA, represented by their parent EVELINA R. VERGARA; JOHANN and DERIKKO, all surnamed VICENTE, represented by their parent CECILIA M. VICENTE; DIANA RUBY and CLAIRE ANN, all surnamed VILLANUEVA, represented by their parent LYDIA VILLANUEVA; MARIE FRANCE and ANTHONY, all surnamed VILLAREAL, represented by their parent ANITA P. VILLAREAL; TASEI YOSHIDA and NEMUEL O. VILLAROJAS, JR., represented by their guardian NELIA G. VILLAROXAS; NILO P. VILLARUEL; FREDERICK A. VINAS, represented by his parent BONIFACIO B. VINAS, JR.; DIANE CHRISTINE and DARLENE, all surnamed VISPO, represented by their parent ADELAIDA P. VISPO; RAY KRISTOFFER O. ZAPANTA, represented by his parent CRISTINA O. ZAPANTA, in their individual capacities as defrauded purchasers of policies of CAP shares and for and in behalf of 780,603 others similarly situated, *petitioners, vs.* **HON. ROMEO F. BARZA,[*] in his capacity as the Presiding Judge of the Regional Trial Court of Makati City, Branch 61, and COLLEGE ASSURANCE PLAN PHILIPPINES, INC.,** *respondents.*

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[*] Now an Associate Justice of the Court of Appeals.

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; DESIGNED ONLY FOR THE CORRECTION OF ERRORS OF JURISDICTION OR GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION. — At the outset, it must be pointed out that the special civil action for *certiorari* under Rule 65 of the Rules of Court is a remedy designed only for the correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction. In this case, it is undisputed that the RTC has jurisdiction over the petition for rehabilitation under Section 2, Rule 3 of the Interim Rules of Procedure on Corporate Rehabilitation (2000).

2. COMMERCIAL LAW; SECURITIES AND EXCHANGE COMMISSION (SEC); SECURITIES REGULATION CODE; "PRE-NEED PLANS," DEFINED. — CAP is a domestic corporation engaged in the business of selling pre-need educational plans. Republic Act (R.A.) No. 8799, otherwise known as *The Securities Regulation Code*, defines "pre-need plans" as "contracts which provide for the performance of future services or the payment of future monetary considerations at the time of actual need, for which planholders pay in cash or installment at stated prices, with or without interest or insurance coverage, and includes life, pension, education, interment, and other plans which the Commission may from time to time approve."

3. ID.; ID.; PRESIDENTIAL DECREE NO. 902-A, AS AMENDED; GOVERNS CORPORATE REHABILITATION AND SUSPENSION OF ACTIONS FOR CLAIMS AGAINST CORPORATION; JURISDICTION OF THE SEC OVER ALL CASES ENUMERATED THEREUNDER IS TRANSFERRED TO THE REGIONAL TRIAL COURT. — The law governing corporate rehabilitation and suspension of actions for claims against corporations is Presidential Decree (P.D.) No. 902-A, as amended. Section 5 of P.D. No. 902-A, as amended by P.D. No. 1758, enumerates the cases over which SEC has jurisdiction to hear and decide, which includes "[p]etitions of corporations, partnerships or associations to be declared in the state of suspension of payments in cases where the corporation, partnership or association possesses

sufficient property to cover all its debts, but foresees the impossibility of meeting them when they respectively fall due or in cases where the corporation, partnership or association has no sufficient assets to cover its liabilities, but is under the management of a Rehabilitation Receiver or Management Committee." R.A. No. 8799, which took effect on August 8, 2000, transferred SEC's jurisdiction over all cases enumerated under Section 5 of P.D. No. 902-A, as amended, to the courts of general jurisdiction or the appropriate Regional Trial Court.

4. ID.; ID.; ID.; INTERIM RULES OF PROCEDURE ON CORPORATE REHABILITATION OF 2000; APPLY TO PETITIONS FOR REHABILITATION FILED BY CORPORATIONS, PARTNERSHIPS AND ASSOCIATIONS PURSUANT TO P.D. NO. 902-A. — On November 21, 2000, this Court approved the Interim Rules of Procedure on Corporate Rehabilitation of 2000 (Interim Rules), which took effect on December 15, 2000. The Interim Rules apply to petitions for rehabilitation filed by corporations, partnerships, and associations pursuant to P.D. No. 902-A, as amended. The Interim Rules governed the proceedings in Sp. Proc. No. M-6144. CAP filed the petition for corporate rehabilitation, because it is "unable to service its debts as they fall due and its assets are insufficient to cover its liabilities."

5. ID.; ID.; ID.; ID.; WHO MAY FILE A PETITION FOR REHABILITATION; TERM "DEBTOR," DEFINED; NO DISTINCTION ON WHETHER A PRE-NEED CORPORATION CANNOT FILE A PETITION FOR REHABILITATION BEFORE THE REGIONAL TRIAL COURT. — CAP filed the petition under Section 1, Rule 4 of the Interim Rules, which provides: SECTION 1. *Who May Petition*.— Any **debtor** who foresees the impossibility of meeting its debts when they respectively fall due, or any creditor or creditors holding at least twenty-five percent (25%) of the debtor's total liabilities, may petition the proper Regional Trial Court to have the debtor placed under rehabilitation. Under the Interim Rules, **"debtor"** shall mean "**any corporation**, partnership, or association, **whether supervised or regulated by the Securities and Exchange Commission or other government agencies**, on whose behalf a petition for rehabilitation has been filed under these Rules." The Interim Rules does not distinguish whether a pre-need corporation like

CAP cannot file a petition for rehabilitation before the RTC. Courts are not authorized to distinguish where the Interim Rules makes no distinction.

6. ID.; ID.; ID.; ID.; CLAIM OF PETITIONERS FOR PAYMENT OF TUITION FEES FROM THE PRIVATE RESPONDENT IS INCLUDED IN THE DEFINITION OF CLAIMS. — Moreover, under the Interim Rules, "**claim**" shall include "**all claims or demands <u>of whatever nature or character</u> against a debtor** or its property, whether for money or otherwise." "Creditor" shall mean "any holder of a claim." Hence, the claim of petitioners for payment of tuition fees from CAP is included in the definition of "claims" under the Interim Rules.

7. ID.; ID.; ID.; ID.; CLAIMS ARISING FROM PRE-NEED CONTRACTS ARE NOT EXEMPT FROM THE STAY ORDER. — What is to be determined at this point is whether or not claims arising from the pre-need contracts between petitioners and CAP can be stayed under Section 6, Rule 4 of the Interim Rules or Section 6(c) of P.D. No. 902-A. x x x The above provision does not provide that a claim arising from a pre-need contract is an exception to the power of the trial court to stay enforcement of **all** claims upon the finding that the petition for rehabilitation is sufficient in form and substance. The foregoing provision echoes the provision in Section 6(c) of the governing law, P.D. No. 602-A, as amended by P.D. No. 1758, which mandates that "upon appointment of a management committee, rehabilitation receiver, board or body, x x x **all actions for claims against corporations**, partnerships or associations **under management or receivership pending before any court**, tribunal, board or body **shall be suspended accordingly**." In *Negros Navigation Co., Inc. v. Court of Appeals*, the Court held that "P.D. No. 902-A does not make any distinction as to what claims are covered by the suspension of actions for claims against corporations under rehabilitation x x x Thus, since the law does not make any exemptions or distinctions, neither should we."

8. ID.; ID.; ID.; ID.; CLAIM ARISING FROM A TRUST RELATIONSHIP IS NOT EXCLUDED FROM THE STAY ORDER; RATIONALE FOR SUSPENDING ALL PENDING CLAIMS AGAINST A CORPORATION UNDER RECEIVERSHIP. — The Interim Rules of Procedure on

Corporate Rehabilitation of 2000 has been amended by the Rules of Procedure on Corporate Rehabilitation of 2009, which took effect on January 16, 2009. Under the 2009 Rules of Procedure, the power of the RTC to issue a Stay Order when it finds the petition for rehabilitation to be sufficient in form and substance is contained in Section 7, Rule 3, which likewise does not exempt claims arising from pre-need contracts from the Stay Order. Petitioners contend that the relationship between a planholder and a pre-need corporation is one of trust and not a debtor-creditor relationship. However, such a relationship has not been properly established by petitioners. This Court is not a trier of facts and cannot rule in this petition on whether the relationship between CAP and the planholders is one of trust, absent a factual finding by the trial court. Nevertheless, even if the relationship is one of trust, there is no provision in the Interim Rules that a claim arising from a trust relationship is excluded from the Stay Order. *Negros Navigation Co., Inc. v. Court of Appeals* explained the reason for suspending all pending claims against a corporation under receivership, thus: x x x The stay order is effective on all creditors of the corporation without distinction, whether secured or unsecured. All assets of a corporation under rehabilitation receivership are held in trust for the equal benefit of all creditors to preclude one from obtaining an advantage or preference over another by the expedience of attachment, execution or otherwise. As between the creditors, the key phrase is equality in equity. Once the corporation threatened by bankruptcy is taken over by a receiver, all the creditors ought to stand on equal footing. Not one of them should be paid ahead of the others.

9. ID.; ID.; ID.; ID.; COURT'S ENFORCEMENT OF THE STAY ORDER AGAINST CLAIMS ARISING FROM PRE-NEED CONTRACTS, PROPER. — The case for specific performance and/or annulment of contract (SEC Case No. 05-365) and CAP's petition for rehabilitation (Sp. Proc. No. M 6144) are two different cases; hence, respondent Judge has the discretion to decide each case according to its merits. The case for specific performance and/or annulment of contract was filed pursuant to the Interim Rules of Procedure for Intra-Corporate Controversies, while CAP's petition for rehabilitation was filed under the Interim Rules of Procedure on Corporate Rehabilitation. Under Section 6, Rule 4 of the latter Interim Rules, respondent Judge has the authority to appoint a

rehabilitation receiver after finding the petition for rehabilitation to be sufficient in form and substance. Absent any provision in the Interim Rules, as amended, or P.D. No. 902-A exempting claims arising from pre-need contracts from a court order staying enforcement of all claims against the debtor/pre-need company, the Court holds that respondent Judge did not commit grave abuse of discretion in enforcing the Stay Order against petitioners.

10. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; GRAVE ABUSE OF DISCRETION; THE ABUSE OF DISCRETION MUST BE AS PATENT AND GROSS AS TO AMOUNT TO AN EVASION OR REFUSAL TO PERFORM A DUTY ENJOINED BY LAW. — In addition, respondent Judge did not gravely abuse its discretion in giving due course to the petition for rehabilitation. In the Order dated December 16, 2005, the RTC considered the comments of the SEC and CAP's creditors before resolving the petition. xxx Grave abuse of discretion implies capricious and whimsical exercise of judgment amounting to lack of jurisdiction, or arbitrary and despotic exercise of power because of passion or personal hostility. It must be as patent and gross as to amount to an evasion or refusal to perform a duty enjoined by law. It is absent in this case. Despite the Court's finding that respondent judge did not gravely abuse his discretion in issuing the Orders staying the enforcement of all claims against CAP and in giving due course to CAP's petition for rehabilitation, petitioners are not precluded from seeking other remedies available to them with the lower court.

APPEARANCES OF COUNSEL

Syquia Pascual-Lopez and Santos Law Offices for petitioners.

Poblador Bautista and Reyes and *Sobreviñas Hayudini Bodegon Navarro and San Juan* for College Assurance Plan Philippines, Inc.

D E C I S I O N

PERALTA, *J.*:

This is a petition for *certiorari* and prohibition alleging that respondent Judge Romeo F. Barza of the Regional Trial Court (RTC) of Makati City, Branch 61, committed grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Orders dated September 13, 2005 and December 16, 2005 in Special Proceedings (Sp. Proc.) No. M-6144. The Order dated September 13, 2005 found the petition for corporate rehabilitation of the College Assurance Plan Philippines, Inc. (CAP) to be sufficient in form and substance and stayed the enforcement of all claims against CAP. While the Order dated December 16, 2005 gave due course to CAP's petition for corporate rehabilitation.

The facts are as follows:

CAP was incorporated on February 14, 1980 for the purpose of engaging in the sale of pre-need educational plans. Initially, it sold open-ended educational plans which guaranteed the payment of tuition and other standard school fees to the planholder irrespective of the cost at the time of availment. Later, it engaged in the sale of fixed value plans which guaranteed the payment of a predetermined amount to the planholder. In 1982, CAP was among the country's top 2000 corporations. It started sending its scholars to college in 1984 and saw its first batch of graduates in 1988. However, it subsequently suffered financial difficulties.[1]

On April 28, 2005, six petitioners herein,[2] together with other CAP planholders, filed an action with the RTC of Makati City for Specific Performance and/or Annulment of Contract due to Fraud, Return and Disgorgement of Illegal Profits, Damages with Application for Receiver and/or Management Committee

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[1] Comment, *rollo*, pp. 852-913.

[2] Edna Valenzuela, Elsa S. Azurin, Theresa J. Azurin, Mabel B. Camus, Eden A. Payuyo and Remedios C. Fernando.

against CAP, its Directors and Officers, and the Fil-Estate Group of Companies. The case, docketed as Securities and Exchange Commission (SEC) Case. No. 05-365,[3] was assigned to respondent Judge Romeo Barza of the RTC of Makati City, Branch 61.

Petitioners alleged that proceedings commenced in SEC Case No. 05-365, but the prayer for the appointment of a receiver and creation of a management committee was not acted upon by the RTC.

On September 8, 2005, CAP filed a Petition for Corporate Rehabilitation, docketed as Sp. Proc. No. M-6144, which was raffled to the RTC of Makati City, Branch 61, presided by respondent Judge Romeo F. Barza.

On September 13, 2005, Judge Barza issued an Order[4] in Sp. Proc. No. M-6144 staying the enforcement of all claims against CAP, thus:

> Before this court is a Petition for Rehabilitation filed by COLLEGE ASSURANCE [PLAN] PHILIPPINES, INC. (CAP), a corporation with principal office address at CAP Building, Amorsolo Street, Legaspi Village, Makati City.
>
> Finding the petition to be sufficient in form and substance, the enforcement of all claims, whether for money or otherwise, and whether such enforcement is by court action or otherwise, against COLLEGE ASSURANCE [PLAN] PHILIPPINES, INC., its guarantors and sureties not solidarily liable with it, is stayed.
>
> As a consequence of the stay order, the COLLEGE ASSURANCE [PLAN] PHILIPPINES, INC. is prohibited from selling, encumbering, transferring, or disposing in any manner any of its properties except in the ordinary course of business. It is further prohibited from making any payment of its liabilities outstanding as of the date of the filing of this petition on September 8, 2005. Its suppliers of goods and services are likewise prohibited from withholding supply of goods and services in the ordinary course of business for as long as it

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[3] *Valenzuela, et al. v. Sobrepeña, Jr., et al.*

[4] *Rollo,* pp. 336-337.

makes payments for the services and goods supplied after the issuance of the stay order.

x x x x x x x x x

All creditors and interested parties, including the Securities and Exchange Commission, are directed to file and serve on petitioner COLLEGE ASSURANCE [PLAN] PHILIPPINES, INC., a verified comment on or opposition to the petition with supporting affidavits and documents, not later than ten (10) days before the date of the initial hearing. Failure to do so will bar them from participating in the proceedings. Copies of the petition and its annexes may be secured from the court within such time as to enable them to file their comment on or opposition to the petition to prepare for its initial hearing.

x x x x x x x x x

Mr. Mamerto A. Marcelo, Jr., CPA, with address at 1407 Cityland Condominium 10 Tower 2, Ayala Avenue, cor. H.V. Dela Costa St., Salcedo Village, Makati City is appointed Interim Rehabilitation Receiver of COLLEGE ASSURANCE [PLAN] PHILIPPINES, INC. He may discharge his duties and functions as such after taking his oath to perform his powers, duties and functions faithfully and posting a bond in the amount of ₱100,000.00 to guarantee the faithful discharge of his duties and obedience to the orders of the court.

Petitioner COLLEGE ASSURANCE [PLAN] PHILIPPINES, INC. is directed to immediately serve a copy of this Order to Mr. Mamerto A. Marcelo, Jr., who is directed to manifest his acceptance or non-acceptance of his appointment not later than ten (10) days from receipt of this Order.

SO ORDERED.

On October 17, 2005, ten planholders, who are also petitioners in this case,[5] filed an Opposition to the Rehabilitation and Motion to Exclude Planholders from Stay Order and Terminate Proceeding on the ground that planholders are not creditors as they have a trust relationship with the pre-need company.

[5] Rosalina C. Arao, Florencion Bentulan, Yolanda Cernias, Juancito Dacanay, Richard Martin Esguerra, Manuela Gepullano, Nancy Hilario, Marilyn Lajo, Carmen Ramos, and Lydia Rosario.

On December 16, 2005, Judge Barza issued an Order[6] in Sp. Proc. No. M-6144 giving due course to the petition for rehabilitation, thus:

For determination is the issue of whether or not the petition for corporate rehabilitation of College Assurance [Plan] Philippines, Inc. (CAP) should be given due course.

The petition alleges that CAP is a domestic corporation engaged in the business of selling pre-need educational plans. It was incorporated in 1980 with an initial authorized capital of ₱10,000,000.00. Within two years of starting business, it was among the country's top 2000 corporations, and by 2004, it had climbed in ranking to 146th place with a 21% share of the pre-need market. CAP has had 110,000 scholars enrolled; 84,490 scholars graduated; 780,000 planholders; 174,720 planholders being served; and has paid over ₱11.3 billion in tuition fees. However, it was brought to financial difficulties by reason of the policy of deregulation adopted by the Department of Education which resulted in the unbridled increase in tuition fees over the years; the effect of the Asian financial crisis on CAP's trust fund investments; the onerous application by the Securities and Exchange Commission (SEC) of the Pre-Need Uniform Chart Accounts (PNUCA) beginning in 2002; and the refusal of the SEC to renew CAP's dealership license after its expiration in September 2004 and the cancellation of its permit to sell in August 2004. It is unable to service its debts as they fall due and its assets are insufficient to cover its liabilities, owing in great part to a bloated yet theoretical trust fund deficit and capital deficiency reflected in its financial statements under the SEC's Pre-Need Rules, which it has asked the SEC to re-audit in light of the essential nature of pre-need plans as investment contracts rather than insurance contracts.

In support of its petition, CAP has submitted an eight-year Business Development Plan under which it proposes to build up its equity and liquidity to meet projected cash requirements and eliminate any equity impairment, and to build up the asset base and liquidity of its trust fund to cover its trust variance and meet its maturing obligations.

Pursuant to this court's Stay Order of September 13, 2005, several pleadings were filed with the Court by interested parties, including

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[6] *Rollo*, pp. 341-342.

the Securities and Exchange Commission (SEC), by way of comment on the verified Petition dated August 23, 2005.

During the summary hearing on November 23, 2005, representatives from the SEC admitted that "actuarial reserve liabilities" are not actual and present liabilities of the petitioner.

The Court has carefully evaluated the Petition and the comments filed by the various parties relative thereto, and hereby resolves to give due course to the petition. Even as the Court notes the substantial questions posed by the SEC and some creditors on the solvency of the corporation, it finds the interests of the planholder/investing public as an overriding consideration which cannot be summarily or injudiciously dismissed without a thorough evaluation by the Rehabilitation Receiver of the corporation's chances of being restored to a successful operation and solvency if given the opportunity and considering particularly the adverse results to the planholders of a liquidation scenario as against its proposed rehabilitation under which they may possibly recover 100% of their contributions.

On the basis of the allegations of the petition and the Business Development Plan, and in order that it may be well-guided in its final disposition of the petition, the Court finds merit in the Petition sufficient to warrant its referral to the Rehabilitation Receiver for study and evaluation.

WHEREFORE, the Court resolves to GIVE DUE COURSE to the petition and to REFER the same, together with its Annexes and the comments on the Petition, to the court-appointed Rehabilitation Receiver who is directed to evaluate the rehabilitation plan and submit his recommendation within thirty (30) days from receipt hereof.

Petitioners alleged that the Stay Order dated September 13, 2005 and the Order dated December 16, 2005 had been cited for the non-resolution of pending matters in SEC Case. No. 05-365 for Specific Performance and/or Annulment of Contract due to Fraud, Return and Disgorgement of Illegal Profits and Damages.

Petitioners averred that the proceedings in Sp. Proc. Case No. M-6144 were summary and non-adversarial in nature, and the filing of a petition for relief or a motion to dismiss or for reconsideration was prohibited. Having no speedy and adequate remedy in the ordinary course of law, they filed this petition.

The pertinent issues raised are as follows:

1. WHETHER THE STAY ORDER AND THE ORDER GRANTING THE PETITION FOR REHABILITATION WAS ISSUED WITHOUT OR IN EXCESS OF JURISDICTION, CONSIDERING THAT THE TUITION FEE PAYMENTS DUE PLANHOLDERS' BENEFICIARIES ARE FROM TRUST FUND ASSETS NOT INCLUDED IN REHABILITATION PROCEEDINGS, IT BEING PROPERTY NOT BELONGING TO THE DEBTOR.
2. WHETHER THE STAY ORDER AND ORDER GRANTING THE PETITION FOR REHABILITATION WAS ISSUED WITHOUT OR IN EXCESS OF JURISDICTION CONSIDERING THAT ALL THE REMAINING ASSETS OF THE CORPORATION IS TRACEABLE FROM FUNDS COLLECTED FROM PLANHOLDERS; HENCE, SUBJECT TO TRUST FOR THE BENEFIT OF THE PLANHOLDERS' BENEFICIARIES.
3. WHETHER THE ORDER APPOINTING A REHABILITATION RECEIVER WAS ISSUED IN EXCESS OF JURISDICTION CONSIDERING THAT A PREVIOUS INTRACORPORATE DISPUTE WITH PRAYER FOR [THE] IMMEDIATE APPOINTMENT FOR RECEIVER WAS FILED AHEAD OF THE REHABILITATION PROCEEDINGS.
4. WHETHER THE PUBLIC RESPONDENT'S ORDER DATED DECEMBER 16, 2005 WAS ISSUED IN EXCESS OF JURISDICTION BY NOT ACCORDING DUE RESPECT TO THE FINDINGS OF A SPECIALIZED ADMINISTRATIVE AGENCY.[7]

At the outset, it must be pointed out that the special civil action for *certiorari* under Rule 65 of the Rules of Court[8] is

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[7] Memorandum, *rollo*, pp. 1057-1058.

[8] Rule 65, Sec. 1. *Petition for certiorari*.—When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings

a remedy designed only for the correction of errors of jurisdiction or grave abuse of discretion amounting to lack or excess of jurisdiction.[9] In this case, it is undisputed that the RTC has jurisdiction over the petition for rehabilitation under Section 2, Rule 3 of the Interim Rules of Procedure on Corporate Rehabilitation (2000).[10]

The main issue is whether or not respondent Judge committed grave abuse of discretion amounting to lack or excess of jurisdiction in issuing the Order dated September 13, 2005 staying enforcement of all claims against CAP and the Order dated December 16, 2005 giving due course to CAP's petition for rehabilitation.

Petitioners allege that the relationship between a planholder and a pre-need corporation was one of trust and not a debtor-creditor relationship. They avered that in 2002, the Securities and Exchange Commission (SEC) implemented the New Pre-Need Rules, which mandated a pre-need company to set up a trust fund for the benefit of the beneficiary and in compliance with the agreement; hence, they contend that an express trust relationship exists between the policyholder as trustor, the pre-need firm as trustee, and the beneficiary as *cestui que trust*. Petitioners add that Section 1.9 of the Pre-Need Rules defines "trust fund" as a fund set up from the planholders' payments, separate and distinct from the paid-up capital of a registered Pre-Need Company, established with a trustee under a trust agreement approved by the Commission, to pay for the benefits as provided in the Pre-Need Plan.

Petitioners assert that since a trust relationship exists between a planholder and a pre-need company, CAP may not avail itself of rehabilitation proceedings to stop payments from its trust assets to the beneficiaries.

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of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

[9] *Land Bank of the Philippines v. Court of Appeals*, 456 Phil. 755 (2003).

[10] Rule 3, Sec. 2. *Venue*. — Petitions for rehabilitation pursuant to these Rules shall be filed in the Regional Trial Court having jurisdiction over the territory where the debtor's principal office is located.

Petitioners contend that respondent Judge "acted completely without jurisdiction in giving due course to the petition for rehabilitation, including planholders in the Stay Order and including trust assets in the rehabilitation proceedings notwithstanding the fact that there was a prior case filed by planholders for receivership and management committee and that the assets of debtors do not include the funds collected from planholders."

Petitioners' arguments do not persuade.

CAP is a domestic corporation engaged in the business of selling pre-need educational plans. Republic Act (R.A.) No. 8799, otherwise known as *The Securities Regulation Code*, defines "pre-need plans" as "contracts which provide for the performance of future services or the payment of future monetary considerations at the time of actual need, for which planholders pay in cash or installment at stated prices, with or without interest or insurance coverage, and includes life, pension, education, interment, and other plans which the Commission may from time to time approve."

Section 16, Chapter IV of R.A. No. 8799 provides for the regulation of pre-need plans by SEC, thus:

> SEC.16. *Pre-Need Plans*. — No person shall sell or offer for sale to the public any pre-need plan except in accordance with rules and regulations which the Commission (SEC) shall prescribe. Such rules shall regulate the sale of pre-need plans by, among other things, requiring the registration of pre-need plans, licensing persons involved in the sale of pre-need plans, requiring disclosures to prospective planholders, prescribing advertising guidelines, providing for uniform accounting system, reports and recordkeeping with respect to such plans, imposing capital, bonding and other financial responsibility, and establishing trust funds for the payment of benefits under such plans.

The law governing corporate rehabilitation and suspension of actions for claims against corporations is Presidential Decree (P.D.) No. 902-A,[11] as amended. Section 5 of P.D. No. 902-A,

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[11] P.D. No. 902-A is entitled *Reorganization of the Securities and Exchange Commission with Additional Powers and Placing the Said Agency under the Administrative Supervision of the Office of the President*.

as amended by P.D. No. 1758, enumerates the cases over which SEC has jurisdiction to hear and decide, which includes "[p]etitions of corporations, partnerships or associations to be declared in the state of suspension of payments in cases where the corporation, partnership or association possesses sufficient property to cover all its debts, but foresees the impossibility of meeting them when they respectively fall due or in cases where the corporation, partnership or association has no sufficient assets to cover its liabilities, but is under the management of a Rehabilitation Receiver or Management Committee." R.A. No. 8799, which took effect on August 8, 2000, transferred SEC's jurisdiction over all cases enumerated under Section 5 of P.D. No. 902-A, as amended, to the courts of general jurisdiction or the appropriate Regional Trial Court.

On November 21, 2000, this Court approved the Interim Rules of Procedure on Corporate Rehabilitation of 2000 (Interim Rules), which took effect on December 15, 2000. The Interim Rules apply to petitions for rehabilitation filed by corporations, partnerships, and associations pursuant to P.D. No. 902-A, as amended.

The Interim Rules governed the proceedings in Sp. Proc. No. M-6144. CAP filed the petition for corporate rehabilitation, because it is "unable to service its debts as they fall due and its assets are insufficient to cover its liabilities."[12] CAP filed the petition under Section 1, Rule 4 of the Interim Rules, which provides:

> SECTION 1. *Who May Petition.*— Any **debtor** who foresees the impossibility of meeting its debts when they respectively fall due, or any creditor or creditors holding at least twenty-five percent (25%) of the debtor's total liabilities, may petition the proper Regional Trial Court to have the debtor placed under rehabilitation.[13]

Under the Interim Rules, **"debtor"** shall mean "**any corporation**, partnership, or association, **whether supervised or regulated**

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[12] RTC Order dated December 16, 2005, *rollo*, pp. 341-342.

[13] (Emphasis supplied.)

by the Securities and Exchange Commission or other government agencies, on whose behalf a petition for rehabilitation has been filed under these Rules."[14]

The Interim Rules does not distinguish whether a pre-need corporation like CAP cannot file a petition for rehabilitation before the RTC. Courts are not authorized to distinguish where the Interim Rules makes no distinction.[15]

Moreover, under the Interim Rules, **"claim"** shall include "**all claims or demands <u>of whatever nature or character</u> against a debtor** or its property, whether for money or otherwise." "Creditor" shall mean "any holder of a claim."

Hence, the claim of petitioners for payment of tuition fees from CAP is included in the definition of "claims" under the Interim Rules.

What is to be determined at this point is whether or not claims arising from the pre-need contracts between petitioners and CAP can be stayed under Section 6, Rule 4 of the Interim Rules or Section 6(c) of P.D. No. 902-A.

Section 6, Rule 4 of the Interim Rules provides:

SEC. 6. *Stay Order.* — **If the court finds the petition to be sufficient in form and substance**, **it shall,** not later than five (5) days from the filing of the petition, **issue an Order**: (a) appointing a Rehabilitation Receiver and fixing his bond; **(b) staying enforcement of <u>all</u> claims, whether for money or otherwise, and whether such enforcement is by court action or otherwise, against the debtor, its guarantors and sureties not solidarily liable with the debtor;** (c) prohibiting the debtor from selling, encumbering, transferring, or disposing in any manner any of its properties except in the ordinary course of business; (d) prohibiting the debtor from making any payment of its liabilities outstanding as of the date of filing of the petition; (e) prohibiting the debtor's suppliers of goods or services from withholding supply of goods and services in the ordinary course of business for as long as the

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[14] (Emphasis supplied.)

[15] Agpalo, *Statutory Construction*, Fifth Edition (2003), p. 198.

debtor makes payments for the services and goods supplied after the issuance of the stay order; (f) directing the payment, in full, of all administrative expenses incurred after the issuance of the stay order; (g) fixing the initial hearing on the petition not earlier than forty-five (45) days but not later than sixty (60) days from the filing thereof; (h) directing the petitioner to publish the Order in a newspaper of general circulation in the Philippines once a week for two (2) consecutive weeks; (i) directing all creditors and all interested parties (including the Securities and Exchange Commission) to file and serve on the debtor a verified comment on or opposition to the petition, with supporting affidavits and documents, not later than ten (10) days before the date of the initial hearing and putting them on notice that their failure to do so will bar them from participating in the proceedings; and (j) directing the creditors and interested parties to secure from the court copies of the petition and its annexes within such time as to enable themselves to file their comment on or opposition to the petition and to prepare for the initial hearing of the petition.

The above provision does not provide that a claim arising from a pre-need contract is an exception to the power of the trial court to stay enforcement of **all** claims upon the finding that the petition for rehabilitation is sufficient in form and substance.

The foregoing provision echoes the provision in Section 6(c) of the governing law, P.D. No. 602-A, as amended by P.D. No. 1758, which mandates that "upon appointment of a management committee, rehabilitation receiver, board or body, x x x **all actions for claims against corporations**, partnerships or associations **under management or receivership pending before any court**, tribunal, board or body **shall be suspended accordingly**."

In *Negros Navigation Co., Inc. v. Court of Appeals*,[16] the Court held that "P.D. No. 902-A does not make any distinction as to what claims are covered by the suspension of actions for claims against corporations under rehabilitation x x x Thus, since the law does not make any exemptions or distinctions, neither should we."

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[16] G.R. Nos. 163156 & 166845, December 10, 2008.

The Interim Rules of Procedure on Corporate Rehabilitation of 2000 has been amended by the Rules of Procedure on Corporate Rehabilitation of 2009, which took effect on January 16, 2009. Under the 2009 Rules of Procedure, the power of the RTC to issue a Stay Order when it finds the petition for rehabilitation to be sufficient in form and substance is contained in Section 7, Rule 3,[17] which likewise does not exempt claims arising from pre-need contracts from the Stay Order.

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[17] SEC. 7. *Stay Order*. — If the court finds the petition to be sufficient in form and substance, it shall, not later than five (5) working days from the filing of the petition, issue an Order: (a) appointing a Rehabilitation Receiver and fixing his bond; (b) staying enforcement of all claims, whether for money or otherwise and whether such enforcement is by court action or otherwise, against the debtor, its guarantors and persons not solidarily liable with the debtor; *provided*, that the stay order shall not cover claims against letters of credit and similar security arrangements issued by a third party to secure the payment of the debtor's obligations; *provided*, further, that the stay order shall not cover foreclosure by a creditor of property not belonging to a debtor under corporate rehabilitation; *provided*, however, that where the owner of such property sought to be foreclosed is also a guarantor or one who is not solidarily liable, said owner shall be entitled to the benefit of excussion as such guarantor; (c) prohibiting the debtor from selling, encumbering, transferring, or disposing in any manner any of its properties except in the ordinary course of business; (d) prohibiting the debtor from making any payment of its liabilities except as provided in items (e), (f) and (g) of this Section or when ordered by the court pursuant to Section 10 of Rule 3; (e) prohibiting the debtor's suppliers of goods or services from withholding supply of goods and services in the ordinary course of business for as long as the debtor makes payments for the services and goods supplied after the issuance of the stay order; (f) directing the payment in full of all administrative expenses incurred after the issuance of the stay order; (g) directing the payment of new loans or other forms of credit accommodations obtained for the rehabilitation of the debtor with prior court approval; (h) fixing the dates of the initial hearing on the petition not earlier than forty-five (45) days but not later than sixty (60) days from the filing thereof; (i) directing the petitioner to publish the Order in a newspaper of general circulation in the Philippines once a week for two (2) consecutive weeks; (j) directing the petitioner to furnish a copy of the petition and its annexes, as well as the stay order, to the creditors named in the petition and the appropriate regulatory agencies such as, but not limited to, the Securities and Exchange Commission, the Bangko Sentral ng Pilipinas, the Insurance Commission, the National Telecommunications Commission, the Housing and Land Use Regulatory Board and the Energy Regulatory Commission; (k) directing

Petitioners contend that the relationship between a planholder and a pre-need corporation is one of trust and not a debtor-creditor relationship. However, such a relationship has not been properly established by petitioners. This Court is not a trier of facts and cannot rule in this petition on whether the relationship between CAP and the planholders is one of trust, absent a factual finding by the trial court. Nevertheless, even if the relationship is one of trust, there is no provision in the Interim Rules that a claim arising from a trust relationship is excluded from the Stay Order.

Negros Navigation Co., Inc. v. Court of Appeals[18] explained the reason for suspending all pending claims against a corporation under receivership, thus:

> x x x The stay order is effective on all creditors of the corporation without distinction, whether secured or unsecured. All assets of a corporation under rehabilitation receivership are held in trust for the equal benefit of all creditors to preclude one from obtaining an advantage or preference over another by the expedience of attachment, execution or otherwise. As between the creditors, the key phrase is equality in equity. Once the corporation threatened by bankruptcy is taken over by a receiver, all the creditors ought to stand on equal footing. Not one of them should be paid ahead of the others.

Petitioners also contend that the Rehabilitation Court may not appoint a rehabilitation receiver when a previous intra-corporate

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the petitioner that foreign creditors with no known addresses in the Philippines be individually given a copy of the stay order at their foreign addresses; (l) directing all creditors and all interested parties (including the regulatory agencies concerned) to file and serve on the debtor a verified comment on or opposition to the petition, with supporting affidavits and documents, not later than fifteen (15) days before the date of the first initial hearing and putting them on notice that their failure to do so will bar them from participating in the proceedings; and (m) directing the creditors and interested parties to secure from the court copies of the petition and its annexes within such time as to enable themselves to file their comment on or opposition to the petition and to prepare for the initial hearing of the petition.

The issuance of a stay order does not affect the right to commence actions or proceedings insofar as it is necessary to preserve a claim against the debtor.

[18] *Supra* note 16.

dispute (SEC Case No. 05-365) with prayer for the immediate appointment of a receiver has been filed ahead of the petition for rehabilitation.

The contention is without merit.

The case for specific performance and/or annulment of contract (SEC Case No. 05-365) and CAP's petition for rehabilitation (Sp. Proc. No. M-6144) are two different cases; hence, respondent Judge has the discretion to decide each case according to its merits. The case for specific performance and/or annulment of contract was filed pursuant to the Interim Rules of Procedure for Intra-Corporate Controversies, while CAP's petition for rehabilitation was filed under the Interim Rules of Procedure on Corporate Rehabilitation. Under Section 6, Rule 4 of the latter Interim Rules,[19] respondent Judge has the authority to appoint a rehabilitation receiver after finding the petition for rehabilitation to be sufficient in form and substance.

Absent any provision in the Interim Rules, as amended, or P.D. No. 902-A exempting claims arising from pre-need contracts from a court order staying enforcement of all claims against the debtor/pre-need company, the Court holds that respondent Judge did not commit grave abuse of discretion in enforcing the Stay Order against petitioners.

In addition, respondent Judge did not gravely abuse its discretion in giving due course to the petition for rehabilitation. In the Order dated December 16, 2005, the RTC considered the comments of the SEC and CAP's creditors before resolving the petition. It explained its decision, thus:

The Court has carefully evaluated the Petition and the comments filed by the various parties relative thereto, and hereby resolves to

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[19] SEC. 6. *Stay Order*. — **If the court finds the petition to be sufficient in form and substance**, **it shall,** not later than five (5) working days from the filing of the petition, **issue an Order**: **(a) appointing a Rehabilitation Receiver and fixing his bond;** (b) staying enforcement of all claims, whether for money or otherwise and whether such enforcement is by court action or otherwise, against the debtor, its guarantors and sureties not solidarily liable with the debtor; x x x.

give due course to the petition. Even as the Court notes the substantial questions posed by the SEC and some creditors on the solvency of the corporation, **it finds the interests of the planholder/investing public as an overriding consideration which cannot be summarily or injudiciously dismissed without a thorough evaluation by the Rehabilitation Receiver of the corporation's chances of being restored to a successful operation and solvency if given the opportunity and considering particularly the adverse results to the planholders of a liquidation scenario as against its proposed rehabilitation under which they may possibly recover 100% of their contributions.**

On the basis of the allegations of the petition and the Business Development Plan, and in order that it may be well-guided in its final disposition of the petition, the Court finds merit in the Petition sufficient to warrant its referral to the Rehabilitation Receiver for study and evaluation.[20]

Grave abuse of discretion implies capricious and whimsical exercise of judgment amounting to lack of jurisdiction, or arbitrary and despotic exercise of power because of passion or personal hostility.[21] It must be as patent and gross as to amount to an evasion or refusal to perform a duty enjoined by law.[22] It is absent in this case.

Despite the Court's finding that respondent judge did not gravely abuse his discretion in issuing the Orders staying the enforcement of all claims against CAP and in giving due course to CAP's petition for rehabilitation, petitioners are not precluded from seeking other remedies available to them with the lower court.

The other issues raised pertain to matters that were not discussed in the subject RTC Orders or are not pertinent to the main issue of whether or not respondent Judge gravely abused its discretion in including the claims of petitioners in the Stay Order; hence, they do not fall within the scope of this petition for *certiorari.*

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[20] *Rollo*, p. 342. (Emphasis supplied.)

[21] *Batul v. Bayron*, 468 Phil. 131, 148 (2004).

[22] *Id.*

WHEREFORE, the petition for *certiorari* is *DISMISSED*. No costs.

SO ORDERED.

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

THIRD DIVISION

[G.R. No. 174116. September 11, 2009]

EASTERN SHIPPING LINES, INC., *petitioner, vs.* **PRUDENTIAL GUARANTEE AND ASSURANCE, INC.,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; PETITION FOR REVIEW ON *CERTIORARI*; ONLY QUESTIONS OF LAW MAY BE ENTERTAINED THEREIN; EXCEPTIONS; PRESENT IN CASE AT BAR. — The rule in our jurisdiction is that only questions of law may be entertained by this Court in a petition for review on *certiorari*. This rule, however, is not iron-clad and admits of certain exceptions, one of which is when the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion. In the case at bar, the records of the case contain evidence which justify the application of the exception.

2. COMMERCIAL LAW; INSURANCE; MARINE INSURANCE; MARINE RISK NOTE IS NOT AN INSURANCE POLICY; NATURE OF MARINE CARGO RISK NOTE.— Before anything else, it must be emphasized that a marine risk note is not an insurance policy. It is only an acknowledgment or declaration of the insurer confirming the specific shipment covered by its marine open policy, the evaluation of the cargo

and the chargeable premium. In *International Container Terminal Services, Inc. v. FGU Insurance Corporation* (International), the nature of a marine cargo risk note was explained, thus: x x x **It is the marine open policy which is the main insurance contract.** In other words, the marine open policy is the blanket insurance to be undertaken by FGU on all goods to be shipped by RAGC during the existence of the contract, while the marine risk note specifies the particular goods/shipment insured by FGU on that specific transaction, including the sum insured, the shipment particulars as well as the premium paid for such shipment. x x x.

3. ID.; ID.; ID.; MARINE RISK NOTE RELIED UPON BY THE RESPONDENT IN CASE AT BAR IS INSUFFICIENT TO PROVE ITS CLAIM. — It is undisputed that the cargoes were already on board the carrier as early as November 8, 1995 and that the same arrived at the port of Manila on November 16, 1995. It is, however, very apparent that the Marine Cargo Risk Note was issued only on November 16, 1995. The same, therefore, should have raised a red flag, as it would be impossible to know whether said goods were actually insured while the same were in transit from Japan to Manila. xxx In addition, petitioner also contended that the Marine Cargo Risk Note referred to "Institute Cargo Clauses A and other terms and conditions per Marine Open Policy-86-168." Based on the forgoing, it is already evident why herein petition is meritorious. The Marine Risk Note relied upon by respondent as the basis for its claim for subrogation is insufficient to prove said claim.

4. ID.; ID.; ID.; NO INSURANCE ON A RISK THAT HAD ALREADY OCCURRED BY THE TIME THE CONTRACT WAS EXECUTED. — It is significant that the date when the alleged insurance contract was constituted cannot be established with certainty without the contract itself. Said point is crucial because there can be no insurance on a risk that had already occurred by the time the contract was executed. Surely, the Marine Risk Note on its face does not specify when the insurance was constituted.

5. ID.; ID.; ID.; RULING IN *INTERNATIONAL* CASE (G.R. NO. 161539, JUNE 27, 2008) NOT APPLICABLE TO CASE AT BAR; NON-PRESENTATION OF MARINE INSURANCE POLICY IS FATAL WHERE THERE ARE ISSUES AS REGARDS THE PROVISIONS THEREON. — Although the

CA may have ruled that the damage to the cargo occurred while the same was in petitioner's custody, this Court cannot apply the ruling in *International* to the case at bar. In contrast, unlike in *International* where there was no issue as regards the provisions of the marine insurance policy, such that the presentation of the contract itself is necessary for perusal, herein petitioner had repeatedly objected to the non-presentation of the marine insurance policy and had manifested its desire to know the specific provisions thereof. Moreover, and the same is critical, the marine risk note in the case at bar is questionable because: *first*, it is dated on the same day the cargoes arrived at the port of Manila and not during the duration of the voyage; *second*, without the Marine Insurance Policy to elucidate on the specifics of the terms and conditions alluded to in the marine risk note, it would be simply guesswork to know if the same were complied with.

6. ID.; ID.; ID.; RULING IN *MALAYAN* CASE (G.R. NO. 172156, NOV. 23, 2007) APPLIED TO CASE AT BAR; NON PRESENTATION OF THE MARINE INSURANCE POLICY IN CASE AT BAR IS FATAL. — Lastly, to cast all doubt on the merits of herein petition, this Court is guided by the ruling in *Malayan*, to wit: x x x **The Court further recognizes the danger as precedent should we sustain Malayan's position, and not only because such a ruling would formally violate the rule on actionable documents. Malayan would have us effectuate an insurance contract without having to consider its particular terms and conditions, and on a blind leap of faith that such contract is indeed valid and subsisting.** The conclusion further works to the utter prejudice of defendants such as Regis or Paircargo since they would be deprived the opportunity to examine the document that gives rise to the plaintiff's right to recover against them, or to raise arguments or objections against the validity or admissibility of such document. If a legal claim is irrefragably sourced from an actionable document, the defendants cannot be deprived of the right to examine or utilize such document in order to intelligently raise a defense. **The inability or refusal of the plaintiff to submit such document into evidence constitutes an effective denial of that right of the defendant which is ultimately rooted in due process of law, to say nothing on how such failure fatally diminishes the plaintiff's substantiation of its own cause of action.** In conclusion,

this Court rules that based on the applicable jurisprudence, because of the inadequacy of the Marine Cargo Risk Note for the reasons already stated, it was incumbent on respondent to present in evidence the Marine Insurance Policy, and having failed in doing so, its claim of subrogation must necessarily fail.

APPEARANCES OF COUNSEL

Contreras & Limqueco Law Office for petitioner.
Zapa Law Office for respondent.

D E C I S I O N

PERALTA, *J.*:

Before this Court is a Petition for Review on *Certiorari*[1] under Rule 45 of the Rules of Court, seeking to set aside the April 26, 2006 Decision[2] and August 15, 2006 Resolution[3] of the Court of Appeals (CA) in CA-G.R. CV No. 68165.

The facts of the case:

On November 8, 1995, fifty-six cases of completely knock-down auto parts of Nissan motor vehicle (cargoes) were loaded on board M/V Apollo Tujuh (carrier) at Nagoya, Japan, to be shipped to Manila. The shipment was consigned to Nissan Motor Philippines, Inc. (Nissan) and was covered by Bill of Lading No. NMA-1.[4] The carrier was owned and operated by petitioner Eastern Shipping Lines, Inc.

On November 16, 1995, the carrier arrived at the port of Manila. On November 22, 1995, the shipment was then discharged from the vessel onto the custody of the *arrastre* operator, Asian

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[1] *Rollo*, pp. 3-20.

[2] Penned by Associate Justice Edgardo P. Cruz, with Associate Justices Rosalinda Asuncion-Vicente and Sesinando E. Villon, concurring; *id.* at 24-34.

[3] *Id.* at 36.

[4] *Rollo*, p. 24.

Terminals, Inc. (ATI), complete and in good condition, except for four cases.[5]

On November 24 to 28, 1995, the shipment was withdrawn by Seafront Customs and Brokerage from the pier and delivered to the warehouse of Nissan in Quezon City.[6]

A survey of the shipment was then conducted by Tan-Gaute Adjustment Company, Inc. (surveyor) at Nissan's warehouse. On January 16, 1996, the surveyor submitted its report[7] with a finding that there were "short (missing)" items in Cases Nos. 10/A26/T3K and 10/A26/7K and "broken/scratched" and "broken" items in Case No. 10/A26/70K; and that (i)n (its) opinion, the "shortage and damage sustained by the shipment were due to pilferage and improper handling, respectively while in the custody of the vessel and/or Arrastre Contractors."[8]

As a result, Nissan demanded the sum of ₱1,047,298.34[9] representing the cost of the damages sustained by the shipment from petitioner, the owner of the vessel, and ATI, the *arrastre* operator. However, the demands were not heeded.[10]

On August 21, 1996, as insurer of the shipment against all risks per Marine Open Policy No. 86-168 and Marine Cargo Risk Note No. 3921/95, respondent Prudential Guarantee and Assurance Inc. paid Nissan the sum of ₱1,047,298.34.

On October 1, 1996, respondent sued petitioner and ATI for reimbursement of the amount it paid to Nissan before the Regional Trial Court (RTC) of Makati City, Branch 148, docketed as Civil Case No. 96-1665, entitled *Prudential Guarantee and Assurance, Inc. v. Eastern Shipping Lines, Inc.* Respondent

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[5] *Id.*

[6] *Id.*

[7] Exhibit J; records pp. 181-183.

[8] *Rollo*, p. 25.

[9] Exhibit A; records, pp. 76-78.

[10] *Rollo*, p. 25.

claimed that it was subrogated to the rights of Nissan by virtue of said payment.[11]

On June 21, 1999, the RTC rendered a Decision,[12] the dispositive portion of which reads:

> WHEREFORE, premises considered, judgment is hereby rendered in favor of the plaintiff and against the defendants Eastern Shipping Lines, Inc. and ATI, and said defendants are hereby ordered to pay jointly and solidarily plaintiff the following:
>
> 1) The claim of ₱1,047,298.34 with legal interest thereon of 6% per annum from the date of the filing of this complaint until the same is fully paid;
>
> 2) [Twenty-five (25%)] percent of the principal claim, as and for attorney's fees;
>
> 3) Plus costs of suit.
>
> Both the counterclaims and crossclaims are without legal basis. The counterclaims and crossclaims are based on the assumption that the other defendant is the one solely liable. However, inasmuch as the solidary liability of the defendants have been established, the counterclaims and crossclaims must be denied.
>
> Equal costs against Eastern Shipping Lines, Inc. and Asian Terminals, Inc.
>
> SO ORDERED.[13]

Both petitioner and ATI appealed to the CA.

On April 26, 2006, the CA rendered a Decision the dispositive portion of which reads:

> WHEREFORE, the appealed decision is AFFIRMED with MODIFICATIONS, in that (i) defendant-appellant Eastern Shipping Lines, Inc. is ordered to pay appellee (a) the amount of ₱904,293.75 plus interest thereon at the rate of 6% per annum from the filing of the complaint up to the finality of this judgment, when the interest

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[11] *Id.*

[12] *Rollo,* pp. 109-115.

[13] *Id.* at 114-115.

shall become 12% per annum until fully paid, and (b) the costs of suit; (ii) the award of attorney's fees is DELETED; and (iii) the complaint against defendant-appellant Asian Terminals, Inc. is DISMISSED.

SO ORDERED.[14]

The CA exonerated ATI and ruled that petitioner was solely responsible for the damages caused to the cargoes. Moreover, the CA relying on *Delsan Transport Lines, Inc. vs. Court of Appeals*,[15] ruled that the right of subrogation accrues upon payment by the insurance company of the insurance claim and that the presentation of the insurance policy is not indispensable before the appellee may recover in the exercise of its subrogatory right.[16]

Petitioner then filed a motion for reconsideration, which was, however, denied by the CA in a Resolution dated August 15, 2006.

Hence, herein petition, with petitioner raising the following assignment of errors to wit:

I.

WHETHER OR NOT THE COURT OF APPEALS ERRED IN AFFIRMING THE DECISION OF THE LOWER COURT FINDING HEREIN PETITIONER LIABLE DESPITE THE FACT THAT RESPONDENT FAILED TO SUBMIT ANY INSURANCE POLICY.

II.

WHETHER OR NOT THE COURT OF APPEALS ERRED IN NOT APPLYING THE US$500.00/PACKAGE/CASE PACKAGE LIMITATION OF LIABILITY IN ACCORDANCE WITH THE CARRIAGE OF GOODS BY SEA ACT.[17]

The petition is meritorious.

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[14] *Id.* at 33-34.

[15] 420 Phil. 824, 835 (2001).

[16] *Rollo*, p. 32.

[17] *Id.* at 11.

The rule in our jurisdiction is that only questions of law may be entertained by this Court in a petition for review on *certiorari*. This rule, however, is not iron-clad and admits of certain exceptions, one of which is when the CA manifestly overlooked certain relevant and undisputed facts that, if properly considered, would justify a different conclusion.[18] In the case at bar, the records of the case contain evidence which justify the application of the exception.

Anent the first error, petitioner argues that respondent was not properly subrogated because of the non-presentation of the marine insurance policy. In the case at bar, in order to prove its claim, respondent presented a marine cargo risk note and a subrogation receipt. Thus, the question to be resolved is whether the two documents, without the Marine Insurance Policy, are sufficient to prove respondent's right of subrogation.

Before anything else, it must be emphasized that a marine risk note is not an insurance policy. It is only an acknowledgment or declaration of the insurer confirming the specific shipment covered by its marine open policy, the evaluation of the cargo and the chargeable premium.[19] In *International Container Terminal Services, Inc. v. FGU Insurance Corporation* (International),[20] the nature of a marine cargo risk note was explained, thus:

x x x **It is the marine open policy which is the main insurance contract.** In other words, the marine open policy is the blanket insurance to be undertaken by FGU on all goods to be shipped by RAGC during the existence of the contract, while the marine risk note specifies the particular goods/shipment insured by FGU on that specific transaction, including the sum insured, the shipment particulars as well as the premium paid for such shipment. x x x.[21]

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[18] *Philippine Charter Insurance Corporation v. Unknown Owner of the Vessel M/V "National Honor,"* G.R. No. 161833 , July 8, 2005, 463 SCRA 202, 215.

[19] *Aboitiz Shipping Corporation v. Philippine American General Insurance Co.*, G.R. No. 77530, October 5, 1989, 178 SCRA 357, 360-361.

[20] G.R. No. 161539, June 27, 2008, 556 SCRA 194.

[21] *Id.* at 202-203. (Emphasis supplied.)

For clarity, the pertinent portions of the Marine Cargo Risk Note,[22] relied upon by respondent, are hereunder reproduced, to wit:

RN NO 39821/95
Date: Nov. 16, 1995

NISSAN MOTOR PHILS., INC.
x x x

Gentlemen:

We have this day noted a Risk in your favor **subject to all clauses and condition of the Company's printed form of Marine Open Policy No. 86-168**

For PHILIPINE (sic) PESOS FOURTEEN MILLION ONE HUNDRED SEVENTY-THREE THOUSAND FORTY-TWO & 91/100 ONLY (₱14,173,042.91) x x x

CARGO: 56 CASES NISSAN MOTOR VEHICLE CKD (GC22)

CONDITIONS: **INSTITUTE CARGO CLAUSES "A"**
OTHER TERMS AND CONDITIONS PER MOP-86-168

From: NAGOYA
To: MANILA, PHILS.
ETD: NOV. 8, 1995 ETA: NOV. 17, 1995
CARRIER: "APOLLO TUJUH"
B/L NO: NMA-1
BANK: BANK OF THE PHILLIPINE (sic) ISLANDS
L/C NO: 026010051971
Shipper/ Consignee: MARUBENI CORPORATION

It is undisputed that the cargoes were already on board the carrier as early as November 8, 1995 and that the same arrived at the port of Manila on November 16, 1995. It is, however, very apparent that the Marine Cargo Risk Note was issued only on November 16, 1995. The same, therefore, should have raised a red flag, as it would be impossible to know whether said goods were actually insured while the same were in transit from Japan to Manila. On this score, this Court is guided by *Malayan*

[22] Records, p. 79.

Insurance Co., Inc. v. Regis Brokerage Corp.,[23] where this Court ruled:

> Thus, we can only consider the Marine Risk Note in determining whether there existed a contract of insurance between ABB Koppel and Malayan at the time of the loss of the motors. **However, the very terms of the Marine Risk Note itself are quite damning. It is dated 21 March 1995, or after the occurrence of the loss**, and specifically states that Malayan "ha[d] this day noted the above-mentioned risk in your favor and hereby guarantee[s] that this document has all the force and effect of the terms and conditions in the Corporation's printed form of the standard Marine Cargo Policy and the Company's Marine Open Policy."[24]

Likewise, the date of the issuance of the Marine Risk Note also caught the attention of petitioner. In petitioner's Comment/Opposition[25] to the formal offer of evidence before the RTC, petitioner made the following manifestations, to wit:

> Exhibit "B", **Marine Cargo Risk Note No. 39821 dated November 16, 1995 is being objected to for being irrelevant and immaterial as it was executed on November 16, 1995. The cargoes arrived in Manila on November 16, 1995. <u>This means that the cargoes are not specifically covered by any particular insurance at the time of transit</u>**. The alleged Marine Open Policy was not presented. Marine Open Policy may be subject to Institute Cargo Clauses which may require arbitration prior to the filing of an action in court.[26]

In addition, petitioner also contended that the Marine Cargo Risk Note referred to "Institute Cargo Clauses A and other terms and conditions per Marine Open Policy-86-168."

Based on the forgoing, it is already evident why herein petition is meritorious. The Marine Risk Note relied upon by respondent as the basis for its claim for subrogation is insufficient to prove said claim.

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[23] G.R. No. 172156, November 23, 2007, 538 SCRA 681.

[24] *Id.* at 689.

[25] Records, pp. 186-188.

[26] *Id.* at 186.

As previously stated, the Marine Risk Note was issued only on November 16, 1995; hence, without a copy of the marine insurance policy, it would be impossible and simply guesswork to know whether the cargo was insured during the voyage which started on November 8, 1995. Again, without the marine insurance policy, it would be impossible for this Court to know the following: first, the specifics of the "Institute Cargo Clauses A and other terms and conditions per Marine Open Policy-86-168" as alluded to in the Marine Risk Note; second, if the said terms and conditions were actually complied with before respondent paid Nissan's claim.

Furthermore, a reading of the transcript of the records clearly show that, at the RTC, petitioner had already objected to the non-presentation of the marine insurance policy, to wit:

Q. Are you also the one preparing the Marine Insurance Contract?
A. No, sir.

Q. Who is the one?
A. Our Marine Cargo Underwriting Department.

Q. And do you know anybody in that department?
A. Yes, sir.

Q. And you were aware that this particular cargo of the shipment was insured?
A. Yes, sir, per policy issued.

Q. And that you are referring to Exhibit?
A. The Marine Cargo Risk.

Q. Is this the only contract of Insurance between Prudential Guarantee and Nissan?
A. Sir, there is a Marine Open Policy.

Q. Do you have any copy of that?
A. It is in the office.

Atty. Alojado Can you produce that copy?
Atty. Zapa May we know the request of counsel for producing this Marine Open Policy?

Atty. Alojado — The basis of the question is the answer of the witness which says that there is another contract of insurance.

COURT — **Yes, that is a Marine Open Policy?**
Are you familiar with Marine Open Policy?

Atty. Alojado — **Yes, Your Honor.**
But we would also like to be familiarize with that contract.

COURT — But you know already a Marine Open Policy

Atty. Alojado — Yes, Your Honor.

COURT — I do not know if you work as a lawyer for several Insurance Company?

Atty. Alojado — No, Your Honor. Honestly, Your Honor I worked as a Maritime lawyer.

COURT — Then you should know what is Marine Open Policy.
Atty. Alojado — **I would like to know the specification of the Marine Open Policy in this regard.**

Atty. Zapa — I think your Honor, between the plaintiff and the defendant there is no issue against the insurance.

COURT — Yes because this witness it (sic) not testifying on the Marine Open Policy.

Atty. Alojado — We submit.

COURT — Proceed.

Atty. Alojado

Q. But there is a Marine Open Policy
A. Yes, sir.[27]

x x x x x x x x x

COURT

Q. Is the policy a standing policy, a continuing policy or is it going only for only a year or for a particular shipment or what?
A. For this particular consignee, they have Marine Open Policy.

[27] TSN, May 20, 1997, pp. 14-18.

Atty. Alojado That was not presented.

COURT That's why I'm asking. So the policy is not only for a particular shipment, but all other shipments that may come?
A. Yes, Your Honor.

Q. Are covered?
A. Yes, Your Honor.

Q. Without any specifications?
A. Yes, Your Honor.[28]

Clearly, petitioner was not remiss when it openly objected to the non-presentation of the Marine Insurance Policy. As testified to by respondent's witness, they had a copy of the marine insurance policy in their office. Thus, respondent was already apprised of the possible importance of the said document to their cause.

In addition, this Court takes notice that notwithstanding that the RTC may have denied the repeated manifestation of petitioner of the non-presentation of the marine insurance policy, the same by itself does not exonerate respondent. As plaintiff, it was respondent's burden to present the evidence necessary to substantiate its claim.

In its Complaint,[29] respondent alleged: "That the above-described shipment was insured for ₱14,173,042.91 against all risks under plaintiff's Marine Cargo Risk Note No. 39821/**Marine Open Policy No. 86-168."**[30] Therefore, other than the marine cargo risk note, respondent should have also presented the marine insurance policy, as the same also served as the basis for its complaint. Section 7, Rule 9 of the 1997 Rules of Civil Procedure, provide:

SECTION 7. *Action or defense based on document*. — Whenever an action or defense is based upon a written instrument or document, the substance of such instrument or document shall be set forth in the pleading, and the original or a copy thereof shall be attached to

[28] TSN, July 3, 1997, pp. 9-10.

[29] Records, pp. 1-5.

[30] *Id.* at. 2.

the pleading as an exhibit, which shall be deemed to be a part of the pleading, or said copy may, with like effect, be set forth in the pleading.

On this score, *Malayan* is instructive:

Malayan's right of recovery as a subrogee of ABB Koppel cannot be predicated alone on the liability of the respondent to ABB Koppel, even though such liability will necessarily have to be established at the trial for Malayan to recover. Because Malayan's right to recovery derives from contractual subrogation as an incident to an insurance relationship, and not from any proximate injury to it inflicted by the respondents, it is critical that Malayan establish the legal basis of such right to subrogation by presenting the contract constitutive of the insurance relationship between it and ABB Koppel. Without such legal basis, its cause of action cannot survive.

Our procedural rules make plain how easily Malayan could have adduced the Marine Insurance Policy. Ideally, this should have been accomplished from the moment it filed the complaint. Since the Marine Insurance Policy was constitutive of the insurer-insured relationship from which Malayan draws its right to subrogation, such document should have been attached to the complaint itself, as provided for in Section 7, Rule 9 of the 1997 Rules of Civil Procedure: x x x[31]

Therefore, since respondent alluded to an actionable document in its complaint, the contract of insurance between it and Nissan, as integral to its cause of action against petitioner, the Marine Insurance Policy should have been attached to the Complaint. Even in its formal offer of evidence, respondent alluded to the marine insurance policy which can stand independent of the Marine Cargo Risk Note, to wit:

EXH "B" = Marine Cargo Risk Note No. 39821/95 Dated November 16, 1995.

Purpose: As proof that the subject shipment was covered by insurance for ₱14,173, 042.91 **under Marine Open Policy No. 86-168**.[32]

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[31] *Malayan Insurance Co., Inc. v. Regis Brokerage Corp., supra* note 23, at 690.

[32] Records, p. 72.

It is significant that the date when the alleged insurance contract was constituted cannot be established with certainty without the contract itself. Said point is crucial because there can be no insurance on a risk that had already occurred by the time the contract was executed.[33] Surely, the Marine Risk Note on its face does not specify when the insurance was constituted.

The importance of the presentation of the Marine Insurance Policy was also emphasized in *Wallem Philippines Shipping, Inc. v. Prudential Guarantee & Assurance, Inc.*,[34] where this Court ruled:

> x x x Wallem still cannot be held liable because of the failure of Prudential to present the contract of insurance or a copy thereof. Prudential claims that it is subrogated to the rights of GMC pursuant to their insurance contract. For this purpose, it submitted a subrogation receipt (Exh. J) and a marine cargo risk note (Exh. D). However, as the trial court pointed out, this is not sufficient. As GMC's subrogee, Prudential can exercise only those rights granted to GMC under the insurance contract. The contract of insurance must be presented in evidence to indicate the extent of its coverage. As there was no determination of rights under the insurance contract, this Court's ruling in *Home Insurance Corporation v. Court of Appeals* is applicable:
>
> The insurance contract has not been presented. It may be assumed for the sake of argument that the subrogation receipt may nevertheless be used to establish the relationship between the petitioner [Home Insurance Corporation] and the consignee [Nestlé Phil.] and the amount paid to settle the claim. But that is all the document can do. By itself alone, the subrogation receipt is not sufficient to prove the petitioner's claim holding the respondent [Mabuhay Brokerage Co., Inc.] liable for the damage to the engine.
>
> . . . . . .
>
> It is curious that the petitioner disregarded this rule, knowing that the best evidence of the insurance contract was its original copy, which was presumably in the possession of Home itself. Failure to

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[33] *Malayan Insurance Co., Inc. v. Regis Brokerage Corp., supra* note 23, at 694.

[34] G.R. No. 152158, February 7, 2003, 397 SCRA 158.

present this original (or even a copy of it), for reasons the Court cannot comprehend, must prove fatal to this petition.[35]

Finally, there have been cases where this Court ruled that the non-presentation of the marine insurance policy is not fatal, as can be gleaned in *International*, where this Court held:

> Indeed, jurisprudence has it that the marine insurance policy needs to be presented in evidence before the trial court or even belatedly before the appellate court. In *Malayan Insurance Co., Inc. v. Regis Brokerage Corp.*, the Court stated that the presentation of the marine insurance policy was necessary, as the issues raised therein arose from the very existence of an insurance contract between Malayan Insurance and its consignee, ABB Koppel, even prior to the loss of the shipment. In *Wallem Philippines Shipping, Inc. v. Prudential Guarantee and Assurance, Inc.*, the Court ruled that the insurance contract must be presented in evidence in order to determine the extent of the coverage. This was also the ruling of the Court in *Home Insurance Corporation v. Court of Appeals*.
>
> However, as in every general rule, there are admitted exceptions. In *Delsan Transport Lines, Inc. v. Court of Appeals*, the Court stated that the presentation of the insurance policy was not fatal because the loss of the cargo undoubtedly occurred while on board the petitioner's vessel, unlike in *Home Insurance* in which the cargo passed through several stages with different parties and it could not be determined when the damage to the cargo occurred, such that the insurer should be liable for it.
>
> As in *Delsan*, there is no doubt that the loss of the cargo in the present case occurred while in petitioner's custody. **Moreover, there is no issue as regards the provisions of Marine Open Policy No. MOP-12763, such that the presentation of the contract itself is necessary for perusal, not to mention that its existence was already admitted by petitioner in open court**. And even though it was not offered in evidence, it still can be considered by the court as long as they have been properly identified by testimony duly recorded and they have themselves been incorporated in the records of the case.[36]

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[35] *Id.* at 170-171.

[36] *International Container Terminal Services, Inc. v. FGU Insurance Corporation*, *supra* note 20, at 203-204.

Although the CA may have ruled that the damage to the cargo occurred while the same was in petitioner's custody, this Court cannot apply the ruling in *International* to the case at bar. In contrast, unlike in *International* where there was no issue as regards the provisions of the marine insurance policy, such that the presentation of the contract itself is necessary for perusal, herein petitioner had repeatedly objected to the non-presentation of the marine insurance policy and had manifested its desire to know the specific provisions thereof. Moreover, and the same is critical, the marine risk note in the case at bar is questionable because: *first*, it is dated on the same day the cargoes arrived at the port of Manila and not during the duration of the voyage; *second*, without the Marine Insurance Policy to elucidate on the specifics of the terms and conditions alluded to in the marine risk note, it would be simply guesswork to know if the same were complied with.

Lastly, to cast all doubt on the merits of herein petition, this Court is guided by the ruling in *Malayan*, to wit:

> It cannot be denied from the only established facts that Malayan and ABB Koppel comported as if there was an insurance relationship between them and documents exist that evince the presence of such legal relationship. But, under these premises, the very insurance contract emerges as the white elephant in the room — an obdurate presence which everybody reacts to, yet, legally invisible as a matter of evidence since no attempt had been made to prove its corporeal existence in the court of law. **It may seem commonsensical to conclude anyway that there was a contract of insurance between Malayan and ABB Koppel since they obviously behaved in a manner that indicates such relationship, yet the same conclusion could be had even if, for example, those parties staged an elaborate charade to impress on the world the existence of an insurance contract when there actually was none. While there is absolutely no indication of any bad faith of such import by Malayan or ABB Koppel, the fact that the "commonsensical" conclusion can be drawn even if there was bad faith that convinces us to reject such line of thinking**.
>
> **The Court further recognizes the danger as precedent should we sustain Malayan's position, and not only because such a ruling would formally violate the rule on actionable documents.**

Malayan would have us effectuate an insurance contract without having to consider its particular terms and conditions, and on a blind leap of faith that such contract is indeed valid and subsisting. The conclusion further works to the utter prejudice of defendants such as Regis or Paircargo since they would be deprived the opportunity to examine the document that gives rise to the plaintiff's right to recover against them, or to raise arguments or objections against the validity or admissibility of such document. If a legal claim is irrefragably sourced from an actionable document, the defendants cannot be deprived of the right to examine or utilize such document in order to intelligently raise a defense. **The inability or refusal of the plaintiff to submit such document into evidence constitutes an effective denial of that right of the defendant which is ultimately rooted in due process of law, to say nothing on how such failure fatally diminishes the plaintiff's substantiation of its own cause of action.**[37]

In conclusion, this Court rules that based on the applicable jurisprudence, because of the inadequacy of the Marine Cargo Risk Note for the reasons already stated, it was incumbent on respondent to present in evidence the Marine Insurance Policy, and having failed in doing so, its claim of subrogation must necessarily fail.

Because of the foregoing, it would be unnecessary to discuss the second error raised by petitioner.

WHEREFORE, premises considered, the petition is *GRANTED*. The April 26, 2006 Decision and August 15, 2006 Resolution of the Court of Appeals in CA-G.R. CV No. 68165 are hereby *REVERSED* and *SET ASIDE*. The Complaint in Civil Case No. 96-1665 is *DISMISSED*.

SO ORDERED.

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

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[37] *Malayan Insurance Co., Inc. v. Regis Brokerage Corp., supra* note 23, at 692-693. (Emphasis supplied.)

THIRD DIVISION

[G.R. No. 177066. September 11, 2009]

JOSELITO MUSNI PUNO (as heir of the late Carlos Puno), *petitioner, vs.* **PUNO ENTERPRISES, INC., represented by JESUSA PUNO,** *respondent.*

SYLLABUS

1. REMEDIAL LAW; APPEALS; FACTUAL FINDINGS OF THE COURT OF APPEALS, SUPPORTED BY SUBSTANTIAL EVIDENCE, ARE CONCLUSIVE AND BINDING. — Incessantly, we have declared that factual findings of the CA supported by substantial evidence, are conclusive and binding. In an appeal via *certiorari*, the Court may not review the factual findings of the CA. It is not the Court's function under Rule 45 of the Rules of Court to review, examine, and evaluate or weigh the probative value of the evidence presented.

2. CIVIL LAW; PATERNITY AND FILIATION; CIVIL REGISTRAR HAS NO AUTHORITY TO RECORD THE PATERNITY OF AN ILLEGITIMATE CHILD ON THE INFORMATION OF A THIRD PERSON. — A certificate of live birth purportedly identifying the putative father is not competent evidence of paternity when there is no showing that the putative father had a hand in the preparation of the certificate. The local civil registrar has no authority to record the paternity of an illegitimate child on the information of a third person.

3. COMMERCIAL LAW; CORPORATION LAW; CORPORATIONS; PERSONS ENTITLED TO INSPECT THE BOOKS AND RECEIVE THE DIVIDENDS OF THE CORPORATION. — In any case, Sections 74 and 75 of the Corporation Code enumerate the persons who are entitled to the inspection of corporate books, thus — Sec. 74. *Books to be kept; stock transfer agent.* — x x x. The records of all business transactions of the corporation and the minutes of any meeting shall be open to the inspection of any **director, trustee, stockholder** or member of the corporation at reasonable hours on business days and he may demand, in writing, for a copy of excerpts from said records or minutes, at his expense. x x x. The

stockholder's right of inspection of the corporation's books and records is based upon his ownership of shares in the corporation and the necessity for self-protection. After all, a shareholder has the right to be intelligently informed about corporate affairs. Such right rests upon the stockholder's underlying ownership of the corporation's assets and property. Similarly, only stockholders of record are entitled to receive dividends declared by the corporation, a right inherent in the ownership of the shares.

4. ID.; ID.; ID.; HEIRS OF THE DECEASED STOCKHOLDER DO NOT AUTOMATICALLY BECOME STOCKHOLDERS OF THE CORPORATION AND ACQUIRE THE RIGHT AND PRIVILEGE THEREOF. — Upon the death of a shareholder, the heirs do not automatically become stockholders of the corporation and acquire the rights and privileges of the deceased as shareholder of the corporation. The stocks must be distributed first to the heirs in estate proceedings, and the transfer of the stocks must be recorded in the books of the corporation. Section 63 of the Corporation Code provides that no transfer shall be valid, except as between the parties, until the transfer is recorded in the books of the corporation. During such interim period, the heirs stand as the equitable owners of the stocks, the executor or administrator duly appointed by the court being vested with the legal title to the stock. Until a settlement and division of the estate is effected, the stocks of the decedent are held by the administrator or executor. Consequently, during such time, it is the administrator or executor who is entitled to exercise the rights of the deceased as stockholder.

5. CIVIL LAW; PATERNITY AND FILIATION; THE STATUS OF AN ILLEGITIMATE CHILD WHO CLAIMS TO BE AN HEIR TO A DECEDENT'S ESTATE CANNOT BE ADJUDICATED IN AN ORDINARY CIVIL ACTION. — [A] determination of whether a person, claiming proprietary rights over the estate of a deceased person, is an heir of the deceased must be ventilated in a special proceeding instituted precisely for the purpose of settling the estate of the latter. The status of an illegitimate child who claims to be an heir to a decedent's estate cannot be adjudicated in an ordinary civil action, as in a case for the recovery of property. The doctrine applies to the instant case, which is one for specific performance — to

direct respondent corporation to allow petitioner to exercise rights that pertain only to the deceased and his representatives.

APPEARANCES OF COUNSEL

Enrico G. Barin for petitioner.
Joey D. Morales for respondent.

D E C I S I O N

NACHURA, *J.*:

Upon the death of a stockholder, the heirs do not automatically become stockholders of the corporation; neither are they mandatorily entitled to the rights and privileges of a stockholder. This, we declare in this petition for review on *certiorari* of the Court of Appeals (CA) Decision[1] dated October 11, 2006 and Resolution dated March 6, 2007 in CA-G.R. CV No. 86137.

The facts of the case follow:

Carlos L. Puno, who died on June 25, 1963, was an incorporator of respondent Puno Enterprises, Inc. On March 14, 2003, petitioner Joselito Musni Puno, claiming to be an heir of Carlos L. Puno, initiated a complaint for specific performance against respondent. Petitioner averred that he is the son of the deceased with the latter's common-law wife, Amelia Puno. As surviving heir, he claimed entitlement to the rights and privileges of his late father as stockholder of respondent. The complaint thus prayed that respondent allow petitioner to inspect its corporate book, render an accounting of all the transactions it entered into from 1962, and give petitioner all the profits, earnings, dividends, or income pertaining to the shares of Carlos L. Puno.[2]

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[1] Penned by Associate Justice Conrado M. Vasquez, Jr. (now Presiding Justice of the Court of Appeals) with Associate Justices Mariano C. del Castillo (now Associate Justice of the Supreme Court) and Santiago Javier Ranada, concurring; *rollo*, pp. 28-36.

[2] Records, pp. 1-4.

Respondent filed a motion to dismiss on the ground that petitioner did not have the legal personality to sue because his birth certificate names him as "Joselito Musni Muno." Apropos, there was yet a need for a judicial declaration that "Joselito Musni Puno" and "Joselito Musni Muno" were one and the same.

The court ordered that the proceedings be held in abeyance, ratiocinating that petitioner's certificate of live birth was no proof of his paternity and relation to Carlos L. Puno.

Petitioner submitted the corrected birth certificate with the name "Joselito M. Puno," certified by the Civil Registrar of the City of Manila, and the Certificate of Finality thereof. To hasten the disposition of the case, the court conditionally admitted the corrected birth certificate as genuine and authentic and ordered respondent to file its answer within fifteen days from the order and set the case for pretrial.[3]

On October 11, 2005, the court rendered a Decision, the dispositive portion of which reads:

> WHEREFORE, judgment is hereby rendered ordering Jesusa Puno and/or Felicidad Fermin to allow the plaintiff to inspect the corporate books and records of the company from 1962 up to the present including the financial statements of the corporation.
>
> The costs of copying shall be shouldered by the plaintiff. Any expenses to be incurred by the defendant to be able to comply with this order shall be the subject of a bill of costs.
>
> SO ORDERED.[4]

On appeal, the CA ordered the dismissal of the complaint in its Decision dated October 11, 2006. According to the CA, petitioner was not able to establish the paternity of and his filiation to Carlos L. Puno since his birth certificate was prepared without the intervention of and the participatory acknowledgment of paternity by Carlos L. Puno. Accordingly, the CA said that petitioner had no right to demand that he be allowed to examine

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[3] *Id.* at 96.

[4] *Rollo,* p. 30.

respondent's books. Moreover, petitioner was not a stockholder of the corporation but was merely claiming rights as an heir of Carlos L. Puno, an incorporator of the corporation. His action for specific performance therefore appeared to be premature; the proper action to be taken was to prove the paternity of and his filiation to Carlos L. Puno in a petition for the settlement of the estate of the latter.[5]

Petitioner's motion for reconsideration was denied by the CA in its Resolution[6] dated March 6, 2007.

In this petition, petitioner raises the following issues:

I. THE HONORABLE COURT OF APPEALS ERRED IN NOT RULING THAT THE JOSELITO PUNO IS ENTITLED TO THE RELIEFS DEMANDED HE BEING THE HEIR OF THE LATE CARLOS PUNO, ONE OF THE INCORPORATORS [OF] RESPONDENT CORPORATION.

II. HONORABLE COURT OF APPEALS ERRED IN RULING THAT FILIATION OF JOSELITO PUNO, THE PETITIONER[,] IS NOT DULY PROVEN OR ESTABLISHED.

III. THE HONORABLE COURT ERRED IN NOT RULING THAT JOSELITO MUNO AND JOSELITO PUNO REFERS TO THE ONE AND THE SAME PERSON.

IV. THE HONORABLE COURT OF APPEALS ERRED IN NOT RULING THAT WHAT RESPONDENT MERELY DISPUTES IS THE SURNAME OF THE PETITIONER WHICH WAS MISSPELLED AND THE FACTUAL ALLEGATION *E.G.* RIGHTS OF PETITIONER AS HEIR OF CARLOS PUNO ARE DEEMED ADMITTED HYPOTHETICALLY IN THE RESPONDENT[']S] MOTION TO DISMISS.

V. THE HONORABLE COURT OF APPEALS THEREFORE ERRED I[N] DECREEING THAT PETITIONER IS NOT ENTITLED TO INSPECT THE CORPORATE BOOKS OF DEFENDANT CORPORATION.[7]

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[5] *Id.* at 31-35.

[6] CA *rollo,* pp. 90-91.

[7] *Rollo,* pp. 21-22.

The petition is without merit. Petitioner failed to establish the right to inspect respondent corporation's books and receive dividends on the stocks owned by Carlos L. Puno.

Petitioner anchors his claim on his being an heir of the deceased stockholder. However, we agree with the appellate court that petitioner was not able to prove satisfactorily his filiation to the deceased stockholder; thus, the former cannot claim to be an heir of the latter.

Incessantly, we have declared that factual findings of the CA supported by substantial evidence, are conclusive and binding.[8] In an appeal via *certiorari*, the Court may not review the factual findings of the CA. It is not the Court's function under Rule 45 of the Rules of Court to review, examine, and evaluate or weigh the probative value of the evidence presented.[9]

A certificate of live birth purportedly identifying the putative father is not competent evidence of paternity when there is no showing that the putative father had a hand in the preparation of the certificate. The local civil registrar has no authority to record the paternity of an illegitimate child on the information of a third person.[10] As correctly observed by the CA, only petitioner's mother supplied the data in the birth certificate and signed the same. There was no evidence that Carlos L. Puno acknowledged petitioner as his son.

As for the baptismal certificate, we have already decreed that it can only serve as evidence of the administration of the sacrament on the date specified but not of the veracity of the entries with respect to the child's paternity.[11]

In any case, Sections 74 and 75 of the Corporation Code enumerate the persons who are entitled to the inspection of corporate books, thus —

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[8] *Fernandez v. Tarun,* 440 Phil. 334, 349 (2002).

[9] *Social Security System v. Aguas,* G.R. No. 165546, February 27, 2006, 483 SCRA 383, 395-396.

[10] *Cabatania v. Court of Appeals,* 484 Phil. 42, 51 (2004).

[11] *Id*.

Sec. 74. *Books to be kept; stock transfer agent.* — x x x.

The records of all business transactions of the corporation and the minutes of any meeting shall be open to the inspection of any **director, trustee, stockholder** or member of the corporation at reasonable hours on business days and he may demand, in writing, for a copy of excerpts from said records or minutes, at his expense.

x x x x x x x x x

Sec. 75. *Right to financial statements.* — Within ten (10) days from receipt of a written request of any stockholder or member, the corporation shall furnish to him its most recent financial statement, which shall include a balance sheet as of the end of the last taxable year and a profit or loss of statement for said taxable year, showing in reasonable detail its assets and liabilities and the result of its operations.[12]

The stockholder's right of inspection of the corporation's books and records is based upon his ownership of shares in the corporation and the necessity for self-protection. After all, a shareholder has the right to be intelligently informed about corporate affairs.[13] Such right rests upon the stockholder's underlying ownership of the corporation's assets and property.[14]

Similarly, only stockholders of record are entitled to receive dividends declared by the corporation, a right inherent in the ownership of the shares.[15]

Upon the death of a shareholder, the heirs do not automatically become stockholders of the corporation and acquire the rights and privileges of the deceased as shareholder of the corporation. The stocks must be distributed first to the heirs in estate

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[12] Emphasis supplied.

[13] 5A Fletcher Cyclopedia of the Law of Private Corporations, §2213.

[14] *Gokongwei, Jr. v. Securities and Exchange Commission*, 178 Phil. 266, 314 (1979).

[15] Cesar Villanueva, *PHILIPPINE CORPORATE LAW*, p. 259, citing *Nielson & Co., Inc. v. Lepanto Consolidated Mining Co.*, 26 SCRA 540 (1968); Lopez, Rosario, *THE CORPORATION CODE OF THE PHILIPPINES*, p. 617, citing *Knight v. Schultz,* 141 Ohio St. 267, 47 NE (2d) 286.

proceedings, and the transfer of the stocks must be recorded in the books of the corporation. Section 63 of the Corporation Code provides that no transfer shall be valid, except as between the parties, until the transfer is recorded in the books of the corporation.[16] During such interim period, the heirs stand as the equitable owners of the stocks, the executor or administrator duly appointed by the court being vested with the legal title to the stock.[17] Until a settlement and division of the estate is effected, the stocks of the decedent are held by the administrator or executor.[18] Consequently, during such time, it is the administrator or executor who is entitled to exercise the rights of the deceased as stockholder.

Thus, even if petitioner presents sufficient evidence in this case to establish that he is the son of Carlos L. Puno, he would still not be allowed to inspect respondent's books and be entitled to receive dividends from respondent, absent any showing in its transfer book that some of the shares owned by Carlos L. Puno were transferred to him. This would only be possible if petitioner has been recognized as an heir and has participated in the settlement of the estate of the deceased.

Corollary to this is the doctrine that a determination of whether a person, claiming proprietary rights over the estate of a deceased person, is an heir of the deceased must be ventilated in a special proceeding instituted precisely for the purpose of settling the estate of the latter. The status of an illegitimate child who claims to be an heir to a decedent's estate cannot be adjudicated in an ordinary civil action, as in a case for the recovery of property.[19] The doctrine applies to the instant case, which is one for specific performance — to direct respondent corporation to allow petitioner to exercise rights that pertain only to the deceased and his representatives.

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[16] Rosario Lopez, *The Corporation Code of the Philippines*, Vol. 2, p. 718, citing *Miguel A.B. Sison, et al. v. Hon. Agellon, et al.*, SEC-EB No. 293, November 23, 1992.

[17] 5A Fletcher Cyclopedia of the Law of Private Corporations., §2213.

[18] *Tan v. Sycip*, G.R. No. 153468, August 17, 2006, 499 SCRA 216, 231.

[19] *Joaquino v. Reyes*, G.R. No. 154645, July 13, 2004, 434 SCRA 260, 274.

WHEREFORE, premises considered, the petition is *DENIED*. The Court of Appeals Decision dated October 11, 2006 and Resolution dated March 6, 2007 are *AFFIRMED*.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Velasco, Jr., and *Peralta, JJ.,* concur.

THIRD DIVISION

[G.R. No. 179799. September 11, 2009]

ZENAIDA R. GREGORIO, *petitioner, vs.* **COURT OF APPEALS, SANSIO PHILIPPINES, INC., and EMMA J. DATUIN,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; ACTIONS; THE NATURE OF AN ACTION IS DETERMINED BY THE MATERIAL AVERMENTS IN THE COMPLAINT AND THE CHARACTER OF THE RELIEF SOUGHT. — A perusal of the allegations of Gregorio's complaint for damages readily shows that she filed a civil suit against Sansio and Datuin for filing against her criminal charges for violation of B.P. Blg. 22; that respondents did not exercise diligent efforts to ascertain the true identity of the person who delivered to them insufficiently funded checks as payment for the various appliances purchased; and that respondents never gave her the opportunity to controvert the charges against her, because they stated an incorrect address in the criminal complaint. Gregorio claimed damages for the embarrassment and humiliation she suffered when she was suddenly arrested at her city residence in Quezon City while visiting her family. She was, at the time of her arrest, a respected *Kagawad* in Oas, Albay. Gregorio anchored her civil complaint

on Articles 26, 2176, and 2180 of the Civil Code. Noticeably, despite alleging either fault or negligence on the part of Sansio and Datuin, Gregorio never imputed to them any bad faith in her complaint. Basic is the legal principle that the nature of an action is determined by the material averments in the complaint and the character of the relief sought. Undeniably, Gregorio's civil complaint, read in its entirety, is a complaint based on quasi-delict under Article 2176, in relation to Article 26 of the Civil Code, rather than on malicious prosecution.

2. CIVIL LAW; QUASI DELICTS; ELEMENTS. — In every tort case filed under Article 2176 of the Civil Code, the plaintiff has to prove by a preponderance of evidence: (1) the damages suffered by him; (2) the fault or negligence of the defendant or some other person to whose act he must respond; (3) the connection of cause and effect between the fault or negligence and the damages incurred; and (4) that there must be no preexisting contractual relation between the parties.

3. ID.; ID.; ID.; PRESENT IN CASE AT BAR. — A scrutiny of Gregorio's civil complaint reveals that the averments thereof, taken together, fulfill the elements of Article 2176, in relation to Article 26 of the Civil Code. It appears that Gregorio's rights to personal dignity, personal security, privacy, and peace of mind were infringed by Sansio and Datuin when they failed to exercise the requisite diligence in determining the identity of the person they should rightfully accuse of tendering insufficiently funded checks. This fault was compounded when they failed to ascertain the correct address of petitioner, thus depriving her of the opportunity to controvert the charges, because she was not given proper notice. Because she was not able to refute the charges against her, petitioner was falsely indicted for three (3) counts of violation of B.P. Blg. 22. Although she was never found at No. 76 Peñaranda St., Legaspi City, the office address of Alvi Marketing as stated in the criminal complaint, Gregorio was conveniently arrested by armed operatives of the PARAC-DILG at her city residence at 78 K-2 St., Kamuning, Quezon City, while visiting her family. She suffered embarrassment and humiliation over her sudden arrest and detention and she had to spend time, effort, and money to clear her tarnished name and reputation, considering that she had held several honorable positions in different organizations and offices in the public service, particularly her being a

Kagawad in Oas, Albay at the time of her arrest. There exists no contractual relation between Gregorio and Sansio. On the other hand, Gregorio is prosecuting Sansio, under Article 2180 of the Civil Code, for its vicarious liability, as employer, arising from the act or omission of its employee Datuin. These allegations, assuming them to be true, sufficiently constituted a cause of action against Sansio and Datuin. Thus, the RTC was correct when it denied respondents' motion to dismiss.

4. ID.; HUMAN RELATIONS; ARTICLE 26 OF THE CIVIL CODE; GRANTS A CAUSE OF ACTION FOR DAMAGES FOR BREACH NOT CONSTITUTING A CRIMINAL OFFENSE. — On the other hand, Article 26 of the Civil Code grants a cause of action for damages, prevention, and other relief in cases of breach, though not necessarily constituting a criminal offense, of the following rights: (1) right to personal dignity; (2) right to personal security; (3) right to family relations; (4) right to social intercourse; (5) right to privacy; and (6) right to peace of mind.

5. ID.; DAMAGES; ACTION FOR DAMAGES FOR MALICIOUS PROSECUTION; ELEMENTS; NOT PRESENT IN CASE AT BAR; PETITIONER'S ACTION IS BASED ON *QUASI DELICT*. — Sansio and Datuin are in error when they insist that Gregorio's complaint is based on malicious prosecution. In an action to recover damages for malicious prosecution, it must be alleged and established that Sansio and Datuin were impelled by legal malice or bad faith in deliberately initiating an action against Gregorio, knowing that the charges were false and groundless, intending to vex and humiliate her. As previously mentioned, Gregorio did not allege this in her complaint. Moreover, the fact that she prayed for moral damages did not change the nature of her action based on quasi-delict. She might have acted on the mistaken notion that she was entitled to moral damages, considering that she suffered physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, and social humiliation on account of her indictment and her sudden arrest. Verily, Gregorio was only acting within her right when she instituted against Sansio and Datuin an action she perceived to be proper, given the factual antecedents of the case.

APPEARANCES OF COUNSEL

Acejo Gotiangco Sempio & Associates Law Offices for petitioner.
Chua & Associates Law Office for respondents.

D E C I S I O N

NACHURA, *J.*:

This is a petition[1] for *certiorari* under Rule 45 of the Rules of Court assailing the Decision[2] of the Court of Appeals (CA) dated January 31, 2007 and its Resolution[3] dated September 12, 2007 in CA-G.R. SP No. 63602, entitled "*Sansio Philippines, Inc., et al. v. Hon. Romulo SG. Villanueva, et al.*"

The case arose from the filing of an Affidavit of Complaint[4] for violation of *Batas Pambansa Bilang* (B.P. Blg.) 22 (Bouncing Checks Law) by respondent Emma J. Datuin (Datuin), as Officer-in-Charge of the Accounts Receivables Department, and upon authority of petitioner Sansio Philippines, Inc. (Sansio), against petitioner Zenaida R. Gregorio (Gregorio) and one Vito Belarmino, as proprietors of Alvi Marketing, allegedly for delivering insufficiently funded bank checks as payment for the numerous appliances bought by Alvi Marketing from Sansio.

As the address stated in the complaint was incorrect, Gregorio was unable to controvert the charges against her. Consequently, she was indicted for three (3) counts of violation of B.P. Blg. 22, docketed as Criminal Case Nos. 236544, 236545, and 236546, before the Metropolitan Trial Court (MeTC), Branch 3, Manila.

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[1] *Rollo,* pp. 8-45.

[2] Penned by Associate Justice Amelita G. Tolentino, with Associate Justices Conrado M. Vasquez, Jr. (now Presiding Justice) and Lucenito N. Tagle, concurring; *id.* at 46-59.

[3] *Rollo,* p. 60.

[4] *Id.* at 61-62.

The MeTC issued a warrant[5] for her arrest, and it was served upon her by the armed operatives of the Public Assistance and Reaction Against Crime (PARAC) of the Department of Interior and Local Government (DILG) on October 17, 1997, Friday, at around 9:30 a.m. in Quezon City while she was visiting her husband and their two (2) daughters at their city residence. Gregorio was brought to the PARAC-DILG Office where she was subjected to fingerprinting and mug shots, and was detained. She was released in the afternoon of the same day when her husband posted a bond for her temporary liberty.

On December 5, 1997, Gregorio filed before the MeTC a Motion[6] for Deferment of Arraignment and Reinvestigation, alleging that she could not have issued the bounced checks, since she did not even have a checking account with the bank on which the checks were drawn, as certified by the branch manager of the Philippine National Bank, Sorsogon Branch. She also alleged that her signature was patently and radically different from the signatures appearing on the bounced checks.

The MeTC granted the Motion and a reinvestigation was conducted. In the course of the reinvestigation, Datuin submitted an Affidavit of Desistance[7] dated August 18, 1998, stating, among others, that Gregorio was not one of the signatories of the bounced checks subject of prosecution.

Subsequently, the assistant city prosecutor filed a Motion to Dismiss[8] dated November 12, 1998 with respect to Criminal Case Nos. 236544-46. The MeTC granted the motion and ordered the B.P. Blg. 22 cases dismissed.[9]

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[5] *Id.* at 64.

[6] *Id.* at 70-72.

[7] *Id.* at 73.

[8] *Id.* at 76.

[9] *Id.* at 77.

On August 18, 2000, Gregorio filed a complaint[10] for damages against Sansio and Datuin before the Regional Trial Court (RTC), Branch 12, Ligao, Albay. The complaint, in part, reads —

4. That on or about December 15, 1995, defendant Emma J. Datuin filed with the Office of the City Prosecutor of Manila an "Affidavit of Complaint" wherein, among others, she alleged under oath that as an Officer In-charge of the Accounts Receivables Department of SANSIO PHILIPPINES, INC., she was duly authorized and empowered by said company to file cases against debtors, customers and dealers of the company;

x x x x x x x x x

5. That while acting under authority of her employer namely the defendant SANSIO PHILIPPINES, INC., defendant EMMA J. DATUIN falsely stated in the "Affidavit of Complaint" (Annex "A"), among others, that plaintiff Zenaida R. Gregorio issued and delivered to their office the following checks, to wit:

a. PNB Check No. C-347108 dated November 30, 1992 in the amount of ₱9,564.00;
b. PNB Check No. C-347109 dated November 30, 1992 in the amount of ₱19,194.48; and
c. PNB Check No. C-347104 dated December 2, 1992 in the amount of ₱10,000.00

and that the above-mentioned PNB Checks bounced when deposited upon maturity;

6. That as a result of the filing of the "Affidavit of Complaint" (Annex "A") wherein defendant Emma J. Datuin falsely charged the plaintiff with offenses of Estafa and/or violation of B.P. Blg. 22 on three (3) counts, the Office of the City Prosecutor of Manila issued a Resolution dated April 1, 1996 finding the existence of a probable cause against the plaintiff for violation of Batas Pambansa Blg. 22 on three counts;

x x x x x x x x x

7. That in the "MEMO OF PRELIMINARY INVESTIGATION" attached hereto as Annex "C", signed by defendant Emma J. Datuin she falsely indicated the address of plaintiff to be at No. 76 Peñaranda

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[10] *Id.* at 78-85.

Street, Legaspi City when the truth of the matter is that the latter's correct address is at Barangay Rizal, Oas, Albay;

8. That as a consequence of the aforegoing false and misleading indication of address, plaintiff was therefore not duly notified of the charges filed against her by defendant Emma J. Datuin; and more, she was not able to controvert them before the investigating prosecutor, finally resulting in the filing in court of three (3) informations accusing her of violating B.P. 22;

x x x x x x x x x

9. That as pernicious result of the unwarranted and baseless accusation by the defendants which culminated in the filing of three (3) informations in the Metropolitan Trial Court of Manila, Branch 3 indicting the plaintiff on three counts of the offense of violating B.P. 22, the said court issued a Warrant of Arrest on July 22, 1996 ordering the arrest of the plaintiff;

x x x x x x x x x

10. That taking extra effort to expedite the apprehension of plaintiff, defendants' retained private prosecutor managed to obtain the Warrant for the Arrest of said plaintiff from the Court as evidenced by the copy of the letter of lawyer Alquin B. Manguerra of Chua and Associates Law Office (Annex "H") so much so that in the morning of October 17, 1997, while plaintiff was visiting her husband Jose Gregorio and their two daughters at their city residence at 78 K-2 Street, Kamuning, Quezon City, and without the slightest premonition that she was wanted by the law, armed operatives of the Public Assistance and Reaction Against Crime (PARAC) of DILG suddenly swooped down on their residence, arrested the plaintiff and brought her to the PARAC DILG Office in Quezon City where she was fingerprinted and detained like an ordinary criminal;

x x x x x x x x x

11. That feeling distraught, helpless and hungry (not having eaten for a whole day) the plaintiff languished in her place of confinement until the late afternoon of October 17, 1997 when her husband was able to post a bond for her temporary liberty and secure an order of release (Annex "J") from the court. It was providential that a city judge was available in the late afternoon of October 17, 1997 which was a Friday, otherwise plaintiff would have remained in confinement for the entire weekend;

12. That because of her desire to prove and establish her innocence of the unjustified charges lodged against her by the defendants, the plaintiff was thus compelled to retain the services of counsel resulting in the filing of a Motion for Deferment of Arraignment and Reinvestigation (Annex "K") which was granted by the court; the filing of a Request for Reinvestigation with the prosecutor's office (Annex "L"); and the submission of a Counter-Affidavit to the investigating prosecutor. All of these culminated in the filing by the investigating prosecutor of a Motion to Dismiss (Annex "M") the three criminal cases as a consequence of which the Court issued an Order dated June 1, 1999 (Annex "N") dismissing Criminal Cases No. 236544, No. 236545 and No. 236546, copy of which was received by plaintiff only on July 7, 2000;

13. That previous to the filing of the above-mentioned Motion to Dismiss by the prosecutor and having been faced with the truth and righteousness of plaintiff's avowal of innocence which was irrefutable, defendants had no recourse but to concede and recognize the verity that they had wrongly accused an innocent person, in itself a brazen travesty of justice, so much so that defendant Emma J. Datuin had to execute an Affidavit of Desistance (Annex "O") admitting that plaintiff is not a signatory to the three bouncing checks in question, rationalizing, albeit lamely, that the filing of the cases against the plaintiff was by virtue of an honest mistake or inadvertence on her (Datuin's) part;

14. **Be that as it may, incalculable damage has been inflicted on the plaintiff on account of the defendants' wanton, callous and reckless disregard of the fundamental legal precept that "every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons" *(Art. 26, Civil Code of the Philippines)***;

15. That the plaintiff, being completely innocent of the charges against her as adverted to in the preceding paragraphs, was socially humiliated, embarrassed, suffered physical discomfort, mental anguish, fright, and serious anxiety as a proximate result of her unjustified indictment, arrest and detention at the PARAC headquarters – all of these ordeals having been exacerbated by the fact that plaintiff is a woman who comes from a respected family in Oas, Albay, being the wife of an executive of the Philippine National Construction Corporation, the mother of two college students studying in Manila, a pharmacist by profession, a businesswoman by occupation, and an incumbent Municipal Councilor *(Kagawad)* of Oas, Albay, at the

time of her arrest and detention; and that she previously held the following positions:

(a). President, Philippine Pharmaceutical Association (Albay Chapter);
(b). Chairman of the Board, Albay Pharmaceutical Marketing Cooperative (ALPHAMAC);
(c). Charter Secretary, Kiwanis Club of Oas;
(d). Chairman, Polangui Ladies Multi-Purpose Cooperative, Polangui, Albay;
(e). Vicarial Regent, Daughters of Mary Immaculate International, District IX;
(f). Chapter President and Municipal Coordinator, Albay Women Volunteers Association, Inc., Legaspi City;
(g). Regent, Daughters of Mary Immaculate International Virgo Clemens Circle, Oas, Albay;
(h). Secretary, Girl Scout of the Philippines District Association; and
(i). Director, Albay Electric Cooperative (ALECO),

not to mention the undue aspersion cast upon her social, professional and business reputation because of defendants' tortious act of accusing her of Estafa and/or issuing bouncing checks – even without a scintilla of evidence;

16. That to compound the aforegoing travails and sufferings of the plaintiff she had to devote and spend much of her time, money and efforts trying to clear her tarnished name and reputation, including traveling to and from Manila to confer with her lawyer, attend the hearings at the prosecutor's office and at the Metropolitan Trial Court;

17. By and large, defendants' fault or, at the very least, their reckless imprudence or negligence, in filing the three (3) criminal cases against the plaintiff unequivocally caused damage to the latter and because of defendants' baseless and unjustified accusations, plaintiff was constrained to retain the services of a lawyer to represent her at the Metropolitan Trial Court and at the Office of the City Prosecutor at Manila in order to establish her innocence and cause the dismissal of the three (3) criminal cases filed against her, reason for which she spent ₱20,000.00; and in order to institute this instant action for the redress of her grievances, plaintiff have to pay the sum of ₱50,000.00 as attorney's fees and incur litigation expenses in the amount of ₱35,000.00;

18. **That by reason of all the aforegoing and pursuant to the provision of law that "whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done," (Article 2176, Civil Code of the Philippines), the plaintiff is entitled to and hereby claims the following items of damages**:

a. ₱3,000,000.00 as moral damages
b. ₱50,000.00 as actual damages
c. ₱50,000.00 as nominal damages
d. ₱70,000.00 as attorney's fees
e. ₱35,000.00 as litigation expenses

19. **That defendants herein are jointly and solidarily liable for the payment of the above items of damages being co-tortfeasors. Moreover, defendant SANSIO PHILIPPINES, INC. is vicariously liable as the employer of defendant Emma J. Datuin who patently acted within the scope of her assigned tasks *(Vide: Art. 2180, Civil Code of the Philippines)***.[11]

Sansio and Datuin filed a Motion to Dismiss[12] on the ground that the complaint, being one for damages arising from malicious prosecution, failed to state a cause of action, as the ultimate facts constituting the elements thereof were not alleged in the complaint. Gregorio opposed[13] the Motion. Sansio and Datuin filed their Reply[14] to the Opposition. Gregorio, in turn, filed her Rejoinder.[15]

On October 10, 2000, the RTC issued an Order[16] denying the Motion to Dismiss. Sansio and Datuin filed a Motion for Reconsideration[17] of the October 10, 2000 Order, but the RTC denied the same in its Order[18] dated January 5, 2001.

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[11] *Id.* at 78-83. (Underscoring supplied.)

[12] *Id.* at 109-116.

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

[14] *Id.* at 120-122.

[15] *Id.* at 123-124.

[16] *Id.* at 127-129.

[17] *Id.* at 130-135.

[18] *Id.* at 136-137.

Sansio and Datuin went to the CA via a petition[19] for *certiorari* under Rule 65 of the Rules of Court alleging grave abuse of discretion on the part of the presiding judge of the RTC in denying their motions to dismiss and for reconsideration.

Meanwhile, on March 20, 2003, the RTC rendered its Decision in the civil case for damages instituted by Gregorio, directing Sansio and Datuin, jointly and solidarily, to pay Gregorio ₱200,000.00 as moral damages; ₱10,000.00 as nominal damages; ₱35,000.00 as litigation expenses; ₱30,000.00 as attorney's fees; and costs of the suit. The RTC expressly stated in its Decision that the complaint was one for damages based on quasi-delict and not on malicious prosecution.

Aggrieved by the March 20, 2003 Decision, Sansio and Datuin appealed to the CA, and the same is now pending resolution.

On January 31, 2007, the CA rendered a Decision on the *certiorari* case granting the petition and ordering the dismissal of the damage suit of Gregorio. The latter moved to reconsider the said Decision but the same was denied in the appellate court's Resolution dated September 12, 2007.

Hence, this petition.

The core issue to be resolved, as culled from the factual circumstances of this case, is whether the complaint, a civil suit filed by Gregorio, is based on quasi-delict or malicious prosecution.

It is the position of Sansio and Datuin that the complaint for damages filed by Gregorio before the RTC was for malicious prosecution, but it failed to allege the elements thereof, such that it was aptly dismissed on appeal by the CA on the ground of lack of cause of action. In their comment, citing *Albenson Enterprise Corporation v. Court of Appeals*,[20] they posit that Article 26 of the Civil Code, cited by Gregorio as one of the bases for her complaint, and Articles 19, 20, and 21 of the same Code, mentioned by the RTC as bases for sustaining the

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[19] *Id.* at 138-152.

[20] G.R. No. 88694, January 11, 1993, 217 SCRA 16.

complaint, are the very same provisions upon which malicious prosecution is grounded. And in order to further buttress their position that Gregorio's complaint was indeed one for malicious prosecution, they even pointed out the fact that Gregorio prayed for moral damages, which may be awarded only in case of malicious prosecution or, if the case is for quasi-delict, only if physical injury results therefrom.

We disagree.

A perusal of the allegations of Gregorio's complaint for damages readily shows that she filed a civil suit against Sansio and Datuin for filing against her criminal charges for violation of B.P. Blg. 22; that respondents did not exercise diligent efforts to ascertain the true identity of the person who delivered to them insufficiently funded checks as payment for the various appliances purchased; and that respondents never gave her the opportunity to controvert the charges against her, because they stated an incorrect address in the criminal complaint. Gregorio claimed damages for the embarrassment and humiliation she suffered when she was suddenly arrested at her city residence in Quezon City while visiting her family. She was, at the time of her arrest, a respected *Kagawad* in Oas, Albay. Gregorio anchored her civil complaint on Articles 26,[21] 2176,[22] and 2180[23] of the Civil Code. Noticeably, despite

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[21] Art. 26. Every person shall respect the dignity, personality, privacy and peace of mind of his neighbors and other persons. The following and similar acts, though they may not constitute a criminal offense, shall produce a cause of action for damages, prevention and other relief:

(1) Prying into the privacy of another's residence;
(2) Meddling with or disturbing the private life or family relations of another;
(3) Intriguing to cause another to be alienated from his friends;
(4) Vexing or humiliating another on account of his religious beliefs, lowly station in life, place of birth, physical defect, or other personal condition.

[22] ART. 2176. Whoever by act or omission causes damage to another, there being fault or negligence, is obliged to pay for the damage done. Such fault or negligence, if there is no preexisting contractual relation between the parties, is called a quasi-delict and is governed by the provisions of this Chapter.

[23] ART. 2180. The obligation imposed by Article 2176 is demandable not only for one's own acts or omissions, but also for those of persons for whom one is responsible.

alleging either fault or negligence on the part of Sansio and Datuin, Gregorio never imputed to them any bad faith in her complaint.

Basic is the legal principle that the nature of an action is determined by the material averments in the complaint and the character of the relief sought.[24] Undeniably, Gregorio's civil complaint, read in its entirety, is a complaint based on quasi-delict under Article 2176, in relation to Article 26 of the Civil Code, rather than on malicious prosecution.

In every tort case filed under Article 2176 of the Civil Code, the plaintiff has to prove by a preponderance of evidence: (1) the damages suffered by him; (2) the fault or negligence of the defendant or some other person to whose act he must respond; (3) the connection of cause and effect between the fault or negligence and the damages incurred; and (4) that there must be no preexisting contractual relation between the parties.[25]

On the other hand, Article 26 of the Civil Code grants a cause of action for damages, prevention, and other relief in cases of breach, though not necessarily constituting a criminal offense, of the following rights: (1) right to personal dignity; (2) right to personal security; (3) right to family relations; (4) right to social intercourse; (5) right to privacy; and (6) right to peace of mind.[26]

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The owners and managers of an establishment or enterprise are likewise responsible for damages caused by their employees in the service of the branches in which the latter are employed or on the occasion of their functions.

Employers shall be liable for the damages caused by their employees and household helpers acting within the scope of their assigned tasks, even though the former are not engaged in any business or industry.

[24] *Hernudd v. Lofgren*, G.R. No. 140337, September 27, 2007, 534 SCRA 205, 213-214; *Barbosa v. Hernandez*, G.R. No. 133564, July 10, 2007, 527 SCRA 99, 103; *Benguet State University v. Commission on Audit*, G.R. No. 169637, June 8, 2007, 524 SCRA 437, 444; *Agoy v. Court of Appeals*, G.R. No. 162927, March 6, 2007, 517 SCRA 535, 541.

[25] *Corinthian Gardens Association, Inc. v. Tanjangco*, G.R. No. 160795, June 27, 2008, 556 SCRA 154, 168.

[26] Tolentino, A.M., *Commentaries and Jurisprudence on the Civil Code of the Philippines*, Vol. I. (1985).

A scrutiny of Gregorio's civil complaint reveals that the averments thereof, taken together, fulfill the elements of Article 2176, in relation to Article 26 of the Civil Code. It appears that Gregorio's rights to personal dignity, personal security, privacy, and peace of mind were infringed by Sansio and Datuin when they failed to exercise the requisite diligence in determining the identity of the person they should rightfully accuse of tendering insufficiently funded checks. This fault was compounded when they failed to ascertain the correct address of petitioner, thus depriving her of the opportunity to controvert the charges, because she was not given proper notice. Because she was not able to refute the charges against her, petitioner was falsely indicted for three (3) counts of violation of B.P. Blg. 22. Although she was never found at No. 76 Peñaranda St., Legaspi City, the office address of Alvi Marketing as stated in the criminal complaint, Gregorio was conveniently arrested by armed operatives of the PARAC-DILG at her city residence at 78 K-2 St., Kamuning, Quezon City, while visiting her family. She suffered embarrassment and humiliation over her sudden arrest and detention and she had to spend time, effort, and money to clear her tarnished name and reputation, considering that she had held several honorable positions in different organizations and offices in the public service, particularly her being a *Kagawad* in Oas, Albay at the time of her arrest. There exists no contractual relation between Gregorio and Sansio. On the other hand, Gregorio is prosecuting Sansio, under Article 2180 of the Civil Code, for its vicarious liability, as employer, arising from the act or omission of its employee Datuin.

These allegations, assuming them to be true, sufficiently constituted a cause of action against Sansio and Datuin. Thus, the RTC was correct when it denied respondents' motion to dismiss.

Sansio and Datuin are in error when they insist that Gregorio's complaint is based on malicious prosecution. In an action to recover damages for malicious prosecution, it must be alleged and established that Sansio and Datuin were impelled by legal malice or bad faith in deliberately initiating an action against Gregorio, knowing that the charges were false and groundless,

intending to vex and humiliate her.[27] As previously mentioned, Gregorio did not allege this in her complaint. Moreover, the fact that she prayed for moral damages did not change the nature of her action based on quasi-delict. She might have acted on the mistaken notion that she was entitled to moral damages, considering that she suffered physical suffering, mental anguish, fright, serious anxiety, besmirched reputation, wounded feelings, moral shock, and social humiliation on account of her indictment and her sudden arrest.

Verily, Gregorio was only acting within her right when she instituted against Sansio and Datuin an action she perceived to be proper, given the factual antecedents of the case.

WHEREFORE, the petition is *GRANTED*. The Decision dated January 31, 2007 and the Resolution dated September 12, 2007 are *REVERSED* and *SET ASIDE*. Costs against respondents.

SO ORDERED.

Ynares-Santiago (Chairperson), Chico-Nazario, Velasco, Jr., and *Peralta, JJ.,* concur.

EN BANC

[G.R. No. 181613. September 11, 2009]

ROSALINDA A. PENERA, *petitioner, vs.* **COMMISSION ON ELECTIONS and EDGAR T. ANDANAR,** *respondents*.

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; THE SUPREME COURT IS NOT A TRIER OF FACTS. — x x x. Crystal clear from the

[27] *Magbanua v. Junsay*, G.R. No. 132659, February 12, 2007, 515 SCRA 419, 435-437.

above arguments is that Penera is raising only questions of fact in her Petition presently before us. We do not find any reason to pass upon the same, as this Court is not a trier of facts. It is not the function of the Court to review, examine and evaluate or weigh the probative value of the evidence presented. A question of fact would arise in such an event.

2. ID.; ID.; ABSENT GRAVE ABUSE OF DISCRETION, ARBITRARINESS, FRAUD OR ERROR OF LAW, THE SUPREME COURT WILL NOT INTERFERE WITH THE FINDINGS OF FACT OF THE COMELEC. — The sole function of a writ of *certiorari* is to address issues of want of jurisdiction or grave abuse of discretion, and it does not include a review of the tribunal's evaluation of the evidence. Because of its fact-finding facilities and its knowledge derived from actual experience, the COMELEC is in a peculiarly advantageous position to evaluate, appreciate and decide on factual questions before it. Factual findings of the COMELEC, based on its own assessments and duly supported by evidence, are conclusive on this Court, more so in the absence of a grave abuse of discretion, arbitrariness, fraud, or error of law in the questioned resolutions. Unless any of these causes are clearly substantiated, the Court will not interfere with the findings of fact of the COMELEC.

3. ID.; SPECIAL CIVIL ACTIONS; *CERTIORARI*; GRAVE ABUSE OF DISCRETION; EXPLAINED; DISQUALIFICATION OF PETITIONER AS MAYORALTY CANDIDATE NOT TAINTED WITH GRAVE ABUSE OF DISCRETION. — Grave abuse of discretion is such capricious and whimsical exercise of judgment equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It must be grave, as when it is exercised arbitrarily or despotically by reason of passion or personal hostility. The abuse must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law. We find no grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the COMELEC Second Division in disqualifying Penera as a mayoralty candidate in Sta. Monica in the Resolution dated 24 July 2007; and also on the part of the COMELEC *en banc* in denying Penera's Motion for Reconsideration on the Resolution dated 30 January 2008. Said Resolutions are sufficiently supported by substantial evidence,

meaning, such evidence as a reasonable mind might accept as adequate to support a conclusion.

4. POLITICAL LAW; ELECTIONS; OMNIBUS ELECTION CODE; SECTION 80 THEREOF; PREMATURE CAMPAIGNING; THE CONDUCT OF A MOTORCADE IS A FORM OF ELECTION CAMPAIGN OR PARTISAN POLITICAL ACTIVITY. — More importantly, the conduct of a motorcade is a form of election campaign or partisan political activity, falling squarely within the ambit of Section 79(b)(2) of the Omnibus Election Code, on "[h]olding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate[.]" A motorcade is a procession or parade of automobiles or other motor vehicles. The conduct thereof during election periods by the candidates and their supporters is a fact that need not be belabored due to its widespread and pervasive practice. The obvious purpose of the conduct of motorcades is to introduce the candidates and the positions, to which they seek to be elected, to the voting public; or to make them more visible so as to facilitate the recognition and recollection of their names in the minds of the voters come election time. Unmistakably, motorcades are undertaken for no other purpose than to promote the election of a particular candidate or candidates.

5. ID.; ID.; ID.; ID.; PETITIONER IS FOUND GUILTY OF PREMATURE CAMPAIGNING. — As we previously noted, Penera and her witnesses admitted that the vehicles, consisting of two jeepneys and ten motorcycles, were festooned with multi-colored balloons; the motorcade went around three *barangays* in Sta. Monica; and Penera and her partymates waved their hands and threw sweet candies to the crowd. With vehicles, balloons, and even candies on hand, Penera can hardly persuade us that the motorcade was spontaneous and unplanned. For violating Section 80 of the Omnibus Election Code, proscribing election campaign or partisan political activity outside the campaign period, Penera must be disqualified from holding the office of Mayor of Sta. Monica.

6. STATUTORY CONSTRUCTION; STATUTES; EXPRESS REPEAL; REQUIREMENT; REPUBLIC ACT NO. 9369; DID NOT EXPRESSLY REPEAL SECTION 80 OF THE

OMNIBUS ELECTION CODE. — Section 80 of the Omnibus Election Code remains relevant and applicable despite Section 15 of Republic Act No. 8436, as amended. A close reading of the entire Republic Act No. 9369, which amended Republic Act No. 8436, would readily reveal that that it did not contain an express repeal of Section 80 of the Omnibus Election Code. An **express repeal** is one wherein a statute declares, usually in its repealing clause, that a particular and specific law, **identified by its number or title,** is repealed. Absent this specific requirement, an express repeal may not be presumed.

7. ID.; ID.; REPEAL OF LAW DISTINGUISHED FROM AMENDMENT THEREOF; REPUBLIC ACT NO. 9369; DID NOT EXPRESSLY AMEND SECTION 80 OF THE OMNIBUS ELECTION CODE. — Although the title of Republic Act No. 9369 particularly mentioned the amendment of Batas Pambansa Blg. 881, or the Omnibus Election Code, to wit: An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System x x x, **Amending for the Purpose Batas Pambansa Blg. 881, As Amended** x x x, said title explicitly mentions, not the repeal, but the **amendment** of Batas Pambansa Blg. 881. Such fact is indeed very material. *Repeal* of a law means its complete abrogation by the enactment of a subsequent statute, whereas the *amendment* of a statute means an alteration in the law already existing, leaving some part of the original still standing. Section 80 of the Omnibus Election Code is not even one of the specific provisions of the said code that were expressly **amended** by Republic Act No. 9369.

8. ID.; ID.; IMPLIED REPEAL; THE LATER STATUTE MUST BE SO IRRECONCILABLY INCONSISTENT AND REPUGNANT WITH THE EXISTING LAW THAT THEY CANNOT BE MADE TO RECONCILE AND STAND TOGETHER. — Additionally, Section 46, the repealing clause of Republic Act No. 9369, states that: Sec. 46. *Repealing Clause.* – All laws, presidential decrees, executive orders, rules and regulations or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly. Section 46 of Republic Act No. 9369 is a general repealing clause. It is a clause which predicates the intended repeal under the condition that a **substantial conflict** must be found in existing and prior acts. The failure to add a specific repealing clause

indicates that the intent was not to repeal any existing law, unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and old laws. This latter situation falls under the category of an **implied repeal.** Well-settled is the rule in statutory construction that implied repeals are disfavored. In order to effect a repeal by implication, the later statute must be so irreconcilably inconsistent and repugnant with the existing law that they cannot be made to reconcile and stand together. The clearest case possible must be made before the inference of implied repeal may be drawn, for inconsistency is never presumed. There must be a showing of repugnance clear and convincing in character. The language used in the later statute must be such as to render it irreconcilable with what had been formerly enacted. An inconsistency that falls short of that standard does not suffice.

9. ID.; ID.; ID.; THE COURT SHOULD ENDEAVOR TO RECONCILE THE TWO CONFLICTING STATUTES, IF POSSIBLE, INSTEAD OF OUTRIGHTLY INVALIDATING ONE AS AGAINST THE OTHER; NO ABSOLUTE AND IRRECONCILABLE INCOMPATIBILITY BETWEEN SECTION 15 OF REPUBLIC ACT NO. 8436, AS AMENDED AND SECTION 80 OF THE OMNIBUS ELECTION CODE. — Courts of justice, when confronted with apparently conflicting statutes, should endeavor to **reconcile** the same instead of declaring outright the invalidity of one as against the other. Such alacrity should be avoided. The wise policy is for the judge to **harmonize** them if this is possible, bearing in mind that they are equally the handiwork of the same legislature, and so give effect to both while at the same time also according due respect to a coordinate department of the government. To our mind, there is **no absolute and irreconcilable incompatibility** between Section 15 of Republic Act No. 8436, as amended, and Section 80 of the Omnibus Election Code, which defines the prohibited act of premature campaigning. It is possible to harmonize and reconcile these two provisions and, thus, give effect to both.

10. POLITICAL LAW; ELECTIONS; OMNIBUS ELECTION CODE; SECTION 80 THEREOF; PREMATURE CAMPAIGNING MAY BE COMMITTED EVEN BY A PERSON WHO IS NOT A CANDIDATE. — Section 80 of the Omnibus Election Code, on premature campaigning,

explicitly provides that "[i]t shall be unlawful for **any person, whether or not a voter or candidate,** or for any party, or association of persons, to engage in an election campaign or partisan political activity, **except during the campaign period."** Very simply, premature campaigning may be committed even by a person who is **not a candidate**. For this reason, the plain declaration in *Lanot* that "[w]hat Section 80 of the Omnibus Election Code prohibits is 'an election campaign or partisan political activity' **by a 'candidate'** 'outside' of the campaign period," is clearly erroneous.

11. ID.; ID.; ID.; PREMATURE CAMPAIGNING; THE PERSON'S ACTS, AFTER THE FILING OF HIS CERTIFICATE OF CANDIDACY AND PRIOR TO THE CAMPAIGN PERIOD, SHALL BE CONSIDERED AS PROMOTION OF HIS ELECTION AS A CANDIDATE, HENCE, CONSTITUTING PREMATURE CAMPAIGNING. — Section 79(b) of the Omnibus Election Code defines election campaign or partisan political activity in the following manner: x x x True, that pursuant to Section 15 of Republic Act No. 8436, as amended, even after the filing of the COC but before the start of the campaign period, a person is not yet officially considered a *candidate*. Nevertheless, a person, **upon the filing of his/her COC,** already **explicitly declares his/her intention** to run as a candidate in the coming elections. The commission by such a person of any of the acts enumerated under Section 79(b) of the Omnibus Election Code (*i.e.*, holding rallies or parades, making speeches, *etc*.) can, thus, be logically and reasonably construed as for the purpose of promoting his/her intended candidacy. When the campaign period starts and said person proceeds with his/her candidacy, **his/her intent turning into actuality**, we can already consider his/her acts, after the filing of his/her COC and prior to the campaign period, as the promotion of his/her election **as a candidate**, hence, constituting premature campaigning, for which he/she may be disqualified. Also, conversely, if said person, for any reason, withdraws his/her COC before the campaign period, then there is no point to view his/her acts prior to said period as acts for the promotion of his/her election as a candidate. In the latter case, there can be no premature campaigning as there is no candidate, whose disqualification may be sought, to begin with.

12. ID.; ID.; ID.; SECTION 15 OF REPUBLIC ACT NO. 8436, AS AMENDED; CONSTRUED. — *Third*, in connection with the preceding discussion, the line in Section 15 of Republic Act No. 8436, as amended, which provides that "any unlawful act or omission applicable to a candidate shall **take effect** only upon the start of the campaign period," does not mean that the acts constituting premature campaigning can only be committed, for which the offender may be disqualified, **during** the campaign period. Contrary to the pronouncement in the dissent, **nowhere** in the said *proviso* was it stated that campaigning before the start of the campaign period is lawful, such that the offender may freely carry out the same with impunity. As previously established, **a person**, after filing his/her COC but prior to his/her becoming a candidate (thus, prior to the start of the campaign period), can already **commit** the acts described under Section 79(b) of the Omnibus Election Code as election campaign or partisan political activity. However, only after said person officially becomes a candidate, at the beginning of the campaign period, can said acts be **given effect** as premature campaigning under Section 80 of the Omnibus Election Code. Only after said person officially becomes a candidate, at the start of the campaign period, can his/her **disqualification** be sought for acts constituting premature campaigning. **Obviously, it is only at the start of the campaign period, when the person officially becomes a candidate, that the undue and iniquitous advantages of his/her prior acts, constituting premature campaigning, shall accrue to his/her benefit.** Compared to the other candidates who are only about to begin their election campaign, a candidate who had previously engaged in premature campaigning already enjoys an unfair headstart in promoting his/her candidacy. As can be gleaned from the foregoing disquisition, harmony in the provisions of Sections 80 and 79 of the Omnibus Election Code, as well as Section 15 of Republic Act No. 8436, as amended, is not only very possible, but in fact desirable, necessary and consistent with the legislative intent and policy of the law.

13. ID.; ID.; ID.; ID.; RATIONALE BEHIND THE PROHIBITION AGAINST PREMATURE CAMPAIGNING. — The laudable and exemplary intention behind the prohibition against premature campaigning, as declared in *Chavez v. Commission on Elections*, is to level the playing field for candidates of public office, to equalize the situation between the popular or

rich candidates, on one hand, and lesser-known or poorer candidates, on the other, by preventing the former from enjoying undue advantage in exposure and publicity on account of their resources and popularity. The intention for prohibiting premature campaigning, as explained in *Chavez*, could not have been significantly altered or affected by Republic Act No. 8436, as amended by Republic Act No. 9369, the avowed purpose of which is to carry-on the automation of the election system. **Whether the election would be held under the manual or the automated system, the need for prohibiting premature campaigning — to level the playing field between the popular or rich candidates, on one hand, and the lesser-known or poorer candidates, on the other, by allowing them to campaign only within the same limited period — remains.** We cannot stress strongly enough that premature campaigning is a pernicious act that is continuously threatening to undermine the conduct of fair and credible elections in our country, no matter how great or small the acts constituting the same are. The choice as to who among the candidates will the voting public bestow the privilege of holding public office should not be swayed by the shrewd conduct, verging on bad faith, of some individuals who are able to spend resources to promote their candidacies in advance of the period slated for campaign activities.

14. ID.; ID.; ID.; SECTION 68 THEREOF; CONSEQUENCES FOR VIOLATION OF THE PROHIBITION AGAINST PREMATURE CAMPAIGNING. — Verily, the consequences provided for in Section 68 of the Omnibus Election Code for the commission of the prohibited act of premature campaigning are severe: the candidate who is declared guilty of committing the offense shall be disqualified from continuing as a candidate, or, if he/she has been elected, from holding office. Not to mention that said candidate also faces criminal prosecution for an election offense under Section 262 of the same Code.

15. STATUTORY CONSTRUCTION; STATUTES; SECTION 15 OF REPUBLIC ACT NO. 8436, AS AMENDED; DID NOT EXPRESSLY OR IMPLIEDLY REPEAL SECTION 80 OF THE OMNIBUS ELECTION CODE. — The Dissenting Opinion attempts to brush aside our preceding arguments by contending that there is no room for statutory construction in the present case since Section 15 of Republic Act No. 8436, as amended by Section 13 of Republic Act No. 9369, is crystal

clear in its meaning. We disagree. There would only be no need for statutory construction if there is a provision in Republic Act No. 8436 or Republic Act No. 9369 that explicitly states that there shall be no more premature campaigning. But absent the same, our position herein, as well as that of the Dissenting Opinion, necessarily rest on our respective construction of the legal provisions involved in this case. Notably, while faulting us for resorting to statutory construction to resolve the instant case, the Dissenting Opinion itself cites a rule of statutory construction, particularly, that penal laws should be liberally construed in favor of the offender. The Dissenting Opinion asserts that because of the third paragraph in Section 15 of Republic Act No. 8436, as amended, the election offense described in Section 80 of the Omnibus Election Code is practically impossible to commit at any time and that this flaw in the law, which defines a criminal act, must be construed in favor of Penera, the offender in the instant case. The application of the above rule is uncalled for. It was acknowledged in *Lanot* that a disqualification case has two aspects: one, electoral; the other, criminal. The instant case concerns only the electoral aspect of the disqualification case. Any discussion herein on the matter of Penera's criminal liability for premature campaigning would be nothing more than *obiter dictum*. More importantly, as heretofore already elaborated upon, Section 15 of Republic Act No. 8436, as amended, did not expressly or even impliedly repeal Section 80 of the Omnibus Election Code, and these two provisions, based on legislative intent and policy, can be harmoniously interpreted and given effect. Thus, there is **no flaw** created in the law, arising from Section 15 of Republic Act No. 8436, as amended, which needed to be construed in Penera's favor.

16. ID.; ID.; INTERPRETATION OF A STATUTE OR PROVISION, WHEN SHOULD BE AVOIDED. — The Dissenting Opinion, therefore, should not be too quick to pronounce the ineffectiveness or repeal of Section 80 of the Omnibus Election Code just because of a change in the meaning of *candidate* by Section 15 of Republic Act No. 8436, as amended, primarily, for administrative purposes. An interpretation should be avoided under which a statute or provision being construed is defeated, or as otherwise expressed, nullified, destroyed, emasculated, repealed, explained away, or rendered insignificant, meaningless, inoperative, or nugatory.

Indeed, not only will the prohibited act of premature campaigning be officially decriminalized, the value and significance of having a campaign period before the conduct of elections would also be utterly negated. Any unscrupulous individual with the deepest of campaign war chests could then afford to spend his/her resources to promote his/her candidacy well ahead of everyone else. Such is the very evil that the law seeks to prevent. Our lawmakers could not have intended to cause such an absurd situation.

17. REMEDIAL LAW; APPEALS; A PARTY WHO DELIBERATELY ADOPTS A CERTAIN THEORY UPON WHICH THE CASE IS TRIED AND DECIDED BY THE LOWER COURT WILL NOT BE PERMITTED TO CHANGE THEORY ON APPEAL. — Lastly, as we have observed at the beginning, Penera's Petition is essentially grounded on questions of fact. x x x. **Penera herself never raised the argument that she can no longer be disqualified for premature campaigning under Section 80, in relation to Section 68, of the Omnibus Election Code, since the said provisions have already been, in the words of the Dissenting Opinion, rendered "inapplicable," "repealed," and "done away with" by Section 15 of Republic Act No. 8436, as amended.** This legal argument was wholly raised by the Dissenting Opinion. As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal. Points of law, theories, issues, and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Basic considerations of due process underlie this rule. If we do not allow and consider the change in theory of a case by a party on appeal, should we not also refrain from *motu proprio* adopting a theory which none of the parties even raised before us?

18. POLITICAL LAW; LOCAL GOVERNMENT CODE; PERMANENT VACANCIES IN THE OFFICE OF THE MAYOR; RULES ON SUCCESSION. — Despite the disqualification of Penera, we cannot grant Andanar's prayer to be allowed to assume the position of Mayor of Sta. Monica. The well-established principle is that the ineligibility of a candidate receiving majority votes does not entitle the candidate receiving the next highest number of votes to be declared

elected. In this case, the rules on succession under the Local Government Code shall apply, to wit: SECTION 44. *Permanent Vacancies in the Offices of the Governor, Vice-Governor, Mayor, and Vice-Mayor*. — **If a permanent vacancy occurs in the office of the x x x mayor, the x x x vice-mayor concerned shall become the x x x mayor. x x x** For purposes of this Chapter, a permanent vacancy arises when an elective local official fills a higher vacant office, refuses to assume office, **fails to qualify or is removed from office,** voluntarily resigns, or is otherwise permanently incapacitated to discharge the functions of his office. Considering Penera's disqualification from holding office as Mayor of Sta. Monica, the proclaimed Vice-Mayor shall then succeed as Mayor.

CARPIO, *J., dissenting opinion:*

1. POLITICAL LAW; ELECTIONS; OMNIBUS ELECTION CODE; PREMATURE CAMPAIGNING; ELEMENTS; THERE CAN BE NO PREMATURE "ELECTION CAMPAIGN" OR "PARTISAN POLITICAL ACTIVITY" UNLESS THERE IS A CANDIDATE. — The *ponencia* relies on Sections 80 and 68 of the Omnibus Election Code. Section 80 states that "[i]t shall be unlawful for any person x x x to engage in an election campaign or partisan political activity except during the campaign period: x x x." Section 68 states that violators of Section 80 "shall be disqualified from continuing as a candidate, or if he has been elected, from holding the office." The *ponencia* also relies on this Court's enumeration in *Lanot* of the elements of premature campaigning under Section 80 of the Omnibus Election Code: (1) a person engages in an election campaign or partisan political activity; (2) **the act is designed to promote the election or defeat of a particular candidate or candidates;** and (3) the act is done outside the campaign period. However, in her reply to this dissent, the *ponente* quoted from *Lanot*, "[w]hat Section 80 of the Omnibus Election Code prohibits is 'an election campaign or partisan political activity' by a 'candidate' outside of the campaign period," and stated that the quoted portion was erroneous. I submit, however, that the quote was taken out of context. The *ponente* merely quoted in isolation and conveniently ignored the succeeding paragraph enumerating the elements of premature campaigning which she also quoted

in her *ponencia*. The *ponencia* pointed out that a private person, not just a candidate, can commit the crime of premature campaigning. True, but before a private person can commit the crime, there must first be another person who is already considered by law a "candidate." Section 79(b) of the Omnibus Election Code provides that "the term 'election campaign' or 'partisan political activity' refers to an act designed to promote the election or defeat of a particular **candidate or candidates** to public office." Thus, there can be no premature "election campaign" or "partisan political activity" unless there is a "candidate."

2. ID.; ID.; ID.; ID.; CANDIDATE DEFINED; A PERSON WHO FILES A CERTIFICATE OF CANDIDACY SHALL BE CONSIDERED A CANDIDATE, FOR THE PURPOSE OF DETERMINING POSSIBLE VIOLATIONS OF ELECTION LAWS, ONLY DURING THE CAMPAIGN PERIOD. — Section 80 of the Omnibus Election Code is not applicable to the present case because the second element requires the existence of a "candidate." The definition of a "candidate" in Section 79(a) of the Omnibus Election Code should be read together with the amended Section 15 of R.A. 8436. A "'candidate' refers to any person aspiring for or seeking an elective public office, who has filed a certificate of candidacy by himself or through an accredited political party, aggroupment or coalition of parties." However, it is no longer enough to merely file a certificate of candidacy for a person to be considered a candidate because **"any person who files his certificate of candidacy within [the filing] period shall *only be considered a candidate at the start of the campaign period* for which he filed his certificate of candidacy."** Any person may thus file a certificate of candidacy on any day within the prescribed period for filing a certificate of candidacy yet that person shall be considered a candidate, for purposes of determining one's possible violations of election laws, **only during the campaign period**. Indeed, there is no "election campaign" or "partisan political activity" designed to promote the election or defeat of a particular candidate or candidates to public office simply because there is no "candidate" to speak of prior to the start of the campaign period. Therefore, despite the filing of her certificate of candidacy, the law does not consider Penera a candidate at the time of the questioned motorcade which was conducted a day before the start of the

campaign period. In the same manner, when the law states that one is a candidate only at the start of the campaign period, determining whether any private person committed premature campaigning for a particular candidate can only be made once that prospective candidate actually files a certificate of candidacy.

3. ID.; ID.; SECTION 15 OF REPUBLIC ACT 8436, AS AMENDED BY REPUBLIC ACT 9369; EXPRESSLY REPEALS SECTION 80 OF THE OMNIBUS ELECTION CODE. — The amendment by R.A. 9369 of Section 15 of R.A. 8436 expressly declares that "unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period." This amendment expressly repeals Section 80 of the Omnibus Election Code which states that "it shall be unlawful for any person x x x to engage in an election campaign or partisan political activity except during the campaign period." In any event, even assuming that there is no express repeal, there is absolute and irreconcilable incompatibility between Section 15 of R.A. 8436, as amended, and Section 80 of the Omnibus Election Code. One provision states that campaigning before the start of the campaign period is lawful while the other provision states that campaigning before such period is unlawful. In such a case, the later law, which is R.A. 9369, shall prevail.

4. STATUTORY CONSTRUCTION; STATUTES; WHERE THE LAW IS CLEAR AND LEAVES NO ROOM FOR INTERPRETATION, RESORT TO STATUTORY CONSTRUCTION IS NOT ALLOWED; SECTION 15 OF REPUBLIC ACT 8436, AS AMENDED BY REPUBLIC ACT 9369 REQUIRES NO STATUTORY CONSTRUCTION. — There is certainly no room for statutory construction in this case. Section 15 of R.A. 8436, as amended by R.A. 9369, is crystal clear and requires no statutory construction. Section 15, as amended, expressly provides, "Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy: *Provided*, That, unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period." This amendment expressly provides that a person becomes a candidate only at the start of the campaign period. This

amendment further expressly provides that unlawful acts or omissions applicable to a candidate take effect only at the start of the campaign period. Nothing can be clearer that any act or omission done before the start of the campaign period, such as campaigning, is not punishable. Where the law is clear and leaves no room for interpretation, resort to statutory construction is not allowed.

5. ID.; ID.; THE OMNIBUS ELECTION CODE IS A PENAL LAW. — The *ponente* also conveniently ignored that penal laws are liberally construed in favor of the offender. The Omnibus Election Code is an example of a penal law since it imposes penalties for violation of its provisions. The *ponencia*'s strained interpretation of the application of Section 80 of the Omnibus Election Code to the present case is egregiously unnecessary. The facts of the case are clear: Penera committed acts for which there are no penalties.

6. POLITICAL LAW; ELECTIONS; THEORY OF THE MAJORITY. — We apply the theory of the majority to the 2010 elections. Under the theory of the majority, a person who files his certificate of candidacy between 20-30 November 2009 cannot say anything about his candidacy until 9 February 2010, the start of the campaign period. Any act of such person, including all political advertisements in all media, can be interpreted as premature campaigning. Worse, even acts done before the filing of the certificate of candidacy will be covered by the majority's prohibition on premature campaigning. All candidates who aired "infomercials" prior to the filing of their certificates of candidacy will be subject to disqualification the moment they file their certificates of candidacy. This will disqualify practically all the prospective presidential candidates who are now leading in the surveys.

7. STATUTORY CONSTRUCTION; STATUTES; REPUBLIC ACT 9369; IT IS NOT FOR THE SUPREME COURT TO QUESTION THE WISDOM OF THE POLICY BEHIND LEGISLATIVE ENACTMENTS. — Chavez asked for exemption from Section 32 because the billboards are mere product endorsement and cannot be construed as election paraphernalia. The COMELEC, however, ordered Chavez to remove or cause the removal of the billboards, or to cover them from public view during the pendency of his request for approval. Chavez asked this Court to declare Section 32

unconstitutional. This Court upheld the validity of Section 32. Chavez's possible offense is the non-removal of the described propaganda materials three days after the effectivity of COMELEC Resolution No. 6520. Failure to remove the propaganda materials will put Chavez under the presumption of conducting premature campaigning in violation of Section 80 of the Omnibus Election Code. The *Chavez* ruling declared that Chavez's billboards featuring his name and image for product endorsements assumed partisan political character because the same indirectly promoted his candidacy. The Court further held that the COMELEC merely exercised its duty to regulate the use of election propaganda materials, and upheld the validity of disallowance of the continued display of a person's propaganda materials and advertisements after he has filed a certificate of candidacy and before the start of the campaign period. At the time *Chavez* was decided by this Court, R.A. 9369 was not yet enacted into law. We cannot stress enough that when Section 13 of R.A. 9369 amended the third paragraph of Section 15 of R.A. 8436, it added **"any person who files his certificate of candidacy within [the filing] period shall *only be considered a candidate at the start of the campaign period* for which he filed his certificate of candidacy."** The effects brought about by premature campaigning as enunciated in *Chavez* are real. However, with the enactment of R.A. 9369, our lawmakers have decided to do away with the imposition of a penalty on premature campaigning. It is not for this Court to question the wisdom of the policy behind legislative enactments.

APPEARANCES OF COUNSEL

Eduardo M. Arriba for petitioner.
The Solicitor General for public respondent.
Fernando S. Almeda III for private respondent.

D E C I S I O N

CHICO-NAZARIO, *J.*:

This Petition for *Certiorari* with Prayer for the Issuance of a Writ of Preliminary Injunction and/or Temporary Restraining

Order [1] under Rule 65, in relation to Rule 64 of the Rules of Court, seeks the nullification of the Resolution[2] dated 30 January 2008 of the Commission on Elections (COMELEC) *en banc*. Said Resolution denied the Motion for Reconsideration of the earlier Resolution[3] dated 24 July 2007 of the COMELEC Second Division in SPA No. 07-224, ordering the disqualification of herein petitioner Rosalinda A. Penera (Penera) as a candidate for the position of mayor of the Municipality of Sta. Monica, Surigao del Norte (Sta. Monica) in the 2007 Synchronized National and Local Elections.

The antecedents of the case, both factual and procedural, are set forth hereunder:

Penera and private respondent Edgar T. Andanar (Andanar) were mayoralty candidates in Sta. Monica during the 14 May 2007 elections.

On 2 April 2007, Andanar filed before the Office of the Regional Election Director (ORED), Caraga Region (Region XIII), a Petition for Disqualification[4] against Penera, as well as the candidates for Vice-Mayor and *Sangguniang Bayan* who belonged to her political party,[5] for unlawfully engaging in election campaigning and partisan political activity prior to the commencement of the campaign period. The petition was docketed as SPA No. 07-224.

Andanar claimed that on 29 March 2007 — a day before the start of the authorized campaign period on 30 March 2007 —

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[1] *Rollo*, pp. 3-28.

[2] Penned by Commissioner Nicodemo T. Ferrer with Acting Chairman Resurreccion Z. Borra and Commissioners Romeo A. Brawner, Florentino A. Tuason, Jr., and Moslemen T. Macarambon, Sr., concurring, and Commissioner Rene V. Sarmiento, dissenting; *rollo*, pp. 41-52.

[3] Penned by Commissioner Nicodemo T. Ferrer with Commissioner Florentino A. Tuason, Jr., concurring, and Commissioner Rene V. Sarmiento, dissenting; *id.* at 29-40.

[4] *Id.* at 53-54.

[5] Arcelito Petallo, Renato Virtudazo, Glorina Aparente, Silverio Tajos, Jose Platil, Medardo Sunico, Edelito Lerio and Sensualito Febra.

Penera and her partymates went around the different *barangays* in Sta. Monica, announcing their candidacies and requesting the people to vote for them on the day of the elections. Attached to the Petition were the Affidavits of individuals[6] who witnessed the said incident.

Penera alone filed an Answer[7] to the Petition on 19 April 2007, averring that the charge of premature campaigning was not true. Although Penera admitted that a motorcade did take place, she explained that it was simply in accordance with the usual practice in nearby cities and provinces, where the filing of certificates of candidacy (COCs) was preceded by a motorcade, which dispersed soon after the completion of such filing. In fact, Penera claimed, in the motorcade held by her political party, no person made any speech, not even any of the candidates. Instead, there was only marching music in the background and "a grand standing for the purpose of raising the hands of the candidates in the motorcade." Finally, Penera cited *Barroso v. Ampig*[8] in her defense, wherein the Court supposedly ruled that a motorcade held by candidates during the filing of their COCs was not a form of political campaigning.

Also on 19 April 2007, Andanar and Penera appeared with their counsels before the ORED-Region XIII, where they agreed to submit their position papers and other evidence in support of their allegations.[9]

After the parties filed their respective Position Papers, the records of the case were transmitted to the COMELEC main office in Manila for adjudication. It was subsequently raffled to the COMELEC Second Division.

While SPA No. 07-224 was pending before the COMELEC Second Division, the 14 May 2007 elections took place and, as

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[6] Loreta Billona, Hermilo Botona and Victorino Florendo; *rollo*, pp. 55-57.

[7] *Id.* at 58-59.

[8] 385 Phil. 237 (2000).

[9] *Rollo*, p. 127.

a result thereof, Penera was proclaimed the duly elected Mayor of Sta. Monica. Penera soon assumed office on 2 July 2002.

On 24 July 2007, the COMELEC Second Division issued its Resolution in SPA No. 07-224, penned by Commissioner Nicodemo T. Ferrer (Ferrer), which disqualified Penera from continuing as a mayoralty candidate in Sta. Monica, for engaging in premature campaigning, in violation of Sections 80 and 68 of the Omnibus Election Code.

The COMELEC Second Division found that:

> On the afternoon of 29 March 2007, the 1st [sic] day to file the certificates of candidacy for local elective positions and a day before the start of the campaign period for the May 14, 2007 elections — [some of the members of the political party Partido Padajon Surigao], headed by their mayoralty candidate "Datty" Penera, filed their respective Certificates of Candidacy before the Municipal Election Officer of Sta. Monica, Surigao del Norte.
>
> Accompanied by a bevy of supporters, [Penera and her partymates] came to the municipal COMELEC office on board a convoy of two (2) trucks and an undetermined number of motorcycles, laden with balloons ad [sic] posters/banners containing names and pictures and the municipal positions for which they were seeking election. Installed with [sic] one of the trucks was a public speaker sound subsystem which broadcast [sic] the intent the [sic] run in the coming elections. The truck had the posters of Penera attached to it proclaiming his [sic] candidacy for mayor. The streamer of [Mar Longos, a candidate for the position of Board Member,] was proudly seen at the vehicle's side. The group proceeded to motorcade until the *barangays* of Bailan, Libertad and as afar [sic] as Mabini almost nine (9) kilometers from Sta. Monica. [Penera and her partymates] were seen aboard the vehicles and throwing candies to the residents and onlookers.
>
> Various affidavits and pictures were submitted elucidating the above-mentioned facts. The above facts were also admitted in the Answer, the Position Paper and during the hearings conducted for this case, the only defense propounded by [Penera] is that such acts allegedly do not constitute campaigning and is therefore not proscribed by the pertinent election laws.
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What we however find disturbing is [Penera's] reference to the *Ampig Case* as the justification for the acts committed by [her]. There is really no reference to the acts or similar acts committed by [Penera] as having been considered as not constituting political campaign or partisan political activity. The issue in that case is whether or not the defect of the lack of a certification against non-forum [sic] shopping should result to the immediate dismissal of the election cases filed in that case. There is nothing in said case justifying a motorcade during the filing of certificates of candidacy. [Penera's] reliance thereon is therefore misplaced and of no potency at all.

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However, the photos submitted by [Andanar] only identified [Penera] and did not have any notation identifying or indicating any of the other [candidates from Penera's party]. It cannot be conclusively proven that the other [candidates from Penera's party] were indeed with Penera during the Motorcade. More importantly, the Answer and the Position Paper contain admissions referring only to [Penera]. There is therefore no justification for a whole sale [sic] disqualification of all the [candidates from Penera's party], as even the petition failed to mention particularly the participation of the other individual [party members].[10]

The afore-quoted findings of fact led the COMELEC Second Division to decree:

PREMISES CONSIDERED, this Commission resolves to disqualify [Penera] but absolves the other [candidates from Penera's party] from violation of Section 80 and 68 of the Omnibus Elections [sic] Code.[11]

Commissioner Florentino A. Tuason, Jr. (Tuason) wrote a Separate Opinion[12] on the 24 July 2007 Resolution. Although Commissioner Tuason concurred with the *ponente*, he stressed that, indeed, Penera should be made accountable for her actions after the filing of her COC on 29 March 2007. Prior thereto,

[10] *Id.* at 30-33.

[11] *Id.* at 33.

[12] *Id.* at 34-36.

there was no candidate yet whose candidacy would have been enhanced by the premature campaigning.

It was the third member of the COMELEC Second Division, Commissioner Rene V. Sarmiento (Sarmiento) who put forth a Dissenting Opinion[13] on the 24 July 2007 Resolution. Commissioner Sarmiento believed that the pieces of evidence submitted by Andanar did not sufficiently establish probable cause that Penera engaged in premature campaigning, in violation of Sections 80 and 68 of the Omnibus Election Code. The two photocopied pictures, purporting to be those of Penera, did not clearly reveal what was actually happening in the truck or who were the passengers thereof. Likewise, the Affidavits seemed to have been prepared and executed by one and the same person because they had similar sentence construction and form, and they were sworn to before the same attesting officer.

Penera filed before the COMELEC *en banc* a Motion for Reconsideration[14] of the 24 July 2007 Resolution of the COMELEC Second Division, maintaining that she did not make any admission on the factual matters stated in the appealed resolution. Penera also contended that the pictures and Affidavits submitted by Andanar should not have been given any credence. The pictures were mere photocopies of the originals and lacked the proper authentication, while the Affidavits were taken *ex parte*, which would almost always make them incomplete and inaccurate. Subsequently, Penera filed a Supplemental Motion for Reconsideration,[15] explaining that supporters spontaneously accompanied Penera and her fellow candidates in filing their COCs, and the motorcade that took place after the filing was actually part of the dispersal of said supporters and their transportation back to their respective *barangays*.

In the Resolution dated 30 January 2008, the COMELEC *en banc* denied Penera's Motion for Reconsideration, disposing thus:

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[13] *Id.* at 37-40.

[14] *Id.* at 97-108.

[15] *Id.* at 112-126.

WHEREFORE, this Commission **RESOLVES** to **DENY** the instant Motion for Reconsideration filed by [Penera] for **UTTER LACK OF MERIT**.[16]

The COMELEC *en banc* ruled that Penera could no longer advance the arguments set forth in her Motion for Reconsideration and Supplemental Motion for Reconsideration, given that she failed to first express and elucidate on the same in her Answer and Position Paper. Penera did not specifically deny the material averments that the motorcade "went as far as Barangay Mabini, announcing their candidacy and requesting the people to vote for them on Election Day," despite the fact that the same were clearly propounded by Andanar in his Petition for Disqualification and Position Paper. Therefore, these material averments should be considered admitted. Although the COMELEC *en banc* agreed that no undue importance should be given to sworn statements or affidavits submitted as evidence, this did not mean that such affidavits should not be given any evidentiary weight at all. Since Penera neither refuted the material averments in Andanar's Petition and the Affidavits attached thereto nor submitted countervailing evidence, then said Affidavits, even if taken *ex parte*, deserve some degree of importance. The COMELEC *en banc* likewise conceded that the pictures submitted by Andanar as evidence would have been unreliable, but only if they were presented by their lonesome. However, said pictures, together with Penera's admissions and the Affidavits of Andanar's witnesses, constituted sufficient evidence to establish Penera's violation of the rule against premature campaigning. Lastly, the COMELEC *en banc* accused Penera of deliberately trying to mislead the Commission by citing *Barroso,* given that the said case was not even remotely applicable to the case at bar.

Consistent with his previous stand, Commissioner Sarmiento again dissented[17] from the 30 January 2008 Resolution of the COMELEC *en banc*. He still believed that Andanar was not able to adduce substantial evidence that would support the claim

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[16] *Id.* at 48.

[17] *Id.* at 49-52.

of violation of election laws. Particularly, Commissioner Sarmiento accepted Penera's explanation that the motorcade conducted after the filing by Penera and the other candidates of their COCs was merely part of the dispersal of the spontaneous gathering of their supporters. The incident was only in accord with normal human social experience.

Still undeterred, Penera filed the instant Petition before us, praying that the Resolutions dated 24 July 2007 and 30 January 2008 of the COMELEC Second Division and *en banc*, respectively, be declared null and void for having been issued with grave abuse of discretion amounting to lack or excess of jurisdiction.

In a Resolution[18] dated 4 March 2008, we issued a Temporary Restraining Order (TRO), enjoining the COMELEC from implementing the assailed Resolutions, on the condition that Penera post a bond in the amount of ₱5,000.00. We also directed COMELEC and Andanar to comment on the instant Petition.

After the COMELEC, through the Office of the Solicitor General (OSG), and Andanar filed their respective Comments[19] on the Petition at bar, we required Penera, in a Resolution[20] dated 17 June 2008, to file a Reply. However, as no Reply was filed in due time, we dismissed Penera's Petition in a Resolution[21] dated 14 October 2008, in accordance with Rule 56, Section 5(e) of the Rules of Court.[22] Penera subsequently filed an *Ex Parte* Motion to Admit Reply,[23] which we treated as a Motion for Reconsideration of the Resolution dated 14 October 2008.

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[18] *Id.* at 138.

[19] *Id.* at 161-165, 190-208.

[20] *Id.* at 210.

[21] *Id.* at 215.

[22] Sec. 5. *Grounds for dismissal of appeal.* — The appeal may be dismissed *motu proprio* or on motion of the respondent on the following grounds:

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(e) Failure to comply with any circular, directive or order of the Supreme Court without justifiable cause;

[23] *Rollo*, pp. 217-225.

On 11 November 2008, we issued another Resolution reinstating Penera's Petition.[24]

Penera presents the following issues for our consideration:

I.

Whether or not [Penera] has engaged in an election campaign or partisan political activity outside the campaign period.

II.

Whether the contents of the complaint are deemed admitted for failure of [Penera] to specifically deny the same.

III.

Whether or not [Andanar] has presented competent and substantial evidence to justify a conclusion that [Penera] violated Section 80 and 68 of the Omnibus Election Code.

IV.

Whether or not [the COMELEC] committed grave abuse of discretion amounting to lack of or in excess of jurisdiction in finding that the act of [Penera] in conducting a motorcade before the filing of her certificate of candidacy constitutes premature campaigning.

V.

Whether or not [the COMELEC] committed grave abuse of discretion amounting to lack of or in excess of jurisdiction when it resolves [sic] to disqualify [Penera] despite the failure of [Andanar] to present competent, admissible and substantial evidence to prove [the] violation of Section 68 and 80 of the Omnibus Election Code.

Penera claims that the COMELEC exercised its discretion despotically, arbitrarily and whimsically in disqualifying her as a mayoralty candidate in Sta. Monica on the ground that she engaged in premature campaigning. She asserts that the evidence adduced by Andanar was grossly insufficient to warrant the ruling of the COMELEC.

Penera insists that the COMELEC Second Division erred in its findings of fact, basically adopting Andanar's allegations which,

[24] *Id.* at 227-228.

contrary to the belief of the COMELEC Second Division, Penera never admitted. Penera maintains that the motorcade was spontaneous and unplanned, and the supporters merely joined Penera and the other candidates from her party along the way to, as well as within the premises of, the office of the COMELEC Municipal Election Officer. Andanar's averments — that after Penera and the other candidates from her party filed their COCs, they held a motorcade in the different *barangays* of Sta. Monica, waived their hands to the public and threw candies to the onlookers — were not supported by competent substantial evidence. Echoing Commissioner Sarmiento's dissent from the assailed COMELEC Resolutions, Penera argues that too much weight and credence were given to the pictures and Affidavits submitted by Andanar. The declaration by the COMELEC that it was Penera in the pictures is tenuous and erroneous, as the COMELEC has no personal knowledge of Penera's identity, and the said pictures do not clearly reveal the faces of the individuals and the contents of the posters therein. In the same vein, the Affidavits of Andanar's known supporters, executed almost a month after Andanar filed his Petition for Disqualification before the ORED-Region XIII, were obviously prepared and executed by one and the same person, because they have a similar sentence construction, and computer font and form, and were even sworn to before the same attesting officer on the same date.

We find no merit in the instant Petition.

The questions of fact

Crystal clear from the above arguments is that Penera is raising only questions of fact in her Petition presently before us. We do not find any reason to pass upon the same, as this Court is not a trier of facts. It is not the function of the Court to review, examine and evaluate or weigh the probative value of the evidence presented. A question of fact would arise in such an event.

The sole function of a writ of *certiorari* is to address issues of want of jurisdiction or grave abuse of discretion, and it does

not include a review of the tribunal's evaluation of the evidence.[25] Because of its fact-finding facilities and its knowledge derived from actual experience, the COMELEC is in a peculiarly advantageous position to evaluate, appreciate and decide on factual questions before it. Factual findings of the COMELEC, based on its own assessments and duly supported by evidence, are conclusive on this Court, more so in the absence of a grave abuse of discretion, arbitrariness, fraud, or error of law in the questioned resolutions. Unless any of these causes are clearly substantiated, the Court will not interfere with the findings of fact of the COMELEC.[26]

Grave abuse of discretion is such capricious and whimsical exercise of judgment equivalent to lack of jurisdiction. Mere abuse of discretion is not enough. It must be grave, as when it is exercised arbitrarily or despotically by reason of passion or personal hostility. The abuse must be so patent and so gross as to amount to an evasion of a positive duty or to a virtual refusal to perform the duty enjoined or to act at all in contemplation of law.[27]

We find no grave abuse of discretion amounting to lack or excess of jurisdiction on the part of the COMELEC Second Division in disqualifying Penera as a mayoralty candidate in Sta. Monica in the Resolution dated 24 July 2007; and also on the part of the COMELEC *en banc* in denying Penera's Motion for Reconsideration on the Resolution dated 30 January 2008. Said Resolutions are sufficiently supported by substantial evidence, meaning, such evidence as a reasonable mind might accept as adequate to support a conclusion.[28]

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[25] *Bantay Republic Act or BA-RA 7941 v. Commission on Elections*, G.R. No. 177271, 4 May 2007, 523 SCRA 11, cited in *Cadangen v. Commission on Elections*, G.R. No. 177179, 5 June 2009.

[26] *Alvarez v. Commission on Elections*, 405 Phil. 950, 959 (2001).

[27] *Cantoria v. Commission on Elections*, G.R. No. 162035, 26 November 2004, 444 SCRA 538, 543, cited in *Basmala v. Commission on Elections*, G.R. No. 176724, 6 October 2008, 567 SCRA 664, 668.

[28] *Doruelo v. Commission on Elections*, 218 Phil. 346 (1984).

The prohibited act of premature campaigning is defined under Section 80 of the Omnibus Election Code, to wit:

SECTION 80. *Election campaign or partisan political activity outside campaign period.* — **It shall be unlawful for any person, whether or not a voter or candidate, or for any party, or association of persons, to engage in an election campaign or partisan political activity except during the campaign period**: *Provided*, That political parties may hold political conventions or meetings to nominate their official candidates within thirty days before the commencement of the campaign period and forty-five days for Presidential and Vice-Presidential election. (Emphasis ours.)

If the commission of the prohibited act of premature campaigning is duly proven, the consequence of the violation is clearly spelled out in Section 68 of the said Code, which reads:

SECTION. 68. *Disqualifications*. — Any candidate who, in an action or protest in which he is a party is declared by final decision of a competent court guilty of, or found by the Commission of having x x x (e) **violated any of Sections 80**, 83, 85, 86 and 261, paragraphs d, e, k, v, and cc, subparagraph 6, **shall be disqualified from continuing as a candidate, or if he has been elected, from holding the office.** Any person who is a permanent resident of or an immigrant to a foreign country shall not be qualified to run for any elective office under this Code, unless said person has waived his status as permanent resident or immigrant of a foreign country in accordance with the residence requirement provided for in the election laws. (Emphases ours.)

In the case at bar, it had been sufficiently established, not just by Andanar's evidence, but also those of Penera herself, that Penera and her partymates, after filing their COCs on 29 March 2007, participated in a motorcade which passed through the different *barangays* of Sta. Monica, waived their hands to the public, and threw candies to the onlookers.

Indeed, Penera expressly admitted in her Position Paper that:

Respondents **actually had a motorcade** of only two (2) jeppneys [sic] and ten (10) motorcycles **after filing their Certificate of Candidacy** at 3:00 P.M., March 29, 2007 without any speeches made and only one streamer of a board member

Candidate and multi-colored balloons attached to the jeppneys [sic] and motorcycles.[29] (Emphasis ours.)

Additionally, the Joint Affidavit of Marcial Dolar, Allan Llatona, and Renante Platil, attached to Penera's Position Paper, gave an even more straightforward account of the events, thus:

1. That on March 29, 2007 at 3:00 P.M. at Sta. Monica, Surigao del Norte, Mayoralty Candidates Rosalinda CA. Penera [sic] and her parties of four (4) *kagawads* filed their certificate of candidacy at the COMELEC Office;

2. That their [sic] was a motorcade consisting of two jeppneys [sic] and 10 motorcycles **after actual registration with the COMELEC** with jeeps decorated with balloons and a streamer of Margarito Longos, Board Member Candidate;

3. That **the motorcade proceeded to three (3) *barangays* out of the 11 *barangays* while supporters were throwing sweet candies to the crowd**;

4. That there was **merriment and marching music** without mention of any name of the candidates more particularly lead-candidate Rosalinda CA. Penera [sic];

5. That we were in the motorcade on that afternoon only riding in one of the jeepneys.[30] (Emphases ours.)

In view of the foregoing admissions by Penera and her witnesses, Penera cannot now be allowed to adopt a conflicting position.

More importantly, the conduct of a motorcade is a form of election campaign or partisan political activity, falling squarely within the ambit of Section 79(b)(2) of the Omnibus Election Code, on "[h]olding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate[.]" A motorcade is a procession or

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[29] *Rollo,* p. 76.

[30] *Id.* at 77.

parade of automobiles or other motor vehicles.[31] The conduct thereof during election periods by the candidates and their supporters is a fact that need not be belabored due to its widespread and pervasive practice. The obvious purpose of the conduct of motorcades is to introduce the candidates and the positions, to which they seek to be elected, to the voting public; or to make them more visible so as to facilitate the recognition and recollection of their names in the minds of the voters come election time. Unmistakably, motorcades are undertaken for no other purpose than to promote the election of a particular candidate or candidates.

In the instant Petition, Penera never denied that she took part in the conduct of the motorcade after she filed her COC on the day before the start of the campaign period. She merely claimed that the same was not undertaken for campaign purposes. Penera proffered the excuse that the motorcade was already part of the dispersal of the supporters who spontaneously accompanied Penera and her partymates in filing their COCs. The said supporters were already being transported back to their respective *barangays* after the COC filing. Penera stressed that no speech was made by any person, and there was only background marching music and a "grand standing for the purpose of raising the hands of the candidates in the motorcade.

We are not convinced.

As we previously noted, Penera and her witnesses admitted that the vehicles, consisting of two jeepneys and ten motorcycles, were festooned with multi-colored balloons; the motorcade went around three *barangays* in Sta. Monica; and Penera and her partymates waved their hands and threw sweet candies to the crowd. With vehicles, balloons, and even candies on hand, Penera can hardly persuade us that the motorcade was spontaneous and unplanned.

For violating Section 80 of the Omnibus Election Code, proscribing election campaign or partisan political activity outside

[31] Motorcade. Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. http://dictionary.reference.com/browse/motorcade (accessed: July 16, 2009).

the campaign period, Penera must be disqualified from holding the office of Mayor of Sta. Monica.

The questions of law

The dissenting opinion, however, raises the legal issue that Section 15 of Republic Act No. 8436, as amended by Republic Act No. 9369, provides a new definition of the term "candidate," as a result of which, premature campaigning may no longer be committed.

Under Section 79(a) of the Omnibus Election Code, a *candidate* is "any person aspiring for or seeking an elective public office, who has filed a certificate of candidacy by himself or through an accredited political party, aggroupment, or coalition of parties."

Republic Act No. 8436,[32] enacted on 22 December 1997, authorized the COMELEC to use an automated election system for the process of voting, counting of votes, and canvassing/ consolidating the results of the national and local elections. The statute also mandated the COMELEC to acquire automated counting machines, computer equipment, devices and materials; and to adopt new electoral forms and printing materials. In particular, Section 11 of Republic Act No. 8436 provided for the specifications of the official ballots to be used in the automated election system and the guidelines for the printing thereof, the relevant portions of which state:

SECTION 11. *Official ballot.* — The Commission shall prescribe the size and form of the official ballot which shall contain the titles of the positions to be filled and/or the propositions to be voted upon in an initiative, referendum or plebiscite. Under each position, the names of candidates shall be arranged alphabetically by surname and uniformly printed using the same type size. A fixed space where the chairman of the Board of Election inspectors shall affix his/her signature to authenticate the official ballot shall be provided.

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[32] AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES.

Both sides of the ballots may be used when necessary.

For this purpose, the deadline for the filing of certificate of candidacy/petition for registration/manifestation to participate in the election shall not be later than one hundred twenty (120) days before the elections: Provided, That, any elective official, whether national or local, running for any office other than the one which he/she is holding in a permanent capacity, except for president and vice-president, shall be deemed resigned only upon the start of the campaign period corresponding to the position for which he/she is running: **Provided, further, That, unlawful acts or omissions applicable to a candidate shall take effect upon the start of the aforesaid campaign period**: Provided, finally, That, for purposes of the May 11, 1998 elections, the deadline for filing of the certificate of candidacy for the positions of President, Vice President, Senators and candidates under the Party-List System as well as petitions for registration and/or manifestation to participate in the Party-List System shall be on February 9, 1998 while the deadline for the filing of certificate of candidacy for other positions shall be on March 27, 1998. (Emphases ours.)

On 10 February 2007, Republic Act No. 9369[33] took effect. Section 13 of Republic Act No. 9369 amended Section 11 of Republic Act No. 8436 and renumbered the same as the new Section 15 of Republic Act No. 8436. The pertinent portions of Section 15 of Republic Act No. 8436, as amended by Republic Act No. 9369, now read:

SECTION.15. *Official Ballot.* — The Commission shall prescribe the format of the electronic display and/or the size and form of the

[33] Republic Act No. 9369 is entitled "AN ACT AMENDING REPUBLIC ACT NO. 8436, ENTITLED 'AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, TO ENCOURAGE TRANSPARENCY, CREDIBILITY, FAIRNESS AND ACCURACY OF ELECTIONS, AMENDING FOR THE PURPOSE BATAS PAMBANSA BLG. 881, AS AMENDED, REPUBLIC ACT NO. 7166 AND OTHER RELATED ELECTIONS LAWS, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES.'" It was published in the newspapers Malaya (26 January 2007) and Business Mirror (26-27 January 2007). It thus took effect fifteen (15) days after its publication or on 10 February 2007.

official ballot, which shall contain the titles of the position to be filled and/or the proposition to be voted upon in an initiative, referendum or plebiscite. Where practicable, electronic displays must be constructed to present the names of all candidates for the same position in the same page or screen, otherwise, the electronic displays must be constructed to present the entire ballot to the voter, in a series of sequential pages, and to ensure that the voter sees all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot. Under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size. The maiden or married name shall be listed in the official ballot, as preferred by the female candidate. Under each proposition to be voted upon, the choices should be uniformly indicated using the same font and size.

A fixed space where the chairman of the board of election inspector shall affix his/her signature to authenticate the official ballot shall be provided.

For this purpose, the Commission shall set the deadline for the filing of certificate of candidacy/petition of registration/manifestation to participate in the election. **Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy**: *Provided*, **That, unlawful acts or omissions applicable to a candidate shall effect only upon the start of the aforesaid campaign period**: *Provided, finally*, That any person holding a public appointive office or position, including active members of the armed forces, and officers, and employees in government-owned or-controlled corporations, shall be considered *ipso facto* resigned from his/her office and must vacate the same at the start of the day of the filing of his/her certification of candidacy. (Emphases ours.)

In view of the third paragraph of Section 15 of Republic Act No. 8436, as amended, the Dissenting Opinion argues that Section 80 of the Omnibus Election Code can not be applied to the present case since, as the Court held in *Lanot v. Commission on Elections*,[34] the election campaign or partisan activity, which

[34] G.R. No. 164858, 16 November 2006, 507 SCRA 114.

constitute the prohibited premature campaigning, should be designed **to promote the election or defeat of a particular candidate or candidates**. Under present election laws, while a person may have filed his/her COC within the prescribed period for doing so, said person shall not be considered a candidate until the start of the campaign period. Thus, prior to the start of the campaign period, there can be no election campaign or partisan political activity designed to promote the election or defeat of a particular candidate to public office because there is no candidate to speak of.

According to the Dissenting Opinion, even if Penera's acts before the start of the campaign period constitute election campaigning or partisan political activities, these are not punishable under Section 80 of the Omnibus Election Code given that she was not yet a candidate at that time. On the other hand, Penera's acts, if committed within the campaign period, when she was already a candidate, are likewise not covered by Section 80 as this provision punishes only acts outside the campaign period.

The Dissenting Opinion ultimately concludes that because of Section 15 of Republic Act No. 8436, as amended, the prohibited act of premature campaigning in Section 80 of the Omnibus Election Code, is practically impossible to commit at any time.

We disagree. Section 80 of the Omnibus Election Code remains relevant and applicable despite Section 15 of Republic Act No. 8436, as amended.

A close reading of the entire Republic Act No. 9369, which amended Republic Act No. 8436, would readily reveal that it did not contain an express repeal of Section 80 of the Omnibus Election Code. An **express repeal** is one wherein a statute declares, usually in its repealing clause, that a particular and specific law, **identified by its number or title**, is repealed.[35] Absent this specific requirement, an express repeal may not be presumed.

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[35] *Mecano v. Commission on Audit*, G.R. No. 103982, 11 December 1992, 216 SCRA 500, 504.

Although the title of Republic Act No. 9369 particularly mentioned the amendment of Batas Pambansa Blg. 881, or the Omnibus Election Code, to wit:

> An Act Amending Republic Act No. 8436, Entitled "An Act Authorizing the Commission on Elections to Use an Automated Election System x x x, **Amending for the Purpose Batas Pambansa Blg. 881, As Amended** x x x. (Emphasis ours.),

said title explicitly mentions, not the repeal, but the **amendment** of Batas Pambansa Blg. 881. Such fact is indeed very material. *Repeal* of a law means its complete abrogation by the enactment of a subsequent statute, whereas the *amendment* of a statute means an alteration in the law already existing, leaving some part of the original still standing.[36] Section 80 of the Omnibus Election Code is not even one of the specific provisions of the said code that were expressly **amended** by Republic Act No. 9369.

Additionally, Section 46,[37] the repealing clause of Republic Act No. 9369, states that:

> Sec. 46. *Repealing Clause*. — All laws, presidential decrees, executive orders, rules and regulations or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly.

Section 46 of Republic Act No. 9369 is a general repealing clause. It is a clause which predicates the intended repeal under the condition that a **substantial conflict** must be found in existing and prior acts. The failure to add a specific repealing clause indicates that the intent was not to repeal any existing law, unless an irreconcilable inconsistency and repugnancy exist in the terms of the new and old laws. This latter situation falls under the category of an **implied repeal**.[38]

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[36] *Black's Law Dictionary* (6th Ed. [1990]), p. 1299.

[37] Erroneously cited as Section 47 in the Revised Dissenting Opinion.

[38] *Intia, Jr. v. Commission on Audit*, 366 Phil. 273, 290 (1999), citing *Mecano v. Commission on Audit, supra* note 35.

Well-settled is the rule in statutory construction that implied repeals are disfavored. In order to effect a repeal by implication, the later statute must be so irreconcilably inconsistent and repugnant with the existing law that they cannot be made to reconcile and stand together. The clearest case possible must be made before the inference of implied repeal may be drawn, for inconsistency is never presumed. There must be a showing of repugnance clear and convincing in character. The language used in the later statute must be such as to render it irreconcilable with what had been formerly enacted. An inconsistency that falls short of that standard does not suffice.[39]

Courts of justice, when confronted with apparently conflicting statutes, should endeavor to **reconcile** the same instead of declaring outright the invalidity of one as against the other. Such alacrity should be avoided. The wise policy is for the judge to **harmonize** them if this is possible, bearing in mind that they are equally the handiwork of the same legislature, and so give effect to both while at the same time also according due respect to a coordinate department of the government.[40]

To our mind, there is **no absolute and irreconcilable incompatibility** between Section 15 of Republic Act No. 8436, as amended, and Section 80 of the Omnibus Election Code, which defines the prohibited act of premature campaigning. It is possible to harmonize and reconcile these two provisions and, thus, give effect to both.

The following points are explanatory:

First, Section 80 of the Omnibus Election Code, on premature campaigning, explicitly provides that "[i]t shall be unlawful for **any person, whether or not a voter or candidate,** or for any party, or association of persons, to engage in an election campaign or partisan political activity, **except during the campaign period.**"

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[39] *Agujetas v. Court of Appeals*, G.R. No. 106560, 23 August 1996, 261 SCRA 17, 34-35.

[40] *Ty v. Trampe*, G.R. No. 117577, 1 December 1995, 250 SCRA 500, 514-515, citing *Gordon v. Veridiano*, 11 December 1992, 216 SCRA 500, 505-506.

Very simply, premature campaigning may be committed even by a person who is **not a candidate**.

For this reason, the plain declaration in *Lanot* that "[w]hat Section 80 of the Omnibus Election Code prohibits is 'an election campaign or partisan political activity' **by a 'candidate'** 'outside' of the campaign period,"[41] is clearly erroneous.

Second, Section 79(b) of the Omnibus Election Code defines election campaign or partisan political activity in the following manner:

SECTION 79. *Definitions*. — As used in this Code:

x x x x x x x x x

(b) The term "**election campaign**" or "**partisan political activity**" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office which shall include:

(1) Forming organizations, associations, clubs, committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate;

(2) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate;

(3) Making speeches, announcements or commentaries, or holding interviews for or against the election of any candidate for public office;

(4) Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or

(5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.

True, that pursuant to Section 15 of Republic Act No. 8436, as amended, even after the filing of the COC but before the start of the campaign period, a person is not yet officially

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[41] G.R. No. 164858, 16 November 2006, 507 SCRA 114, 146.

considered a *candidate*. Nevertheless, a person, **upon the filing of his/her COC,** already **explicitly declares his/her intention** to run as a candidate in the coming elections. The commission by such a person of any of the acts enumerated under Section 79(b) of the Omnibus Election Code (*i.e.*, holding rallies or parades, making speeches, *etc*.) can, thus, be logically and reasonably construed as for the purpose of promoting his/her intended candidacy.

When the campaign period starts and said person proceeds with his/her candidacy, **his/her intent turning into actuality**, we can already consider his/her acts, after the filing of his/her COC and prior to the campaign period, as the promotion of his/her election **as a candidate**, hence, constituting premature campaigning, for which he/she may be disqualified. Also, conversely, if said person, for any reason, withdraws his/her COC before the campaign period, then there is no point to view his/her acts prior to said period as acts for the promotion of his/her election as a candidate. In the latter case, there can be no premature campaigning as there is no candidate, whose disqualification may be sought, to begin with.[42]

Third, in connection with the preceding discussion, the line in Section 15 of Republic Act No. 8436, as amended, which provides that "any unlawful act or omission applicable to a candidate shall **take effect** only upon the start of the campaign period," does not mean that the acts constituting premature campaigning can only be committed, for which the offender may be disqualified, **during** the campaign period. Contrary to the pronouncement in the dissent, **nowhere** in the said *proviso* was it stated that campaigning before the start of the campaign period is lawful, such that the offender may freely carry out the same with impunity.

[42] This same reasoning holds true for a person (who is neither a candidate nor a voter) who commits any of the acts described under Section 79(b) of the Omnibus Election Code for the promotion of the election of **another** person who has already filed a certificate of candidacy; the former shall be prosecuted for the election offense of premature campaigning only in the event that the latter actually continues with his/her candidacy after the start of the campaign period.

As previously established, **a person**, after filing his/her COC but prior to his/her becoming a candidate (thus, prior to the start of the campaign period), can already **commit** the acts described under Section 79(b) of the Omnibus Election Code as election campaign or partisan political activity. However, only after said person officially becomes a candidate, at the beginning of the campaign period, can said acts be **given effect** as premature campaigning under Section 80 of the Omnibus Election Code. Only after said person officially becomes a candidate, at the start of the campaign period, can his/her **disqualification** be sought for acts constituting premature campaigning. **Obviously, it is only at the start of the campaign period, when the person officially becomes a candidate, that the undue and iniquitous advantages of his/her prior acts, constituting premature campaigning, shall accrue to his/her benefit.** Compared to the other candidates who are only about to begin their election campaign, a candidate who had previously engaged in premature campaigning already enjoys an unfair headstart in promoting his/her candidacy.

As can be gleaned from the foregoing disquisition, harmony in the provisions of Sections 80 and 79 of the Omnibus Election Code, as well as Section 15 of Republic Act No. 8436, as amended, is not only very possible, but in fact desirable, necessary and consistent with the legislative intent and policy of the law.

The laudable and exemplary intention behind the prohibition against premature campaigning, as declared in *Chavez v. Commission on Elections*,[43] is to level the playing field for candidates of public office, to equalize the situation between the popular or rich candidates, on one hand, and lesser-known or poorer candidates, on the other, by preventing the former from enjoying undue advantage in exposure and publicity on account of their resources and popularity. The intention for prohibiting premature campaigning, as explained in *Chavez*, could not have been significantly altered or affected by Republic Act No. 8436, as amended by Republic Act No. 9369, the avowed

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[43] 480 Phil. 915 (2004).

purpose of which is to carry-on the automation of the election system. **Whether the election would be held under the manual or the automated system, the need for prohibiting premature campaigning — to level the playing field between the popular or rich candidates, on one hand, and the lesser-known or poorer candidates, on the other, by allowing them to campaign only within the same limited period — remains.**

We cannot stress strongly enough that premature campaigning is a pernicious act that is continuously threatening to undermine the conduct of fair and credible elections in our country, no matter how great or small the acts constituting the same are. The choice as to who among the candidates will the voting public bestow the privilege of holding public office should not be swayed by the shrewd conduct, verging on bad faith, of some individuals who are able to spend resources to promote their candidacies in advance of the period slated for campaign activities.

Verily, the consequences provided for in Section 68[44] of the Omnibus Election Code for the commission of the prohibited act of premature campaigning are severe: the candidate who is declared guilty of committing the offense shall be disqualified from continuing as a candidate, or, if he/she has been elected, from holding office. Not to mention that said candidate also faces criminal prosecution for an election offense under Section 262 of the same Code.

The Dissenting Opinion, therefore, should not be too quick to pronounce the ineffectiveness or repeal of Section 80 of the Omnibus Election Code just because of a change in the meaning of *candidate* by Section 15 of Republic Act No. 8436, as amended, primarily, for administrative purposes. An interpretation should be avoided under which a statute or

[44] Sec. 68. *Disqualifications*. — Any candidate who, in an action or protest in which he is a party is declared by final decision of a competent court guilty of, or found by the Commission of having xxx (e) violated any of Sections 80, 83, 85, 86 and 261, paragraphs d, e, k, v, and cc, subparagraph 6, **shall be disqualified from continuing as a candidate, or if he has been elected, from holding the office**. x x x (Emphasis ours.)

provision being construed is defeated, or as otherwise expressed, nullified, destroyed, emasculated, repealed, explained away, or rendered insignificant, meaningless, inoperative, or nugatory.[45] Indeed, not only will the prohibited act of premature campaigning be officially decriminalized, the value and significance of having a campaign period before the conduct of elections would also be utterly negated. Any unscrupulous individual with the deepest of campaign war chests could then afford to spend his/her resources to promote his/her candidacy well ahead of everyone else. Such is the very evil that the law seeks to prevent. Our lawmakers could not have intended to cause such an absurd situation.

The Dissenting Opinion attempts to brush aside our preceding arguments by contending that there is no room for statutory construction in the present case since Section 15 of Republic Act No. 8436,[46] as amended by Section 13 of Republic Act No. 9369,[47] is crystal clear in its meaning. We disagree. There would only be no need for statutory construction if there is a provision in Republic Act No. 8436 or Republic Act No. 9369 that explicitly states that there shall be no more premature campaigning. But absent the same, our position herein, as well as that of the Dissenting Opinion, necessarily rest on our respective construction of the legal provisions involved in this case.

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[45] *Paras v. Commission on Elections*, 332 Phil. 56, 64 (1996).

[46] AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES.

[47] AN ACT AMENDING REPUBLIC ACT NO. 8436, ENTITLED "AN ACT AUTHORIZING THE COMMISSION ON ELECTIONS TO USE AN AUTOMATED ELECTION SYSTEM IN THE MAY 11, 1998 NATIONAL OR LOCAL ELECTIONS AND IN SUBSEQUENT NATIONAL AND LOCAL ELECTORAL EXERCISES, TO ENCOURAGE TRANSPARENCY, CREDIBILITY, FAIRNESS AND ACCURACY OF ELECTIONS, AMENDING FOR THE PURPOSE BATAS PAMBANSA BLG. 881, AS AMENDED, REPUBLIC ACT NO. 7166 AND OTHER RELATED ELECTIONS LAWS, PROVIDING FUNDS THEREFOR AND FOR OTHER PURPOSES."

Notably, while faulting us for resorting to statutory construction to resolve the instant case, the Dissenting Opinion itself cites a rule of statutory construction, particularly, that penal laws should be liberally construed in favor of the offender. The Dissenting Opinion asserts that because of the third paragraph in Section 15 of Republic Act No. 8436, as amended, the election offense described in Section 80 of the Omnibus Election Code is practically impossible to commit at any time and that this flaw in the law, which defines a criminal act, must be construed in favor of Penera, the offender in the instant case.

The application of the above rule is uncalled for. It was acknowledged in *Lanot* that a disqualification case has two aspects: one, electoral;[48] the other, criminal.[49] The instant case concerns only the electoral aspect of the disqualification case. Any discussion herein on the matter of Penera's criminal liability for premature campaigning would be nothing more than *obiter dictum*. More importantly, as heretofore already elaborated upon, Section 15 of Republic Act No. 8436, as amended, did not expressly or even impliedly repeal Section 80 of the Omnibus Election Code, and these two provisions, based on legislative intent and policy, can be harmoniously interpreted and given effect. Thus, there is **no flaw** created in the law, arising from

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[48] The **electoral aspect** of a disqualification case determines whether the offender should be disqualified from being a candidate or from holding office. Proceedings are summary in character and require only clear preponderance of evidence. An erring candidate may be disqualified even without prior determination of probable cause in a preliminary investigation. The electoral aspect may proceed independently of the criminal aspect, and vice-versa. (*Lanot v. Commission on Elections*, *supra* note 34.)

[49] The **criminal aspect** of a disqualification case determines whether there is probable cause to charge a candidate for an election offense. The prosecutor is the COMELEC, through its Law Department, which determines whether probable cause exists. If there is probable cause, the COMELEC, through its Law Department, files the criminal information before the proper court. Proceedings before the proper court demand a full-blown hearing and require proof beyond reasonable doubt to convict. A criminal conviction shall result in the disqualification of the offender, which may even include disqualification from holding a future public office. (*Lanot v. Commission on Elections*, *supra* note 34.)

Section 15 of Republic Act No. 8436, as amended, which needed to be construed in Penera's favor.

The Dissenting Opinion further expresses the fear that pursuant to our "theory," all the politicians with "infomercials" prior to the filing of their COCs would be subject to disqualification, and this would involve practically all the prospective presidential candidates who are now leading in the surveys.

This fear is utterly unfounded. It is the filing by the person of his/her COC through which he/she explicitly declares his/her intention to run as a candidate in the coming elections. It is such declaration which would color the subsequent acts of said person to be election campaigning or partisan political activities as described under Section 79(b) of the Omnibus Election Code. **It bears to point out that, at this point, no politician has yet submitted his/her COC.** Also, the plain solution to this rather misplaced apprehension is for the politicians themselves to adhere to the letter and intent of the law and keep within the bounds of fair play in the pursuit of their candidacies. This would mean that after filing their COCs, the prudent and proper course for them to take is to wait for the designated start of the campaign period before they commence their election campaign or partisan political activities. Indeed, such is the only way for them to avoid disqualification on the ground of premature campaigning. It is not for us to carve out exceptions to the law, much more to decree away the repeal thereof, in order to accommodate any class of individuals, where no such exception or repeal is warranted.

Lastly, as we have observed at the beginning, Penera's Petition is essentially grounded on questions of fact. Penera's defense against her disqualification, before the COMELEC and this Court, rests on the arguments that she and her partymates did not actually hold a motorcade; that their supporters spontaneously accompanied Penera and the other candidates from her political party when they filed their certificates of candidacy; that the alleged motorcade was actually the dispersal of the supporters of Penera and the other candidates from her party as said supporters were dropped off at their respective *barangays*; and that Andanar

was not able to present competent, admissible, and substantial evidence to prove that Penera committed premature campaigning. **Penera herself never raised the argument that she can no longer be disqualified for premature campaigning under Section 80, in relation to Section 68, of the Omnibus Election Code, since the said provisions have already been, in the words of the Dissenting Opinion, rendered "inapplicable," "repealed," and "done away with" by Section 15 of Republic Act No. 8436, as amended.** This legal argument was wholly raised by the Dissenting Opinion.

As a rule, a party who deliberately adopts a certain theory upon which the case is tried and decided by the lower court will not be permitted to change theory on appeal. Points of law, theories, issues, and arguments not brought to the attention of the lower court need not be, and ordinarily will not be, considered by a reviewing court, as these cannot be raised for the first time at such late stage. Basic considerations of due process underlie this rule.[50] If we do not allow and consider the change in theory of a case by a party on appeal, should we not also refrain from *motu proprio* adopting a theory which none of the parties even raised before us?

Nonetheless, the questions of fact raised by Penera and questions of law raised by the Dissenting Opinion must all be resolved against Penera. Penera should be disqualified from holding office as Mayor of Sta. Monica for having committed premature campaigning when, right after she filed her COC, but still a day before the start of the campaign period, she took part in a motorcade, which consisted of two jeepneys and ten motorcycles laden with multi-colored balloons that went around several *barangays* of Sta. Monica, and gave away candies to the crowd.

Succession

Despite the disqualification of Penera, we cannot grant Andanar's prayer to be allowed to assume the position of Mayor

[50] *Spouses Pasco v. Pison-Arceo Agricultural and Development Corporation*, G.R. No. 165501, 28 March 2006, 485 SCRA 514, 523.

of Sta. Monica. The well-established principle is that the ineligibility of a candidate receiving majority votes does not entitle the candidate receiving the next highest number of votes to be declared elected.[51]

In this case, the rules on succession under the Local Government Code shall apply, to wit:

> SECTION 44. *Permanent Vacancies in the Offices of the Governor, Vice-Governor, Mayor, and Vice-Mayor*. — **If a permanent vacancy occurs in the office of the** x x x **mayor**, **the** x x x **vice-mayor concerned shall become the** x x x **mayor**.
>
> x x x x x x x x x
>
> For purposes of this Chapter, a permanent vacancy arises when an elective local official fills a higher vacant office, refuses to assume office, **fails to qualify or is removed from office**, voluntarily resigns, or is otherwise permanently incapacitated to discharge the functions of his office. (Emphases ours.)

Considering Penera's disqualification from holding office as Mayor of Sta. Monica, the proclaimed Vice-Mayor shall then succeed as Mayor.

WHEREFORE, premises considered, the instant Petition for *Certiorari* is hereby *DISMISSED*. The Resolutions dated 24 July 2007 and 30 January 2008 of the COMELEC Second Division and *en banc*, respectively, in SPA No. 07-224 are hereby *AFFIRMED*. In view of the disqualification of petitioner Rosalinda A. Penera from running for the office of Mayor of Sta. Monica, Surigao del Norte, and the resulting permanent vacancy therein, it is hereby *DECLARED* that the proclaimed Vice-Mayor is the rightful successor to said office. The Temporary Restraining Order issued on 4 March 2008 is hereby *ORDERED* lifted. Costs against the petitioner.

SO ORDERED.

Ynares-Santiago, Corona, Nachura, Leonardo-de Castro, Bersamin, Del Castillo, and *Abad, JJ.*, concur.

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[51] *Labo, Jr. v. Commission on Elections*, 211 Phil. 297, 312 (1992).

Puno, C.J., Carpio Morales, Velasco, Jr., Brion, and *Peralta, JJ.,* join the dissent of *J.* Carpio.

Quisumbing, J., the *C.J.* certifies that *J.* Quisumbing joined the dissent of *J.* Carpio.

Carpio, J., see dissenting opinion.

DISSENTING OPINION

CARPIO, *J.*:

The *ponencia* disqualified Rosalinda A. Penera (Penera) from running for the office of Mayor of Sta. Monica, Surigao del Norte and declared the proclaimed Vice-Mayor as the rightful successor to the resulting permanent vacancy. I submit that the *ponencia* made an erroneous ruling: Penera should remain as Mayor of Sta. Monica, Surigao del Norte and the charge against Penera should be dismissed.

Edgar T. Andanar (Andanar) filed a Petition for Disqualification against Penera, as well as the candidates for Vice-Mayor and *Sangguniang Bayan* who belonged to her political party, for unlawfully engaging in election campaigning and partisan political activity prior to the start of the campaign period. Penera expressly admitted that after filing her certificate of candidacy with the COMELEC office on 29 March 2007, she and her co-respondents had a motorcade of two jeepneys and two motorcycles. The motorcade proceeded to three *barangays* while Penera's supporters threw candies to the crowd. The COMELEC Second Division disqualified Penera for violation of Sections 80 and 68 of the Omnibus Election Code, and the COMELEC *En Banc* denied Penera's motion for reconsideration. The *ponencia* affirms the COMELEC's rulings.

I submit that the *ponencia's* application of Sections 80 and 68 of the Omnibus Election Code and of our ruling in *Lanot* is erroneous.

The President signed Republic Act 9369 (R.A. 9369) on 23 January 2007. Two newspapers of general circulation, Malaya

and Business Mirror, published R.A. 9369 on 26 January 2007. **R.A. 9369 thus took effect on 10 February 2007, or long before the filing of Penera's certificate of candidacy on 29 March 2007.** The third paragraph of Section 15 of R.A. 8436, as amended by Section 13 of R.A. 9369, now reads, thus:

Sec. 15. *Official Ballot.* — The Commission shall prescribe the format of the electronic display and/or the size and form of the official ballot, which shall contain the titles of the positions to be filled and/or the propositions to be voted upon in an initiative, referendum or plebiscite. Where practicable, electronic displays must be constructed to present the names of all candidates for the same position in the same page or screen, otherwise, the electronic displays must be constructed to present the entire ballot to the voter, in a series of sequential pages, and to ensure that the voter sees all of the ballot options on all pages before completing his or her vote and to allow the voter to review and change all ballot choices prior to completing and casting his or her ballot. Under each position to be filled, the names of candidates shall be arranged alphabetically by surname and uniformly indicated using the same type size. The maiden or married name shall be listed in the official ballot, as preferred by the female candidate. Under each proposition to be voted upon, the choices should be uniformly indicated using the same font and size.

A fixed space where the chairman of the board of election inspectors shall affix his/her signature to authenticate the official ballot shall be provided.

For this purpose, the Commission shall set the deadline for the filing of certificate of candidacy/petition for registration/ manifestation to participate in the election. Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy: *Provided*, That, unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period: *Provided, finally*, That any person holding a public appointive office or position, including active members of the armed forces, and officers and employees in government-owned or controlled corporations, shall be considered *ipso facto* resigned from his/her office and must vacate the same at the start of the day of the filing of his/her certificate of candidacy.

Political parties may hold political conventions to nominate their official candidates within thirty (30) days before the start of the period for filing a certificate of candidacy.

With respect to a paper-based election system, the official ballots shall be printed by the National Printing Office and/or the *Bangko Sentral ng Pilipinas* at the price comparable with that of private printers under proper security measures which the Commission shall adopt. The Commission may contract the services of private printers upon certification by the National Printing Office/*Bangko Sentral ng Pilipinas* that it cannot meet the printing requirements. Accredited political parties and deputized citizen's arms of the Commission shall assign watchers in the printing, storage and distribution of official ballots.

To prevent the use of fake ballots, the Commission through the Committee shall ensure that the necessary safeguards, such as, but not limited to, bar codes, holograms, color shifting ink, microprinting, are provided on the ballot.

The official ballots shall be printed and distributed to each city/municipality at the rate of one ballot for every registered voter with a provision of additional three ballots per precinct. (Boldfacing and underscoring supplied)

The only purpose for the early filing of certificates of candidacy is to give ample time to COMELEC for the printing of the ballots. Because of our 2006 decision in *Lanot v. Commission on Elections*,[1] our lawmakers deemed it necessary to further specify in R.A. 9369 that "**any person who files his certificate of candidacy within [the filing] period shall only be considered a candidate *at the start of the campaign period* for which he filed his certificate of candidacy**." This sentence was not in R.A. 8436.

The *ponencia* relies on Sections 80 and 68 of the Omnibus Election Code. Section 80 states that "[i]t shall be unlawful for any person x x x to engage in an election campaign or partisan political activity except during the campaign period: x x x." Section 68 states that violators of Section 80 "shall be disqualified

[1] G.R. No. 164858, 16 November 2006, 507 SCRA 114.

from continuing as a candidate, or if he has been elected, from holding the office."

The *ponencia* also relies on this Court's enumeration in *Lanot* of the elements of premature campaigning under Section 80 of the Omnibus Election Code: (1) a person engages in an election campaign or partisan political activity; (2) **the act is designed to promote the election or defeat of a particular candidate or candidates**; and (3) the act is done outside the campaign period. However, in her reply to this dissent, the *ponente* quoted from *Lanot*, "[w]hat Section 80 of the Omnibus Election Code prohibits is 'an election campaign or partisan political activity' by a 'candidate' outside of the campaign period," and stated that the quoted portion was erroneous. I submit, however, that the quote was taken out of context. The *ponente* merely quoted in isolation and conveniently ignored the succeeding paragraph enumerating the elements of premature campaigning which she also quoted in her *ponencia*. The *ponencia* pointed out that a private person, not just a candidate, can commit the crime of premature campaigning. True, but before a private person can commit the crime, there must first be another person who is already considered by law a "candidate." Section 79(b) of the Omnibus Election Code provides that "the term 'election campaign' or 'partisan political activity' refers to an act designed to promote the election or defeat of a particular **candidate or candidates** to public office." Thus, there can be no premature "election campaign" or "partisan political activity" unless there is a "candidate."

Section 80 of the Omnibus Election Code is not applicable to the present case because the second element requires the existence of a "candidate." The definition of a "candidate" in Section 79(a) of the Omnibus Election Code should be read together with the amended Section 15 of R.A. 8436. A "'candidate' refers to any person aspiring for or seeking an elective public office, who has filed a certificate of candidacy by himself or through an accredited political party, aggroupment or coalition of parties." However, it is no longer enough to merely file a certificate of candidacy for a person to be considered a candidate because "**any person who files his certificate of candidacy**

within [the filing] period shall *only be considered a candidate at the start of the campaign period* for which he filed his certificate of candidacy." Any person may thus file a certificate of candidacy on any day within the prescribed period for filing a certificate of candidacy yet that person shall be considered a candidate, for purposes of determining one's possible violations of election laws, **only during the campaign period**. Indeed, there is no "election campaign" or "partisan political activity"[2] designed to promote the election or defeat of a particular candidate or candidates to public office simply because there is no "candidate" to speak of prior to the start of the campaign period. Therefore, despite the filing of her certificate of candidacy, the law does not consider Penera a candidate at the time of the questioned motorcade which was conducted a day before the start of the campaign period. In the same manner, when the law states that one is a candidate only at the start of the campaign period, determining whether any private person committed premature campaigning for a particular candidate can only be made once that prospective candidate actually files a certificate of candidacy.

The campaign period for local officials began on 30 March 2007 and ended on 12 May 2007. Penera filed her certificate

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[2] Section 79(b) of the Omnibus Election Code reads in part:

Section 79. *Definitions*. — (a) x x x;

(b) The term "election campaign" or "partisan political activity" refers to an act designed to promote the election or defeat of a particular candidate or candidates to a public office which shall include:

(1) Forming organizations, associations, clubs, committees or other groups of persons for the purpose of soliciting votes and/or undertaking any campaign for or against a candidate;

(2) Holding political caucuses, conferences, meetings, rallies, parades, or other similar assemblies, for the purpose of soliciting votes and/or undertaking any campaign or propaganda for or against a candidate;

(3) Making speeches, announcements or commentaries, or holding interviews for or against the election of any candidate for public office;

(4) Publishing or distributing campaign literature or materials designed to support or oppose the election of any candidate; or

(5) Directly or indirectly soliciting votes, pledges or support for or against a candidate.

of candidacy on 29 March 2007. Penera was thus a candidate on 29 March 2009 only for purposes of printing the ballots. **On 29 March 2007, the law still did not consider Penera a candidate for purposes other than the printing of ballots.** Acts committed by Penera prior to 30 March 2007, the date when she became a "candidate," even if constituting election campaigning or partisan political activities, are not punishable under Section 80 of the Omnibus Election Code. Such acts are within the realm of a citizen's protected freedom of expression. Acts committed by Penera within the campaign period are not covered by Section 80 as Section 80 punishes only acts outside the campaign period.

Because of the third paragraph of Section 15 of R.A. 8436, as amended by Section 13 of R.A. 9369, the election offense in Section 80 of the Omnibus Election Code is practically impossible to commit at any time. This flaw in the law, which defines a criminal act, cannot be construed against Penera but must be interpreted in her favor.

The *ponente* insists on using a technical rule of statutory construction. The *ponente* relies on the rule against implied repeals. However, the amendment by R.A. 9369 of Section 15 of R.A. 8436 is not a case of implied repeal but of express repeal. The title of R.A. 9369 expressly mentioned the amendment of the Omnibus Election Code: "An Act Authorizing the Commission on Elections to Use an Automated Election System x x x, **Amending for the Purpose Batas Pambansa Blg. 881**, x x x."[3] Section 47, the repealing clause of R.A. 9369, states that "All laws, presidential decrees, executive orders, rules and regulations or parts thereof inconsistent with the provisions of this Act are hereby repealed or modified accordingly."

The amendment by R.A. 9369 of Section 15 of R.A. 8436 expressly declares that "unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period." This amendment expressly repeals Section 80 of the Omnibus Election Code which states that "it shall be

[3] Batas Pambansa Blg. 881 is the Omnibus Election Code.

unlawful for any person x x x to engage in an election campaign or partisan political activity except during the campaign period." In any event, even assuming that there is no express repeal, there is absolute and irreconcilable incompatibility between Section 15 of R.A. 8436, as amended, and Section 80 of the Omnibus Election Code. One provision states that campaigning before the start of the campaign period is lawful while the other provision states that campaigning before such period is unlawful. In such a case, the later law, which is R.A. 9369, shall prevail.

There is certainly no room for statutory construction in this case. Section 15 of R.A. 8436, as amended by R.A. 9369, is crystal clear and requires no statutory construction. Section 15, as amended, expressly provides, "Any person who files his certificate of candidacy within this period shall only be considered as a candidate at the start of the campaign period for which he filed his certificate of candidacy: *Provided*, That, unlawful acts or omissions applicable to a candidate shall take effect only upon the start of the aforesaid campaign period." This amendment expressly provides that a person becomes a candidate only at the start of the campaign period. This amendment further expressly provides that unlawful acts or omissions applicable to a candidate take effect only at the start of the campaign period. Nothing can be clearer that any act or omission done before the start of the campaign period, such as campaigning, is not punishable. Where the law is clear and leaves no room for interpretation, resort to statutory construction is not allowed.

The *ponente* also conveniently ignored that penal laws are liberally construed in favor of the offender. The Omnibus Election Code is an example of a penal law since it imposes penalties for violation of its provisions. The *ponencia*'s strained interpretation of the application of Section 80 of the Omnibus Election Code to the present case is egregiously unnecessary. The facts of the case are clear: Penera committed acts for which there are no penalties.

We apply the theory of the majority to the 2010 elections. Under the theory of the majority, a person who files his certificate of candidacy between 20-30 November 2009 cannot say anything

about his candidacy until 9 February 2010, the start of the campaign period. Any act of such person, including all political advertisements in all media, can be interpreted as premature campaigning. Worse, even acts done before the filing of the certificate of candidacy will be covered by the majority's prohibition on premature campaigning. All candidates who aired "infomercials" prior to the filing of their certificates of candidacy will be subject to disqualification the moment they file their certificates of candidacy. This will disqualify practically all the prospective presidential candidates who are now leading in the surveys.

The factual circumstances and consequent ruling in *Chavez v. Commission on Elections*[4] differ from the present case precisely because of R.A. 9369. Petitioner Francisco I. Chavez entered into a number of agreements for product endorsements a few months before he filed his certificate of candidacy for Senator on 30 December 2003. On 6 January 2004, COMELEC issued Resolution No. 6520, Section 32 of which reads:

> *Section 32*. All propaganda materials such as posters, streamers, stickers or paintings on walls and other materials showing the picture, image, or name of a person, and all advertisements shown in print, in radio or on television showing the image or mentioning the name of a person, who subsequent to the placement or display thereof becomes a candidate for public office shall be immediately removed by said candidate and radio station, print media or television station within 3 days after the effectivity of these implementing rules; otherwise, he and said radio station, print media or television station shall be presumed to have conducted premature campaigning in violation of Section 80 of the Omnibus Election Code.

Chavez asked for exemption from Section 32 because the billboards are mere product endorsement and cannot be construed as election paraphernalia. The COMELEC, however, ordered Chavez to remove or cause the removal of the billboards, or to cover them from public view during the pendency of his request for approval. Chavez asked this Court to declare Section 32 unconstitutional.

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[4] 480 Phil. 915 (2004).

This Court upheld the validity of Section 32. Chavez' possible offense is the non-removal of the described propaganda materials three days after the effectivity of COMELEC Resolution No. 6520. Failure to remove the propaganda materials will put Chavez under the presumption of conducting premature campaigning in violation of Section 80 of the Omnibus Election Code. The *Chavez* ruling declared that Chavez's billboards featuring his name and image for product endorsements assumed partisan political character because the same indirectly promoted his candidacy. The Court further held that the COMELEC merely exercised its duty to regulate the use of election propaganda materials, and upheld the validity of disallowance of the continued display of a person's propaganda materials and advertisements after he has filed a certificate of candidacy and before the start of the campaign period.

At the time *Chavez* was decided by this Court, R.A. 9369 was not yet enacted into law. We cannot stress enough that when Section 13 of R.A. 9369 amended the third paragraph of Section 15 of R.A. 8436, it added "**any person who files his certificate of candidacy within [the filing] period shall *only be considered a candidate at the start of the campaign period* for which he filed his certificate of candidacy**."

The effects brought about by premature campaigning as enunciated in *Chavez* are real. However, with the enactment of R.A. 9369, our lawmakers have decided to do away with the imposition of a penalty on premature campaigning. It is not for this Court to question the wisdom of the policy behind legislative enactments.

I vote to **GRANT** the petition. The Resolutions dated 24 July 2007 and 30 January 2008 of the COMELEC Second Division and the COMELEC *En Banc*, respectively, in SPA No. 07-224, should be **SET ASIDE**. Rosalinda A. Penera should still be the Mayor of Sta. Monica, Surigao del Norte.

THIRD DIVISION

[G.R. No. 182320. September 11, 2009]

TACLOBAN FAR EAST MARKETING CORPORATION and FRANCISCO Y. ROMUALDEZ, *petitioners, vs.* **THE COURT OF APPEALS, NATIONAL LABOR RELATIONS COMMISSION and BENJAMIN Q. SABULAO,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL CIVIL ACTIONS; *CERTIORARI*; REMEDIES OF APPEAL AND *CERTIORARI* ARE MUTUALLY EXCLUSIVE AND NOT ALTERNATIVE OR SUCCESSIVE. — At the outset, it must be stated that petitioners adopted the wrong mode of remedy in bringing the case before this Court. It is well-settled that the proper recourse of an aggrieved party to assail the decision of the Court of Appeals is to file a petition for review on *certiorari* under Rule 45 of the Rules of Court. The Rules precludes recourse to the special civil action of *certiorari* if appeal, by way of a petition for review is available, as the remedies of appeal and *certiorari* are mutually exclusive and not alternative or successive.

2. ID.; ID.; ID.; CANNOT BE USED AS A SUBSTITUTE FOR A LOST APPEAL. — For a writ of *certiorari* to issue, a petitioner must not only prove that the tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of jurisdiction but must also show that he has no plain, speedy and adequate remedy in the ordinary course of law. *Certiorari* cannot be used as a substitute for a lost appeal. Though there are instances when *certiorari* was granted despite the availability of appeal, none of these recognized exceptions was shown to be present in the case at bar.

3. ID.; ID.; ID.; MAY BE TREATED AS HAVING BEEN FILED UNDER RULE 45 IN THE INTEREST OF SUBSTANTIAL JUSTICE PROVIDED THE SAME WAS FILED WITHIN THE REGLEMENTARY PERIOD FOR FILING A PETITION FOR REVIEW ON *CERTIORARI*. — Moreover, while it is true that the Court may treat a Petition for *Certiorari*

as having been filed under Rule 45 in the interest of substantial justice, the present petition could not be given the same leniency because it was filed beyond the 15-day reglementary period within which to file a petition for review on *certiorari*. The records of the case show that petitioners received a copy of the January 24, 2008 Resolution of the Court of Appeals denying the motion for reconsideration on February 5, 2008. Instead of filing a petition for review on *certiorari* within 15 days from receipt thereof, petitioners waited for two months before filing the instant petition. Accordingly, the decision of the Court of Appeals had already become final and executory and beyond the purview of this Court to act upon. The inescapable conclusion is that the present petition was filed belatedly to make up for a lost appeal.

4. ID.; ID.; ID.; REQUISITES TO PROSPER. — At any rate, even if the Court allows the present petition for *certiorari*, it would still be dismissible for lack of grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of the Court of Appeals. For *certiorari* to prosper, 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. In the instant case, there was no showing that the Court of Appeals ruled in a capricious and whimsical manner amounting to an arbitrary exercise of its powers.

5. LABOR AND SOCIAL LEGISLATION; LABOR RELATIONS; TERMINATION OF EMPLOYMENT; ABANDONMENT; THE BURDEN OF PROVING THAT THERE WAS UNJUSTIFIED REFUSAL TO GO BACK TO WORK RESTS ON THE EMPLOYER; CASE AT BAR. — It is well-settled that in termination cases, the burden of proof rests upon the employer to show that the dismissal was for a just and valid cause and failure to discharge the same would mean that the dismissal is not justified and therefore illegal. Hence, in arguing that Sabulao abandoned his work, it is incumbent upon the petitioners to prove: (1) that the employee failed to report for work or had been absent without valid or justifiable reason; and (2) that there must have been a clear intention to sever the employer-employee relationship as manifested by some overt

acts. Clearly, jurisprudence dictates that the burden of proof to show that there was unjustified refusal to go back to work rests on the employer. The NLRC, as affirmed by the Court of Appeals, correctly found that petitioners failed to substantiate its claim that Sabulao abandoned his work. No evidence was presented to prove that Sabulao clearly intended to sever the employer-employee relationship as manifested by some overt acts.

6. REMEDIAL LAW; APPEALS; QUESTIONS NOT RAISED BEFORE THE TRIBUNALS *A QUO* CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL. — As regards petitioners' allegation that Sabulao is a field personnel and therefore not entitled to the money claims awarded by the NLRC, suffice it to state that the issue was raised only before the Court of Appeals in contravention to the rule that questions not raised before the tribunals *a quo* cannot be raised for the first time on appeal. As such, it deserves no consideration by this Court.

APPEARANCES OF COUNSEL

Von Kaiser P. Soro for petitioners.
Enerio M. Sabulao for private respondent.

D E C I S I O N

YNARES-SANTIAGO, *J.*:

Assailed in this petition for review on *certiorari* is the Decision[1] of the Court of Appeals dated August 23, 2007 in CA-G.R. SP No. 01027 which affirmed the Decision[2] of the National Labor Relations Commission (NLRC) dated June 25, 2004 and its Resolution[3] dated June 30, 2005 declaring petitioners guilty of

[1] *Rollo*, pp. 22-31. Penned by Associate Justice Francisco P. Acosta and concurred in by Associate Justices Agustin S. Dizon and Stephen C. Cruz.

[2] *Id.* at 65-70. Penned by Commissioner Oscar S. Uy and concurred in by Commissioner Edgardo M. Enerlan and Presiding Commissioner Gerardo C. Nograles.

[3] *Id.* at 81-83. Penned by Commissioner Oscar S. Uy and concurred in by Presiding Commissioner Gerardo C. Nograles and Commissioner Aurelio D. Menzon.

illegal dismissal. Also assailed is the Court of Appeals' Resolution[4] denying the motion for reconsideration.

Sometime in 1989, petitioners hired private respondent Benjamin Sabulao as helper in its hardware business, then as a delivery truck driver from 1993 until May 12, 2001. During the first week of May 2001, Sabulao alleged that he asked permission to be absent for five days due to his grandfather's death; that petitioner Francisco Romualdez granted his request but when he reported for work on May 12, 2001, he was informed not to work anymore. Thereafter, he returned to his hometown and engaged in the copra business to support the needs of his family.

On August 10, 2001, Sabulao together with Mario Villanueva filed before the NLRC's Regional Arbitration Branch No. VIII, a complaint for illegal dismissal and money claims against petitioners. Eventually, Mario Villanueva executed a Statement of Quitclaim and Release hence, his complaint was dismissed.

Petitioners denied having illegally dismissed Sabulao and alleged that he abandoned his work. Allegedly, Sabulao had been a frequent absentee without notice since March and April of 2001 that petitioners would even send Edgar Enopia to fetch him to report for work. During the first week of May 2001, petitioners learned that Sabulao was already engaged in the "Ukay-Ukay" business.

On October 2, 2002, the Labor Arbiter rendered a Decision[5] finding Sabulao to have abandoned his work. At the same time, petitioners were ordered to pay Sabulao his salary differentials and service incentive leave pay. The other money claims were denied for failure to substantiate the same. The dispositive portion of the decision reads:

WHEREFORE, premises considered, judgment is hereby rendered —

1. Finding no illegal dismissal of complainant;
2. Ordering respondent to pay complainant:

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[4] *Id.* at 33-34. Penned by Associate Justice Francisco P. Acosta and concurred in by Associate Justices Priscilla Baltazar-Padilla and Stephen C. Cruz.

[5] *Id.* at 44-49.

a. Salary differentials:

May 11, 1998 to Dec. 31, 1999		
(₱153 – ₱130 = ₱23.00 x 511 days)	=	₱11,753.00
Jan. 2, 2000 – Oct. 31, 2000		
(₱163 – ₱160 = ₱3.00 x 259 days)	=	777.00
Nov. 1, 2000 – Dec. 31, 2000		
(₱173 – ₱160 = ₱13.00 x 51 days)	=	663.00
Jan. 2, 2001 – Apr. 30, 2001	= NIL	
May 1, 2001 – May 11, 2001		
(₱177.00 – ₱173 = ₱4.00 x 10 days)	=	40.00
		₱13,233.00

b. Service Incentive Leave Pay

1998	– ₱153 x 5 days	=	765.00
1999	– ₱153 x 5 days	=	765.00
2000	– ₱173 x 5 days	=	865.00
			₱ 2,395.00
	GRAND TOTAL		**₱15,628.00**

3. All other claims are denied for lack of merit.

SO ORDERED.[6]

On appeal, the NLRC reversed the decision of the Labor Arbiter, thus:

> WHEREFORE, premises considered, the decision of the Labor Arbiter is hereby **SET ASIDE and VACATED** and a new one entered finding complainant to have been illegally dismissed. As such, respondent (Tacloban) Far East (M)arketing Corporation is hereby ORDERED to pay complainant his backwages and separation pay from the date of dismissal up to the date of this decision. In addition, respondent is ORDERED to pay salary differentials and service incentive leave pay in the amount of ₱15,628.00.
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> SO ORDERED.[7]

The NLRC found that Sabulao's frequent absences could not by itself constitute abandonment and that no proof of overt

[6] *Id.* at 49.

[7] *Id.* at 70.

acts was adduced showing that he intended to abandon his work; that the three-month delay in the filing of the case is not an indication of abandonment; and that the amounts mentioned in the mandatory conference before the labor arbiter should not be considered in determining the merits of the case.

Petitioners filed a motion for reconsideration but it was denied by the NLRC in its Resolution dated June 30, 2005. In addition, as prayed for by Sabulao, the NLRC made a detailed computation of the award due him as follows:

Backwages: May 2001 – June 2005	₱209,332.99
13th month pay	12,558.00
SILP	640.00
	222,529.99
Salary Differentials	15,628.00
TOTAL DIFFERENTIALS	**₱238,157.99**[8]

Thereafter, petitioners filed a Petition for *Certiorari* before the Court of Appeals which rendered the herein assailed Decision denying the petition and affirming the NLRC Decision finding respondent to have been illegally dismissed.

The Court of Appeals held that the act of filing a complaint for illegal dismissal negates any intention on the part of the employee to abandon his job; that Sabulao's filing of the complaint for illegal dismissal only after three months from the time he was dismissed would not negate the finding that he did not abandon his work; that his returning to his hometown and engaging in copra business could not be taken against him; that engaging in the "Ukay-Ukay" business neither demonstrated an intention to abandon his job; that mere absence is not enough to constitute abandonment, rather, it should be coupled with overt acts showing that the employee is no longer interested to work anymore; and that Sabulao's prayer for separation pay should not be taken against him.

Petitioners' motion for reconsideration was denied on January 24, 2008; hence, this petition raising the following issues:

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[8] *Id.* at 82.

A.

THE QUESTIONED DECISION OF THE HONORABLE COURT OF APPEALS IS BASED ON MISAPPRECIATION OF THE EVIDENCE PRESENTED BEFORE THE LABOR ARBITER AND IT OVERLOOKED FACTS OF SUBSTANCE AND VALUE, THAT IF CONSIDERED WOULD DEFINITELY CONCLUDE THAT PRIVATE RESPONDENT ABANDONED HIS EMPLOYMENT WITH HEREIN PETITIONER, HENCE, IN DOING SO, THE HONORABLE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF JURISDICTION.

B.

PUBLIC RESPONDENT THE HONORABLE COURT OF APPEALS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO EXCESS OF OR LACK OF JURISDICTION WHEN IT ORDERED THE PAYMENT OF BACKWAGES AND OTHER CLAIMS TO PRIVATE RESPONDENT DESPITE A PREPONDERANCE OF EVIDENCE SHOWING AN ABANDONMENT OF WORK BY PRIVATE RESPONDENT.

The petition lacks merit.

At the outset, it must be stated that petitioners adopted the wrong mode of remedy in bringing the case before this Court. It is well-settled that the proper recourse of an aggrieved party to assail the decision of the Court of Appeals is to file a petition for review on *certiorari* under Rule 45 of the Rules of Court.[9] The Rules precludes recourse to the special civil action of *certiorari* if appeal, by way of a petition for review is available, as the remedies of appeal and *certiorari* are mutually exclusive and not alternative or successive.[10]

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[9] RULES OF COURT, Rule 45, Section 1. *Filing of petition with Supreme Court*. — A party desiring to appeal by *certiorari* from a judgment or final order or resolution of the Court of Appeals, the Sandiganbayan, the Regional Trial Court or other courts whenever authorized by law, may file with the Supreme Court a verified petition for review on *certiorari*. The petition shall raise only questions of law which must be distinctly set forth.

[10] *Rigor v. Tenth Division of the Court of Appeals*, G.R. No. 167400, June 30, 2006, 494 SCRA 375, 381-382.

For a writ of *certiorari* to issue, a petitioner must not only prove that the tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of jurisdiction but must also show that he has no plain, speedy and adequate remedy in the ordinary course of law.[11] *Certiorari* cannot be used as a substitute for a lost appeal. Though there are instances when *certiorari* was granted despite the availability of appeal,[12] none of these recognized exceptions was shown to be present in the case at bar.

Moreover, while it is true that the Court may treat a Petition for *Certiorari* as having been filed under Rule 45 in the interest of substantial justice, the present petition could not be given the same leniency because it was filed beyond the 15-day reglementary period within which to file a petition for review on *certiorari*. The records of the case show that petitioners received a copy of the January 24, 2008 Resolution of the Court of Appeals denying the motion for reconsideration on February 5, 2008. Instead of filing a petition for review on *certiorari* within 15 days from receipt thereof, petitioners waited for two months before filing the instant petition. Accordingly, the decision

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[11] RULES OF COURT, Rule 65, Section 1. *Petition for certiorari*. When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

The petition shall be accompanied by a certified true copy of the judgment, order or resolution subject thereof, copies of all pleadings and documents relevant and pertinent thereto, and a sworn certification of non-forum shopping as provided in the third paragraph of Section 3, Rule 46.

[12] These exceptions include: (a) when public welfare and the advancement of public policy dictates; (b) when the broader interest of justice so requires; (c) when the writs issued are null and void; or (d) when the questioned order amounts to an oppressive exercise of judicial authority. *Iloilo La Filipina Uygongco Corporation v. Court of Appeals*, G.R. No. 170244, November 28, 2007, 539 SCRA 178, 189.

of the Court of Appeals had already become final and executory and beyond the purview of this Court to act upon.[13] The inescapable conclusion is that the present petition was filed belatedly to make up for a lost appeal.

At any rate, even if the Court allows the present petition for *certiorari*, it would still be dismissible for lack of grave abuse of discretion amounting to lack of or excess of jurisdiction on the part of the Court of Appeals. For *certiorari* to prosper, 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.[14]

In the instant case, there was no showing that the Court of Appeals ruled in a capricious and whimsical manner amounting to an arbitrary exercise of its powers.

It is well-settled that in termination cases, the burden of proof rests upon the employer to show that the dismissal was for a just and valid cause and failure to discharge the same would mean that the dismissal is not justified and therefore illegal. Hence, in arguing that Sabulao abandoned his work, it is incumbent upon the petitioners to prove: (1) that the employee failed to report for work or had been absent without valid or justifiable reason; and (2) that there must have been a clear intention to sever the employer-employee relationship as manifested by some overt acts. Clearly, jurisprudence dictates that the burden of proof to show that there was unjustified refusal to go back to work rests on the employer.[15]

The NLRC, as affirmed by the Court of Appeals, correctly found that petitioners failed to substantiate its claim that Sabulao

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[13] See *Iloilo La Filipina Uygongco Corporation v. Court of Appeals*, *supra* note 12 at 190.

[14] *Nationwide Security and Allied Services, Inc. v. Court of Appeals*, G.R. No. 155844, July 14, 2008, 558 SCRA 148, 153.

[15] See *Macahilig v. National Labor Relations Commission*, G.R. No. 158095, November 23, 2007, 538 SCRA 375, 384-385.

abandoned his work. No evidence was presented to prove that Sabulao clearly intended to sever the employer-employee relationship as manifested by some overt acts. As regards petitioners' allegation that Sabulao is a field personnel and therefore not entitled to the money claims awarded by the NLRC, suffice it to state that the issue was raised only before the Court of Appeals in contravention to the rule that questions not raised before the tribunals *a quo* cannot be raised for the first time on appeal.[16] As such, it deserves no consideration by this Court.

WHEREFORE, the instant petition is *DENIED* for lack of merit. The August 23, 2007 Decision of the Court of Appeals in CA-G.R. SP No. 01027 which affirmed the Decision of the National Labor Relations Commission declaring petitioners guilty of illegal dismissal, and the January 24, 2008 Resolution denying the motion for reconsideration, are *AFFIRMED.*

SO ORDERED.

Chico-Nazario, Velasco, Jr., Nachura, and *Peralta, JJ.,* concur.

THIRD DIVISION

[G.R. No. 184252. September 11, 2009]

CHINA BANKING CORPORATION, *petitioner, vs.* **SPS. WENCESLAO & MARCELINA MARTIR,** *respondents.*

SYLLABUS

1. CIVIL LAW; OBLIGATIONS AND CONTRACTS; MORTGAGE; EXTRAJUDICIAL FORECLOSURE; NOTICE-POSTING

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[16] *Hermogenes v. Osco Shipping Services, Inc.*, G.R. No. 141505, August 18, 2005, 467 SCRA 301, 310.

REQUIREMENTS; PUBLICATION OF THE NOTICE OF SALE IN A NEWSPAPER OF GENERAL CIRCULATION ALONE IS SUFFICIENT COMPLIANCE WITH THE LAW.— The requirements for posting and publication in extrajudicial foreclosure are set out in Act No. 3135, as amended: xxx Jurisprudence, however, has decreed that the publication of the notice of sale in a newspaper of general circulation alone is more than sufficient compliance with the notice-posting requirements of the law. The Court has elucidated that: We take judicial notice of the fact that newspaper publications have more far-reaching effects than posting on bulletin boards in public places. There is a greater probability that an announcement or notice published in a newspaper of general circulation, which is distributed nationwide, shall have a readership of more people than that posted in a public bulletin board, no matter how strategic its location may be, which caters only to a limited few. Hence, the publication of the notice of sale in the newspaper of general circulation alone is more than sufficient compliance with the notice-posting requirement of the law. By such publication, a reasonably wide publicity had been effected such that those interested might attend the public sale, and the purpose of the law had been thereby subserved. The object of a notice of sale is to inform the public of the nature and condition of the property to be sold, and of the time, place and terms of the sale. Notices are given for the purpose of securing bidders and to prevent a sacrifice of the property. If these objects are attained, immaterial errors and mistakes will not affect the sufficiency of the notice; but if mistakes or omissions occur in the notices of sale, which are calculated to deter or mislead bidders, to depreciate the value of the property, or to prevent it from bringing a fair price, such mistakes or omissions will be fatal to the validity of the notice, and also to the sale made pursuant thereto.

2. ID.; ID.; ID.; ID.; ID.; THE NEWSPAPER NEED NOT HAVE THE LARGEST CIRCULATION SO LONG AS IT IS OF GENERAL CIRCULATION. — Presidential Decree 1079, the governing law at the time of the subject foreclosure, requires that notices shall be published in newspapers or publications published, edited and circulated in the same city and/or province where the requirement of general circulation applies, thus: x x x. Presidential Decree 1079 requires a newspaper of general circulation. A newspaper of general circulation is published

for the dissemination of local news and general information; it has a *bona fide* subscription list of paying subscribers; and it is published at regular intervals. The newspaper must not also be devoted to the interest or published for the entertainment of a particular class, profession, trade, calling, race or religious denomination. The newspaper need not have the largest circulation so long as it is of general circulation.

3. ID.; ID.; ID.; ID.; ID.; ID.; ACCREDITATION BY THE PRESIDING JUDGE IS NOT CONCLUSIVE THAT A NEWSPAPER IS OF GENERAL CIRCULATION. — Presidential Decree 1079, however, does not require accreditation. The requirement of accreditation was imposed by the Court only in 2001, through A.M. No. 01-1-07-SC or the *Guidelines in the Accreditation of Newspapers and Periodicals Seeking to Publish Judicial and Legal Notices and Other Similar Announcements and in the Raffle Thereof.* This circular cannot be applied retroactively to the case at bar as it will impair petitioner's rights. Moreover, as held in *Metrobank v. Peñafiel*, the accreditation by the presiding judge is not conclusive that a newspaper is of general circulation, as each case must be decided on its own merits and evidence. The accreditation of *Maharlika Pilipinas* by the Presiding Judge of the RTC is not decisive of whether it is a newspaper of general circulation in Mandaluyong City. This Court is not bound to adopt the Presiding Judge's determination, in connection with the said accreditation, that *Maharlika Pilipinas* is a newspaper of general circulation. The court before which a case is pending is bound to make a resolution of the issues based on the evidence on record. In the instant case, the Affidavit of Publication executed by the account executive of Sun Star General Santos expressly provided that the said newspaper is of general circulation and is published in the City of General Santos. This is *prima facie* proof that Sun Star General Santos is generally circulated in General Santos City, the place where the properties are located. Notably, respondents did not claim that the subject newspaper was not generally circulated in the city, but only that it was not accredited by the court. Hence, there was valid publication and consequently, the extrajudicial foreclosure and sale are valid.

4. ID.; ID.; ID.; ID.; RIGHT OF REDEMPTION; THE OFFER TO REDEEM IS INEFFECTUAL IF UNACCOMPANIED

BY AN ACTUAL TENDER OF THE REDEMPTION PRICE. — In effecting redemption, the mortgagor has the duty of tendering payment before the redemption period expires. While the complaint alleged that respondents made an offer to redeem the subject properties within the period of redemption, it did not allege that there was an actual tender of payment of the redemption price as required by the rules. The letter dated May 11, 1999 is only a formal offer to redeem, unaccompanied by an actual tender of the redemption price. The general rule in redemption is that it is not sufficient that a person offering to redeem manifests his desire to do so. The statement of intention must be accompanied by an actual and simultaneous tender of payment. This constitutes the exercise of the right to repurchase. In several cases decided by the Court where the right to repurchase was held to have been properly exercised, there was an unequivocal tender of payment for the full amount of the repurchase price. Otherwise, the offer to redeem is ineffectual. *Bona fide* redemption necessarily implies a reasonable and valid tender of the entire repurchase price, otherwise the rule on the redemption period fixed by law can easily be circumvented. Moreover, jurisprudence also characterizes a valid tender of payment as one where the full redemption price is tendered.

5. ID.; ID.; ID.; ID.; ID.; REDEMPTION WITHIN THE PERIOD ALLOWED BY LAW IS NOT A MATTER OF INTENT BUT A QUESTION OF PAYMENT OR VALID TENDER OF FULL REDEMPTION PRICE WITHIN SAID PERIOD. — Respondents' repeated requests for information as regards the amount of loan availed from the credit line and the amount of redemption, and petitioner's failure to accede to said requests do not invalidate the foreclosure. Respondents can find other ways to know the redemption price. For one, they can examine the Certificate of Sale registered with the Register of Deeds to verify the purchase price, or upon the filing of their complaint, they could have moved for a computation of the redemption price and consigned the same to the court. At any rate, whether or not respondents were diligent in asserting their willingness to pay is irrelevant. Redemption within the period allowed by law is not a matter of intent but a question of payment or valid tender of the full redemption price within said period.

6. ID.; ID.; ID.; ID.; ID.; THE INSTITUTION OF AN ACTION TO ANNUL A FORECLOSURE SALE DOES NOT SUSPEND

THE RUNNING OF THE REDEMPTION PERIOD. — Even the complaint instituted by respondents cannot aid their plight because the institution of an action to annul a foreclosure sale does not suspend the running of the redemption period. Moreover, the period within which to redeem the property sold at a sheriff's sale is not suspended by the institution of an action to annul the foreclosure sale. It is clear, then, that petitioners have lost any right or interest over the subject property primarily because of their failure to redeem the same in the manner and within the period prescribed by law. Their belated attempts to question the legality and validity of the foreclosure proceedings and public auction must accordingly fail.

7. ID.; ID.; ID.; ID.; ID.; REDEMPTION PERIOD; PURPOSE; FIXING A DEFINITE TERM WITHIN WHICH THE PROPERTY SHOULD BE REDEEMED IS MEANT TO AVOID PROLONGED ECONOMIC CERTAINTY OVER THE OWNERSHIP OF THE THING SOLD. — Indeed, the law allows respondents the right to redeem their foreclosed properties. But in so granting that right, the law intended that their offer to redeem be valid and effective, accompanied by an actual tender of the redemption price. Fixing a definite term within which the property should be redeemed is meant to avoid prolonged economic uncertainty over the ownership of the thing sold.

APPEARANCES OF COUNSEL

Lim Vigilia Alcala Dumlao Alameda & Casiding for petitioner.
Tabalingcos and Associates Law Offices for respondents.

D E C I S I O N

YNARES-SANTIAGO, *J.*:

Assailed is the November 28, 2007 Decision[1] of the Court of Appeals in CA-G.R. CV No. 00477 which reversed the April 27, 2004 Decision[2] of the Regional Trial Court of General Santos

[1] *Rollo*, pp. 28-40; penned by Associate Justice Mario V. Lopez, and concurred in by Associate Justices Romulo V. Borja and Elihu A. Ybañez.

[2] *Id.* at 78-85; penned by Presiding Judge Jaime V. Quitain.

City, Branch 23; invalidated the foreclosure; and ordered the cancellation of the Certificate of Sale in favor of petitioner, China Banking Corporation. Also assailed is the August 6, 2008 Resolution[3] which denied the motion for reconsideration.

In 1994, respondents, spouses Wenceslao and Marcelina Martir, executed real estate mortgages in favor of petitioner China Banking Corporation over three parcels of land described under TCT No. 50485, OCT No. (P-29452) (P-11287) P-1897, and OCT No. P-2754, as security for their credit line in the amount of ₱1,800,000.00.[4] The loan was released in tranches, and for every amount released, respondents executed the corresponding promissory note.

On September 12, 1997, respondents failed to pay the monthly interests on the promissory notes, thus a demand letter dated October 8, 1997[5] was sent reminding them of their obligation. Respondents still failed to pay; hence, the promissory notes and the credit line were no longer renewed by petitioner. A final demand letter dated December 29, 1997[6] was sent through registered mail to respondents by petitioner's counsel. At that time, respondents' total obligation amounted to ₱1,705,000.00.

On May 20, 1998, upon the application of petitioner, the properties subject of the real estate mortgages were extrajudicially foreclosed and sold at public auction for ₱2,400,000.00 with petitioner as the sole bidder. A Certificate of Sale[7] was issued in favor of petitioner on May 21, 1998, and registered with the Register of Deeds on June 6, 1998.

From March to May 1999, respondents sent series of letters[8] to petitioner inquiring the amount of loan availed from the credit

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

[4] *Id.* at 52-53.

[5] *Exhibits for the Defendants in Civil Case No. 6573*, Exhibit 11.

[6] *Id.*, Exhibit 12.

[7] *Id.*, Exhibit 13.

[8] Records, pp. 29-34.

line, as well as the amount needed to redeem the foreclosed properties. Petitioner, however, failed to respond to the inquiry. In a letter dated May 11, 1999,[9] respondents formally offered to pay the amount of ₱1,300,000.00 to petitioner. Said amount was based on petitioner's letter dated October 8, 1997 stating that the principal obligation amounts to ₱1,300,000.00.

On May 17, 1999, respondents filed a complaint for nullification of the foreclosure proceedings[10] alleging non-compliance with the jurisdictional requirements of publication, posting, registration, payment of filing fees and sheriff fees, and failure to report the extrajudicial foreclosure proceedings and sale to the Executive Judge. Respondents also imputed bad faith on the part of petitioner, which allegedly prevented them from redeeming their properties.

In a Decision dated April 27, 2004, the Regional Trial Court upheld the validity of the foreclosure proceedings, but stated that respondents' failure to redeem the properties was caused by petitioner. Hence, the trial court granted respondents the alternative remedy of redeeming the properties. The dispositive portion of the Decision reads:[11]

> WHEREFORE, considering that the case was filed in 1999, while the requirement for the payment of docket fees, as well as the registration fees required on the petition for foreclosure of mortgage per the Supreme Court Administrative Matter 99-10-05 regarding such procedure in extra-judicial foreclosure of mortgage took effect only on January 15, 2000, the foreclosure could not be invalidated even if there was non-compliance with the Court Administrative Matter 99-10-05. However, the expiration of the period to redeem being without the plaintiff having been able to do so, was caused by the defendant bank; therefore, the plaintiff is hereby granted the alternative remedy of redeeming the properties, in accordance with law and with the mortgage contract entered into by the parties.
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> SO ORDERED.

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[9] *Id.* at 35.

[10] *Rollo*, pp. 69-76.

[11] *Id.* at 85.

On appeal, the Court of Appeals reversed the decision of the trial court. It invalidated the foreclosure and ordered the cancellation of the registration of the Certificate of Sale in favor of petitioner. It also ordered respondents to pay petitioner their loans with interest, without prejudice to the right of petitioner to foreclose the real estate mortgage upon respondents' failure to pay their obligations. The dispositive portion of the November 28, 2007 Decision reads:[12]

> WHEREFORE, the appealed Decision of the Regional Trial Court of General Santos City, Branch 23 is REVERSED. The Register of Deeds of General Santos City is hereby ORDERED to cancel the registration of Certificate of Sale in favor of appellee Bank. Likewise, the appellants are ORDERED to pay the appellee Bank their loans with interest as stipulated in the contract of loan, without prejudice to the right of the appellee Bank to foreclose the real estate mortgage upon the appellants' failure to pay their obligations.
>
> SO ORDERED.

Petitioner moved for reconsideration but was denied. Hence, the instant petition raising the following issues:[13]

I.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED WHEN IT HELD THAT THE EXTRA-JUDICIAL FORECLOSURE SALE WAS VOID BASED ON THE GROUND THAT THE NEWSPAPER WHERE THE NOTICE OF AUCTION SALE WAS PUBLISHED WAS NOT AN "ACCREDITED NEWSPAPER," WHICH CONTENTION IS NOT A REQUIREMENT UNDER EXISTING LAWS AND JURISPRUDENCE.

II.

THE HONORABLE COURT OF APPEALS GRAVELY ERRED IN ITS RULING WHEN IT FAILED TO APPRECIATE THE FACT THAT THERE WAS SUBSTANTIAL COMPLIANCE IN BOTH THE POSTING OF THE NOTICE OF EXTRA-JUDICIAL FORECLOSURE SALE AS WELL AS THE PUBLICATION OF THE SAME IN A

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[12] *Id.* at 40.

[13] *Id.* at 10.

NEWSPAPER OF GENERAL CIRCULATION BY THE FORECLOSING NOTARY PUBLIC.

The petition is meritorious.

In invalidating the extrajudicial foreclosure and sale, the appellate court found that the posting and publication requirements were not met, thus:

> In this case, the appellee Bank failed to comply with both the requirements of posting and publication. The notice of extrajudicial foreclosure and sale was posted in the *barangay* hall and Hall of Justice of General Santos City for only fourteen (14) days, *i.e.* from May 6 to May 20, 1998 in violation of the mandated twenty (20) day period. Likewise, the publication in SUN STAR, a local newspaper, was not valid on the ground that said newspaper is not an accredited newspaper of general circulation in General Santos City pursuant to P.D. No. 1079. This is confirmed by the Certification of Mr. Elmer D. Lastimosa, Clerk of Court VI, Office of the Clerk of Court of the Regional Trial Court, General Santos City, dated January 12, 1999 which states that:
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> x x x x x x x x x
>
> THIS IS TO CERTIFY that SUN-STAR, General Santos published by Ang Peryodiko Dabaw, Inc. with editorial and business address at Halieus Mall, Pendatun Avenue, corner Lukban Street, General Santos City **is not an accredited local newspaper insofar as this Court is concerned and therefore not qualified to publish judicial notices, court orders and summonses and all similar announcement arising from court litigation required by law to be published, as provided in Section 1 of P.D. No. 1079.**
>
> x x x x x x x x x
>
> THIS IS TO FURTHER CERTIFY that SUN-STAR General Santos has filed a "Petition for Accreditation" docketed as Miscellaneous Case No. 1797 now pending consideration before the sala of Honorable Executive Judge Antonio S. Alano.[14]

The requirements for posting and publication in extrajudicial foreclosure are set out in Act No. 3135, as amended:

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[14] *Id.* at 38-39.

Sec. 3. — Notice shall be given by posting notices of the sale for not less than twenty days in at least three public places of the municipality or city where the property is situated, and if such property is worth more than four hundred pesos, such notice shall also be published once a week for at least three consecutive weeks in a newspaper of general circulation in the municipality or city.

Jurisprudence, however, has decreed that the publication of the notice of sale in a newspaper of general circulation alone is more than sufficient compliance with the notice-posting requirements of the law.[15] The Court has elucidated that:

We take judicial notice of the fact that newspaper publications have more far-reaching effects than posting on bulletin boards in public places. There is a greater probability that an announcement or notice published in a newspaper of general circulation, which is distributed nationwide, shall have a readership of more people than that posted in a public bulletin board, no matter how strategic its location may be, which caters only to a limited few. Hence, the publication of the notice of sale in the newspaper of general circulation alone is more than sufficient compliance with the notice-posting requirement of the law. By such publication, a reasonably wide publicity had been effected such that those interested might attend the public sale, and the purpose of the law had been thereby subserved.

The object of a notice of sale is to inform the public of the nature and condition of the property to be sold, and of the time, place and terms of the sale. Notices are given for the purpose of securing bidders and to prevent a sacrifice of the property. If these objects are attained, immaterial errors and mistakes will not affect the sufficiency of the notice; but if mistakes or omissions occur in the notices of sale, which are calculated to deter or mislead bidders, to depreciate the value of the property, or to prevent it from bringing a fair price, such mistakes or omissions will be fatal to the validity of the notice, and also to the sale made pursuant thereto.[16]

The focal issue, then, is whether the requirement of publication was complied with.

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[15] *Cristobal v. Court of Appeals*, 384 Phil. 807, 816 (2000).

[16] *Olizon v. Court of Appeals*, G.R. No. 107075, September 1, 1994, 236 SCRA 148, 155-156.

Presidential Decree 1079, the governing law at the time of the subject foreclosure, requires that notices shall be published in newspapers or publications published, edited and circulated in the same city and/or province where the requirement of general circulation applies, thus:

> Section 1. All notices of auction sales in extra-judicial foreclosure of real estate mortgage under Act No. 3135 as amended, judicial notices such as notices of sale on execution of real properties, notices in special proceedings, court orders and summonses and all similar announcements arising from court litigation required by law to be published in a newspaper or periodical of general circulation in particular provinces and/or cities shall be published in newspapers or publications published, edited and circulated in the same city and/or province where the requirement of general circulation applies; Provided, That the province or city where the publication's principal office is located shall be considered the place where it is edited and published: Provided, further, That in the event there is no newspaper or periodical published in the locality, the same may be published in the newspaper or periodical published, edited and circulated in the nearest city or province: Provided, finally, That no newspaper or periodical which has not been authorized by law to publish and which has not been regularly published for at least one year before the date of publication of the notices or announcements which may be assigned to it shall be qualified to publish the said notices.

Presidential Decree 1079 requires a newspaper of general circulation. A newspaper of general circulation is published for the dissemination of local news and general information; it has a *bona fide* subscription list of paying subscribers; and it is published at regular intervals. The newspaper must not also be devoted to the interest or published for the entertainment of a particular class, profession, trade, calling, race or religious denomination. The newspaper need not have the largest circulation so long as it is of general circulation.[17]

Presidential Decree 1079, however, does not require accreditation. The requirement of accreditation was imposed

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[17] *Perez v. Perez*, 494 Phil. 68, 77 (2005).

by the Court only in 2001, through A.M. No. 01-1-07-SC or the *Guidelines in the Accreditation of Newspapers and Periodicals Seeking to Publish Judicial and Legal Notices and Other Similar Announcements and in the Raffle Thereof.* This circular cannot be applied retroactively to the case at bar as it will impair petitioner's rights.

Moreover, as held in *Metrobank v. Peñafiel*,[18] the accreditation by the presiding judge is not conclusive that a newspaper is of general circulation, as each case must be decided on its own merits and evidence.

> The accreditation of *Maharlika Pilipinas* by the Presiding Judge of the RTC is not decisive of whether it is a newspaper of general circulation in Mandaluyong City. This Court is not bound to adopt the Presiding Judge's determination, in connection with the said accreditation, that *Maharlika Pilipinas* is a newspaper of general circulation. The court before which a case is pending is bound to make a resolution of the issues based on the evidence on record.[19]

In the instant case, the Affidavit of Publication executed by the account executive of Sun Star General Santos expressly provided that the said newspaper is of general circulation and is published in the City of General Santos.[20] This is *prima facie* proof that Sun Star General Santos is generally circulated in General Santos City, the place where the properties are located. Notably, respondents did not claim that the subject newspaper was not generally circulated in the city, but only that it was not accredited by the court. Hence, there was valid publication and consequently, the extrajudicial foreclosure and sale are valid.

We now come to the question of whether respondents can redeem their properties on the basis of the alleged bad faith of petitioner.

The Court rules in the negative.

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[18] G.R. No. 173976, February 27, 2009.

[19] *Id.*

[20] *Rollo,* p. 102.

In effecting redemption, the mortgagor has the duty of tendering payment before the redemption period expires. While the complaint alleged that respondents made an offer to redeem the subject properties within the period of redemption, it did not allege that there was an actual tender of payment of the redemption price as required by the rules.[21] The letter dated May 11, 1999 is only a formal offer to redeem, unaccompanied by an actual tender of the redemption price. The said letter reads:[22]

May 11, 1999

Aparente-Salvani St.,
Dadiangas Heights
General Santos City

THE CHINA BANKING CORPORATION
General Santos City

Sir:

This is with reference to my letter dated May 4, 1999 which remained unanswered up to the present.

I have been asking for the total amount of the loan with your bank so that the proper amount of redemption can be determined, as you also refuse to give us the amount of redemption.

Per my computation, the principal obligation is only ₱1,300,000.00 for which the redemption amount should be based. Because of your failure and refusal consider this as a formal tender of redemption in the principal amount of ₱1,300,000.00. This tender is made without however waiving my right to question the validity of the foreclosure proceedings.

Your reply is highly appreciated, otherwise your failure to do so within a period of two (2) days will constrain us to file the necessary action in court to protect my interest.

Very truly yours,

(signed)
WENCESLAO V. MARTIR JR.,

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[21] *Banco Filipino Savings and Mortgage Bank v. Court of Appeals*, G.R. No. 143896, July 8, 2005, 463 SCRA 64, 76.

[22] Records, p. 35.

This tender of payment is also made to:

ATTY. LORETO B. ACHARON
Notary Public who conducted the
Extrajudicial Sale

The general rule in redemption is that it is not sufficient that a person offering to redeem manifests his desire to do so. The statement of intention must be accompanied by an actual and simultaneous tender of payment. This constitutes the exercise of the right to repurchase.[23]

In several cases decided by the Court where the right to repurchase was held to have been properly exercised, there was an unequivocal tender of payment for the full amount of the repurchase price. Otherwise, the offer to redeem is ineffectual. *Bona fide* redemption necessarily implies a reasonable and valid tender of the entire repurchase price, otherwise the rule on the redemption period fixed by law can easily be circumvented.[24]

Moreover, jurisprudence also characterizes a valid tender of payment as one where the full redemption price is tendered.

Consequently, in this case, the offer by respondents on July 24, 1986 to redeem the foreclosed properties for ₱1,872,935 and the subsequent consignation in court of ₱1,500,000 on August 27, 1986, while made within the period of redemption, was ineffective since the amount offered and actually consigned not only did not include the interest but was in fact also way below the ₱2,782,554.66 paid by the highest bidder/purchaser of the properties during the auction sale.

In *Bodiongan vs. Court of Appeals*, we held:

> In order to effect a redemption, the judgment debtor must pay the purchaser the redemption price composed of the following: (1) the price which the purchaser paid for the property; (2) interest of 1% per month on the purchase price; (3) the

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[23] *BPI Family Savings Bank, Inc. v. Spouses Veloso*, 479 Phil. 627, 632 (2004).

[24] *Id.* at 632-633.

> amount of any assessments or taxes which the purchaser may have paid on the property after the purchase; and (4) interest of 1% per month on such assessments and taxes x x x.

Furthermore, Article 1616 of the Civil Code of the Philippines provides:

> The vendor cannot avail himself of the right to repurchase without returning to the vendee the price of the sale x x x.
>
> It is not difficult to understand why the redemption price should either be fully offered in legal tender or else validly consigned in court. Only by such means can the auction winner be assured that the offer to redeem is being made in good faith.[25]

Respondents' repeated requests for information as regards the amount of loan availed from the credit line and the amount of redemption, and petitioner's failure to accede to said requests do not invalidate the foreclosure. Respondents can find other ways to know the redemption price. For one, they can examine the Certificate of Sale registered with the Register of Deeds to verify the purchase price, or upon the filing of their complaint, they could have moved for a computation of the redemption price and consigned the same to the court. At any rate, whether or not respondents were diligent in asserting their willingness to pay is irrelevant. Redemption within the period allowed by law is not a matter of intent but a question of payment or valid tender of the full redemption price within said period.[26]

Even the complaint instituted by respondents cannot aid their plight because the institution of an action to annul a foreclosure sale does not suspend the running of the redemption period.

> Moreover, the period within which to redeem the property sold at a sheriff's sale is not suspended by the institution of an action to annul the foreclosure sale. It is clear, then, that petitioners have lost any right or interest over the subject property primarily because of their failure to redeem the same in the manner and within the period prescribed by law. Their belated attempts to question the

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[25] *Id.* at 633-634.

[26] *Id.* at 634.

legality and validity of the foreclosure proceedings and public auction must accordingly fail.[27]

Indeed, the law allows respondents the right to redeem their foreclosed properties. But in so granting that right, the law intended that their offer to redeem be valid and effective, accompanied by an actual tender of the redemption price. Fixing a definite term within which the property should be redeemed is meant to avoid prolonged economic uncertainty over the ownership of the thing sold.[28]

WHEREFORE, the petition is *GRANTED*. The November 28, 2007 Decision and the August 6, 2008 Resolution of the Court of Appeals in CA-G.R. CV No. 00477 are *REVERSED AND SET ASIDE*. The April 27, 2004 Decision of the Regional Trial Court of General Santos City, Branch 23 upholding the validity of the extra-judicial foreclosure sale is *REINSTATED* and *AFFIRMED* with the *MODIFICATION* that respondents are no longer allowed to redeem their properties.

SO ORDERED.

Chico-Nazario, Velasco, Jr., Nachura, and *Peralta, JJ.,* concur.

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[27] *Spouses Landrito v. Court of Appeals*, G.R. No. 133079, August 9, 2005, 466 SCRA 107, 118.

[28] *BPI Family Savings Bank, Inc. v. Spouses Veloso*, *supra* note 23 at 634.

THIRD DIVISION

[G.R. No. 186138. September 11, 2009]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **LORETO DARIA, JR.** ***y*** **CRUZ,** *accused-appellant.*

SYLLABUS

1. CRIMINAL LAW; REPUBLIC ACT NO. 9165; SECTION 21, ARTICLE II OF THE IMPLEMENTING RULES AND REGULATIONS; SEIZURES AND CUSTODY OF DRUGS; NOT RENDERED VOID BY THE NON-COMPLIANCE WITH THE PROCEDURAL REQUIREMENTS. — In *People v. Agulay,* therein accused-appellant contended that the non-compliance with the procedure in Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, created an irregularity that overcame the presumption of regularity accorded to police authorities in the performance of their official duties. There, the Court decreed that failure to strictly follow the procedure set forth under Section 21(1), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, did not invalidate the seizure and custody of confiscated items during the buy-bust operation, x x x Moreover, **non-compliance with the procedure outlined in Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, shall not render void and invalid such seizures of and custody over said items,** for as long as the integrity and evidentiary value of the seized items are properly preserved by the apprehending officers. From the foregoing disquisition, it can easily be gleaned that non-compliance with the procedural requirements under Republic Act No. 9165 and its Implementing Rules and Regulations relative to the custody, photographing and drug-testing of the apprehended persons, are not serious flaws that can render void the seizures and custody of drugs in a buy-bust operation. In addition, the Court has already ruled that the non-presentation of the pre-operation report is not fatal to the cause of the prosecution, because it is not indispensable in a buy-bust operation.

2. ID.; ID.; SALE OF DANGEROUS DRUGS; ELEMENTS; ESTABLISHED IN CASE AT BAR. — What determines if there was, indeed, a sale of dangerous drugs in a buy-bust operation is proof of the concurrence of all the elements of the offense, to wit: (1) the identity of the buyer and the seller, the object, and the consideration; and (2) the delivery of the thing sold and the payment therefor, which the prosecution has satisfactorily established. The prosecution satisfactorily proved the illegal sale of dangerous drugs and presented in court the evidence of *corpus delicti*. In the instant case, all the elements of the crime have been sufficiently established by the prosecution.

3. ID.; ID.; ID.; CHAIN OF CUSTODY OF THE SEIZED DRUGS; ESTABLISHED IN CASE AT BAR; INTEGRITY AND EVIDENTIARY VALUE OF THE SEIZED DRUGS, NOT COMPROMISED. — Contrary to what Loreto wants to portray, the chain of custody of the seized prohibited drugs was shown to have not been broken. While still in the crime scene, PO1 Bantog marked the one plastic sachet he bought and the other 10 sachets he seized from Loreto's possession. These plastic sachets containing a white crystalline substance were immediately forwarded to the PNP Crime Laboratory for examination to determine the presence of dangerous drugs. The forensic chemist found that the white crystalline substance inside the 11 confiscated sachets was positive for methylamphetamine hydrochloride (*shabu*), a dangerous drug. Besides, Loreto did not question the custody and disposition of the drugs that were taken from him in the proceedings before the RTC. In fact, he stipulated the existence of the specimens, the existence of the arresting officer's request for laboratory examination, and the fact that the same were examined by Forensic Chemist Annalee Forro. The examination yielded a positive result for methamphetamine hydrochloride, commonly known as *shabu*. There can be no doubt that the drug bought and seized from Loreto was the same one examined in the crime laboratory. Plainly, the prosecution established the crucial link in the chain of custody of the sold and seized sachets of *shabu*, from the time they were first bought and seized from Loreto, until they were brought for examination. We, thus, find the integrity and the evidentiary value of the drugs coming from Loreto to have not been compromised.

4. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; APPELLATE COURTS WILL NOT DISTURB THE CREDENCE, OR LACK OF IT, ACCORDED BY THE TRIAL COURT TO THE TESTIMONIES OF WITNESSES; EXCEPTIONS; NOT PRESENT IN CASE AT BAR. — [L]oreto wants this Court to evaluate the credibility of the prosecution witnesses *vis-a-vis* the defense witness. It has often been said, however, that the credibility of witnesses is a matter best examined by, and left to, the trial courts. The time-tested doctrine is that the matter of assigning values to declarations on the witness stand is best and most competently performed by the trial judge who, unlike appellate magistrates, can weigh such testimony in light of the declarant's demeanor, conduct and position to discriminate between truth and falsehood. Thus, appellate courts will not disturb the credence, or lack of it, accorded by the trial court to the testimonies of witnesses. This is especially true when the trial court's findings have been affirmed by the appellate court, because said findings are generally conclusive and binding upon this Court, unless it be manifestly shown that the trial court had overlooked or disregarded arbitrarily the facts and circumstances of significance in the case. However, in view of the fact that at stake here is no less than the liberty of accused-appellant, this Court thoroughly examined the entire records of this case, scrutinized the testimonies and the pieces of documentary evidence tendered by both parties, and observed them at close range. Regrettably for Loreto, this Court failed to identify any error committed by the RTC or the Court of Appeals, both in their respective appreciations of the evidence presented before them and in the conclusion they arrived at.

5. ID.; ID.; ID.; TESTIMONY OF THE ACCUSED'S SISTER-IN-LAW IS VIEWED WITH DISFAVOR; REASON. — There was no reason why the police officers involved would exact retribution from Loreto. It must be noted that one of his wives filed a complaint against Inspector Pascual, PO1 Ramos, PO1 Orig and PO3 Bernardo for illegal arrest, planting of evidence and robbery in relation to Loreto's first arrest on 22 July 2003, but, said complaint was already dismissed on 18 May 2004. Not only were the police officers cleared, they were also vindicated when Loreto was convicted in a drug case in relation to his first arrest on 22 July 2003. In addition, he cannot ascribe any ill motive on the part of PO1 Bantog, the lone prosecution

witness. What further militates against Loreto's proposition is that it vascillates on whether to stick to the defense that he is a subject of the police officer's revenge or that he is a victim of extortion, both of which remained unsubstantiated. The supposed corroborative testimony mustered by the defense came from Loreto's sister-in-law, a testimony that the court viewed with disfavor since it could easily be fabricated.

6. ID.; ID.; ID.; FAILURE OF THE WITNESS TO RECALL EVERY MINUTE DETAIL OF AN INCIDENT CANNOT AFFECT THE CAUSE OF THE PROSECUTION. — Although PO1 Bantog failed to recall from which pants pocket he seized the ten sachets and the exact quantity of drugs he bought from Loreto, said omission cannot affect the cause of the prosecution. This only shows an honest lack of recollection of the minor and inconsequential aspect of what transpired during the entrapment operation. It would be a tall order, indeed, to require the witness to recall every minute detail of an incident, *i.e.*, from which pocket PO1 got the ten sachets and the quantity of the *shabu* sold. If the event had transpired in rapid succession amid the flurry and excitement of the moment, it would be hard for the arresting officer to absorb all the nitty gritty of what went on during the incident in question.

7. ID.; ID.; ID.; ONLY A TRUSTWORTHY WITNESS COULD NARRATE WITH SUCH CLARITY AND REALISM WHAT TRANSPIRED ON THE DAY IN QUESTION. — Comparing the defense version with that of the arresting/entrapping police officer as to what really happened at about 9:30 p.m. of 18 August 2003 or on 16 August 2003 (defense's version), this Court finds, as did the RTC and the Court of Appeals, the account of the prosecution witness more credible. Aside from the presumption that they — PO1 Bantog and his companions — regularly performed their duties, this Court notes that the prosecution witness gave a consistent and straightforward narration of what transpired on the day in question. The version depicted by the prosecution, through the testimony of the entrapping officer, could have only been described by a person who actually witnessed the event that took place on 18 August 2003. Only a trustworthy witness could have narrated with such clarity and realism what really happened on the date referred to.

8. ID.; ID.; DEFENSE OF DENIAL OR FRAME-UP; VIEWED WITH DISFAVOR; REASONS. — Once again, this Court

stresses that a buy-bust operation is a legally effective and proven procedure, sanctioned by law, for apprehending drug peddlers and distributors. It is often utilized by law enforcers for the purpose of trapping and capturing lawbreakers in the execution of their nefarious activities. This Court, of course, is not unaware that in some instances, law enforcers resort to the practice of planting evidence to extract information or even to harass civilians. But the defense of frame-up in drug cases requires strong and convincing evidence because of the presumption that the law enforcement agencies acted in the regular performance of their official duties. Moreover, the defense of denial or frame-up, like alibi, has been viewed by the court with disfavor, for it can just as easily be concocted and is a common and standard defense ploy in most prosecutions for violations of the drugs law.

9. CRIMINAL LAW; REPUBLIC ACT NO. 9165; ILLEGAL SALE AND POSSESSION OF *SHABU*; IMPOSABLE PENALTY. — In sum, in Criminal Case No. 12832-D, the Court, just like the RTC and the Court of Appeals, is convinced that the prosecution's evidence proved beyond reasonable doubt the charge of violation of Section 5, Article II, Republic Act No. 9165 (illegal sale of *shabu*). Also proven by the same quantum of evidence was the charge for violation of Section 11, Article II, Republic Act No. 9165 (illegal possession of *shabu*) in Criminal Case No. 12833-D, Loreto having knowingly carried with him the ten plastic sachets of *shabu* without legal authority at the time he was apprehended during the buy-bust operation. In the illegal sale, in Criminal Case No. 12832-D, the RTC imposed upon Loreto the penalty of life imprisonment and a fine of ₱500,000.00; while in the illegal possession, in Criminal Case No. 12833-D, he was sentenced to the indeterminate penalty of imprisonment ranging from 12 years and 1 day to 14 years and to pay the fine of ₱300,000.00. Under Section 5, Article II of Republic Act No. 9165, the unauthorized sale of *shabu*, regardless of its quantity and purity, carries with it the penalty of life imprisonment to death and a fine ranging from Five Hundred Thousand Pesos (₱500,000.00) to Ten Million Pesos (₱10,000,000.00). Pursuant, however, to the enactment of Republic Act No. 9346 entitled, "An Act Prohibiting the Imposition of Death Penalty in the Philippines," only life imprisonment and fine shall be imposed. Thus, the RTC properly imposed the penalty of life imprisonment and

fine of ₱500,000.00 on Loreto for the illegal sale of *shabu*. The possession of dangerous drugs is punished under Section 11, Article II of Republic Act No. 9165. Paragraph 2, No. 3 thereof, reads: x x x In the instant case, Loreto was caught in possession of one gram and 11 decigrams (1.11 grams) of *shabu*. The penalty imposed by the RTC is proper.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellant.

D E C I S I O N

CHICO-NAZARIO, *J.*:

The instant appeal assails the Decision[1] of the Court of Appeals dated 25 October 2007 in CA-G.R. CR H.C. No. 02544 which affirmed the 14 June 2006 Decision[2] of the Regional Trial Court (RTC) of Pasig City, Branch 267, in Criminal Cases No. 12832-D and No. 12833-D, finding accused-appellant Loreto C. Daria, Jr., *a.k.a. Tayap* (Loreto), guilty of illegal sale and illegal possession of methamphetamine hydrochloride more popularly known as "*shabu*."

On 1 September 2003, two separate Informations were filed against Loreto before the RTC of Pasig City for violation of Sections 5 and 11, Article II, Republic Act No. 9165, as amended, otherwise known as the Comprehensive Dangerous Drugs Act of 2002, for allegedly (a) selling 0.46 gram of *shabu* and (b) being in illegal possession of 1.11 grams of *shabu*.

The offense involved in Criminal Case No. 12832-D for violation of Section 5,[3] Article II of Republic Act No. 9165, was allegedly committed as follows:

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[1] Penned by Associate Justice Vicente Q. Roxas with Associate Justices Josefina Guevara-Salonga and Ramon R. Garcia, concurring; *rollo*, pp. 2-20.

[2] Penned by Judge Florito S. Macalino; records, pp. 113-123.

[3] SECTION 5. *Sale, Trading, Administration, Dispensation, Delivery, Distribution and Transportation of Dangerous Drugs and/or Controlled*

On or about August 18, 2003, in Pasig City, and within the jurisdiction of this Honorable Court, the accused, not being lawfully authorized by law, did then and there willfully, unlawfully and feloniously sell, deliver and give away to PO1 Victor S. Bantog, Jr., a police poseur-buyer, one (1) heat-sealed transparent plastic sachet containing forty-six decigrams (0.46 gram) of white crystalline

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Precursors and Essential Chemicals. — The penalty of life imprisonment to death and a fine ranging from Five hundred thousand pesos (₱500,000.00) to Ten million pesos (₱10,000,000.00) shall be imposed upon any person, who, unless authorized by law, ***shall sell, trade, administer, dispense, deliver, give away to another, distribute, dispatch in transit or transport any dangerous drug, including any and all species of opium poppy regardless of the quantity and purity involved, or shall act as a broker in any of such transactions.***

The penalty of imprisonment ranging from twelve (12) years and one (1) day to twenty (20) years and a fine ranging from One hundred thousand pesos (₱100,000.00) to Five hundred thousand pesos (₱500,000.00) shall be imposed upon any person, who, unless authorized by law, shall sell, trade, administer, dispense, deliver, give away to another, distribute, dispatch in transit or transport any controlled precursor and essential chemical, or shall act as a broker in such transactions.

If the sale, trading, administration, dispensation, delivery, distribution or transportation of any dangerous drug and/or controlled precursor and essential chemical transpires within one hundred (100) meters from the school, the maximum penalty shall be imposed in every case.

For drug pushers who use minors or mentally incapacitated individuals as runners, couriers and messengers, or in any other capacity directly connected to the dangerous drugs and/or controlled precursor and essential chemicals trade, the maximum penalty shall be imposed in every case.

If the victim of the offense is a minor or a mentally incapacitated individual, or should a dangerous drug and/or a controlled precursor and essential chemical involved in any offense herein provided be the proximate cause of death of a victim thereof, the maximum penalty provided for under this Section shall be imposed.

The maximum penalty provided for under this Section shall be imposed upon any person who organizes, manages or acts as a "financier" of any of the illegal activities prescribed in this Section.

The penalty of twelve (12) years and one (1) day to twenty (20) years of imprisonment and a fine ranging from One hundred thousand pesos (₱100,000.00) to Five hundred thousand pesos (₱500,000.00) shall be imposed upon any person, who acts as a "protector/coddler" of any violator of the provisions under this Section. (Emphasis ours.)

substance, which was found positive to the test for methamphetamine hydrochloride, a dangerous drug, in violation of the said law.[4]

The accusatory portion of the second Information pertaining to Criminal Case No. 12833-D for violation of Section 11,[5] Article II of the same law, reads:

On or about August 18, 2003, in Pasig City and within the jurisdiction of this Honorable Court, the accused, not being lawfully authorized to possess or otherwise use any dangerous drug, did then and there willfully, unlawfully and feloniously have in his possession and under his custody and control ten (10) heat sealed transparent plastic sachets containing the following weights, to wit:

a. five centigrams (0.05 gram)

b. twenty decigrams (0.20 gram)

c. sixteen decigrams (0.16 gram)

d. thirteen decigrams (0.13 gram)

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[4] Records, p. 1.

[5] Section 11. *Possession of Dangerous Drugs*. — The penalty of life imprisonment to death and a fine ranging from Five hundred thousand pesos (₱500,000.00) to Ten million pesos (₱10,000,000.00) shall be imposed upon any person, who, unless authorized by law, shall possess any dangerous drug in the following quantities, regardless of the degree of purity thereof:

x x x x x x x x x

(5) 50 grams or more of methamphetamine hydrochloride or "*shabu*";

x x x x x x x x x

Otherwise, if the quantity involved is less than the foregoing quantities, the penalties shall be graduated as follows:

x x x x x x x x x

(3) Imprisonment of twelve (12) years and one (1) day to twenty (20) years and a fine ranging from Three hundred thousand pesos (₱300,000.00) to Four hundred thousand pesos (₱400,000.00), ***if the quantities of dangerous drugs are less than five (5) grams*** of opium, morphine, heroin, cocaine or cocaine hydrochloride, marijuana resin or marijuana resin oil, ***methamphetamine hydrochloride or "shabu,"*** or other dangerous drugs such as, but not limited to, MDMA or "ecstasy," PMA, TMA, LSD, GHB, and those similarly designed or newly introduced drugs and their derivatives, without having any therapeutic value or if the quantity possessed is far beyond therapeutic requirements; or less than three hundred (300) grams of marijuana.

e. thirteen decigrams (0.13 gram)

f. ten decigrams (0.10 gram)

g. three centigrams (0.03 gram)

h. three centigrams (0.03 gram)

i. ten decigrams (0.10 gram)

j. eighteen decigrams (0.18)

or a total weight of one (1) gram and eleven (11) decigrams (1.11 gram) of white crystalline substance were found positive to the test for methamphetamine hydrochloride, a dangerous drug, in violation of the said law.[6]

When arraigned on 3 February 2004, Loreto pleaded not guilty to the two charges. Thereafter, joint trial ensued.

The prosecution presented the oral testimony of its lone witness, Police Officer (PO) 1 Victor S. Bantog, Jr. (PO1 Bantog), of the District Anti-Illegal Drugs Special Operations Task Force (DAID-SOTF), Eastern Police District, Pasig City. It also offered documentary evidence, which consists of the following: Exhibit "A" — Affidavit of Arrest signed by PO1 Bantog, and a certain Police Inspector Hoover SM Pascual (Inspector Pascual); Exhibit "B" — Request for Laboratory Examination of the specimen suspected to be *shabu* allegedly confiscated from Loreto; Exhibit "C" — Chemistry Report stating that the confiscated specimen tested positive for *shabu*; Exhibit "D" — envelope containing the specimens; and Exhibit "E" — the Buy-Bust Money.

From the foregoing evidence adduced by the prosecution, it appears that at around 7:30 p.m. on 18 August 2003, a confidential informant showed up at the DAID-SOTF of the Eastern Police District, Pasig City reporting that Loreto was peddling *shabu* at Sitio Bolante, Barangay Pinagbuhatan, Pasig City.[7] Inspector Pascual immediately briefed the narcotics operatives present composed of Senior Police Officer (SPO) 1 Bernardo, PO1

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[6] Records, p. 11.

[7] TSN, 18 August 2004, p. 3.

Jocelyn Samson, PO1 Martinez, PO1 Genove, PO1 Orig, PO1 Damasco, PO1 Ramos, PO1 Montefalcon and PO1 Bantog and ordered them to conduct a buy-bust operation.[8] PO1 Bantog was tasked to act as the poseur-buyer.[9] The buy-bust money, a ₱500-peso bill, which came from Inspector Pascual, was marked by PO1 Bantog with his initials "VSB." At around 8:30 p.m., the team went to the target area and arrived there at around 9:30 p.m. Inspector Pascual instructed the asset to verify the location of Loreto in the vicinity. As soon as the asset came back and confirmed the presence of Loreto in the area, the former, together with PO1 Bantog, approached the target.[10] Behind them was PO1 Montefalcon, who acted as back-up. The confidential informant introduced PO1 Bantog to Loreto and told the latter that the former wanted to buy *shabu*.[11] After a brief negotiation, PO1 Bantog handed the buy-bust money to Loreto who, in turn, gave one plastic sachet containing crystalline substance.[12] At once, PO1 Bantog held Loreto and introduced himself as a police officer. PO1 Montefalcon also rushed in and held Loreto.[13] PO1 Bantog retrieved the marked money from Loreto's hand and ten more plastic sachets from the pocket of the latter's pants. PO1 Bantog marked the sachet subject of the buy-bust as "A" and the ten confiscated plastic sachets as "A-1" to "A-10".[14] PO1 Bantog informed Loreto of his constitutional rights. Without delay, the latter was brought to the police station.[15] The recovered plastic sachets were sent to the Philippine National Police (PNP) Crime Laboratory, Eastern Police District Crime Laboratory Office.[16] Per the chemistry

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[8] *Id.*

[9] *Id.* at 4.

[10] TSN, 25 October 2004, p. 4.

[11] *Id.* at 5.

[12] *Id.*

[13] *Id.* at 6.

[14] *Id.* at 8.

[15] *Id.*

[16] Records, p. 7.

report, it was found that the 11 sachets were positive for the presence of methamphetamine hydrochloride or *shabu*.[17] The chemistry report states:

SPECIMEN SUBMITTED:

1. Eleven (11) heat-sealed transparent plastic sachets with markings "EXH-A LCD/180803 through EXH-A10 LCD/180803" marked as A through K respectively, each containing white crystalline substance having the following recorded net weights:

A = 0.46 gram	E = 0.13 gram	I = 0.03 gram
B = 0.05 gram	F = 0.13 gram	J = 0.10 gram
C = 0.20 gram	G = 0.10 gram	K = 0.18 gram
D = 0.16 gram	H = 0.03 gram	

PURPOSE LABORATORY EXAMINATION:

To determine the presence of any dangerous drug.

FINDINGS:

Qualitative examination conducted on the above-stated specimens gave POSITIVE result to the tests for **Methamphetamine Hydrochloride**, a dangerous drug.

CONCLUSION:

Specimens A through K contain Methamphetamine Hydrochloride, a dangerous drug.

The defense, on the other hand, put up the defense of denial and frame-up through the testimonies of Loreto and Rosana de Guzman Daria (Rosana), Loretos's sister-in-law.

According to Loreto, a market vendor, it was on 16 August 2003, and not on 18 August 2003, in the house of his sister-in-law, Rosana, that he was illegally arrested by police officers Orig, Damasco and Montefalcon. He said that at around 10:30 in the evening of 16 June 2003, while he was visiting his sister-in-law and his nephew and niece, said police officers barged inside the living room and pointed guns at him. One of them kicked him in the chest as PO1 Orig sprayed tear gas on his

[17] *Id.* at 8.

eyes. Despite his protestations, he was forcibly dragged downstairs and loaded into a car and brought to the police district office of Pasig City. Rosana was also accosted and brought to the police station. There, the said police officers demanded ₱50,000.00 in exchange for his release. Rosana was released later having been tasked to raise and produce the said amount, while Loreto remained incarcerated. He also testified that the ₱500.00 buy-bust money and the sachets of *shabu* came from PO1 Orig's pocket and were only shown to him in the police station. He declared that he saw PO1 Bantog for the first time at the police station. He further claimed that the police officers implicated him because he and Melinda, one of his three wives, filed a complaint against Inspector Pascual, PO1 Ramos, PO1 Orig and PO3 Bernardo for the illegal arrest, planting of evidence and robbery in relation to Loreto's first arrest on 22 July 2003, but the complaint was eventually dismissed for insufficiency of evidence. Loreto admitted that his first arrest on 22 July 2003 led to his conviction and imprisonment.

Rosana testified that on 16 August 2003, at around 10:00 to 10:30 p.m., while she was on the second floor of her house, she heard a commotion coming from the ground floor where her children and Loreto were. Thereafter, she saw Loreto and one of her children go upstairs escorted by three police officers with their guns pointed at Loreto. The same police officers ordered him to surrender his gun and the *shabu*. He denied possession of said items. He was then handcuffed and frisked by the police officers. They confiscated his wallet and cellular phone. After a while, he and Rosana were brought by said police officers to the police station. There, both were shown several plastic sachets containing *shabu*, the ownership of which were imputed to them. PO1 Orig and PO1 Damasco told Rosana that she would be released, so she could produce ₱50,000 to settle the charge against her and Loreto. She did not return to the police station and instead went to the National Bureau of Investigation (NBI) to file a complaint against said police officers. The case did not progress since she failed to follow it up, as she had gone abroad.

In a Joint Decision dated 14 June 2006, the RTC found Loreto guilty of the two charges. In the illegal sale, Criminal Case No. 12832-D, the RTC imposed upon him the penalty of life imprisonment and a fine of ₱500,000.00; while for illegal possession, Criminal Case No. 12833-D, he was sentenced to suffer imprisonment ranging from 12 years and 1 day to 14 years and to pay a fine of ₱300,000.00.

Loreto filed a motion for reconsideration, which was denied by the RTC.

Dissatisfied, he elevated his convictions to the Court of Appeals.

The Court of Appeals, however, affirmed his convictions.

Hence, the instant appeal.

Loreto faults the RTC and the Court of Appeals for convicting him despite the fact that the apprehending officers failed to follow the procedures for making a pre-operation report, coordinating with the Philippine Drug Enforcement Agency (PDEA), taking photographs and a physical inventory of the confiscated items, and subjecting the accused to the mandatory drug test provided for by Republic Act No. 9165 and its Implementing Rules and Regulations. He implies that failure to follow these procedures makes the apprehension irregular and unauthorized, thereby destroying the presumption of regularity given to police authorities in the performance of their official duties.

Loreto's arguments are unconvincing.

Section 86(a) of the Implementing Rules and Regulations of Republic Act No. 9165 encourages other enforcement agencies to coordinate with the PDEA prior to anti-drug operations, to wit:

> The PDEA shall be the lead agency in the enforcement of the Act, while the PNP, the NBI and other law enforcement agencies shall continue to conduct anti-drug operations in support of the PDEA; Provided, that the said agencies shall, as far as practicable, coordinate with the PDEA prior to anti-drug operations. x x x.

Section 21(a), paragraph 1, Article II of the Implementing Rules and Regulations of Republic Act No. 9165 states:

(a) The apprehending officer/team having initial custody and control of the drugs shall, immediately after seizure and confiscation, physically inventory and photograph the same in the presence of the accused or the person/s from whom such items were confiscated and/or seized, or his/her representative or counsel, a representative from the media and the Department of Justice (DOJ), and any elected public official who shall be required to sign the copies of the inventory and be given a copy thereof. x x x.

Section 36(f) of the same statute provides:

(f) All persons charged before the prosecutor's office with a criminal offense having an imposable penalty of imprisonment of not less than six (6) years and one (1) day shall have to undergo a mandatory drug test.

This is not the first time that the Court is confronted with this same issue. In *People v. Agulay*,[18] therein accused-appellant contended that the non-compliance with the procedure in Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, created an irregularity that overcame the presumption of regularity accorded to police authorities in the performance of their official duties. There, the Court decreed that failure to strictly follow the procedure set forth under Section 21(1), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, did not invalidate the seizure and custody of confiscated items during the buy-bust operation, *viz*:

The dissent agreed with accused-appellant's assertion that the police operatives failed to comply with the proper procedure in the custody of the seized drugs. It premised that **non-compliance with the procedure in Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165 creates an irregularity and overcomes the presumption of regularity accorded police authorities in the performance of their official duties.** This assumption is without merit.

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[18] G.R. No. 181747, 26 September 2008, 566 SCRA 571, 595.

First, it must be made clear that in several cases[19] **decided by the Court, failure by the buy-bust team to comply with said section did not prevent the presumption of regularity in the performance of duty from applying.**

Second, even prior to the enactment of R.A. 9165, the requirements contained in Section 21(a) were already there per Dangerous Drugs Board Regulation No. 3, Series of 1979. Despite the presence of such regulation and its non-compliance by the buy-bust team, the Court still applied such presumption.[20] We held:

> "The failure of the arresting police officers to comply with said DDB Regulation No. 3, Series of 1979 is a matter strictly between the Dangerous Drugs Board and the arresting officers and is totally irrelevant to the prosecution of the criminal case for the reason that the commission of the crime of illegal sale of a prohibited drug is considered consummated once the sale or transaction is established and the prosecution thereof is not undermined by the failure of the arresting officers to comply with the regulations of the Dangerous Drugs Board."
>
> x x x x x x x x x

Moreover, **non-compliance with the procedure outlined in Section 21(a), Article II of the Implementing Rules and Regulations of Republic Act No. 9165, shall not render void and invalid such seizures of and custody over said items,** for as long as the integrity and evidentiary value of the seized items are properly preserved by the apprehending officers.[21] (Emphases supplied.)

From the foregoing disquisition, it can easily be gleaned that non-compliance with the procedural requirements under Republic Act No. 9165 and its Implementing Rules and Regulations relative to the custody, photographing and drug-testing of the apprehended

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[19] *People v. Naquita*, G.R. No. 180511, 28 July 2008, 560 SCRA 430, 446-447; *People v. Concepcion*, G.R. No. 178876, 27 June 2008, 556 SCRA 421, 436-437; *People v. Del Monte*, G.R. No. 179940, 23 April 2008, 552 SCRA 627, 636-637.

[20] *People v. De los Reyes*, G.R. No. 106874, 21 January 1994, 229 SCRA 439, 448-449.

[21] *People v. Agulay, supra* note 18 at 622-624.

persons, are not serious flaws that can render void the seizures and custody of drugs in a buy-bust operation. In addition, the Court has already ruled that the non-presentation of the pre-operation report is not fatal to the cause of the prosecution, because it is not indispensable in a buy-bust operation.[22]

What determines if there was, indeed, a sale of dangerous drugs in a buy-bust operation is proof of the concurrence of all the elements of the offense, to wit: (1) the identity of the buyer and the seller, the object, and the consideration; and (2) the delivery of the thing sold and the payment therefor, which the prosecution has satisfactorily established. The prosecution satisfactorily proved the illegal sale of dangerous drugs and presented in court the evidence of *corpus delicti*.[23]

In the instant case, all the elements of the crime have been sufficiently established by the prosecution. The witness for the prosecution was able to prove that the buy-bust operation indeed took place, and the *shabu* subject of the sale was brought to and duly identified in court. The poseur-buyer (PO1 Bantog) positively identified Loreto as the one who had sold to him one heat-sealed, transparent plastic sachet containing forty-six decigrams (0.46 gram) of *shabu*. After Loreto received the marked money and handed to PO1 Bantog one plastic sachet of *shabu*, the latter introduced himself as a police officer and right away frisked the former. From the body search, PO1 Bantog recovered from the possession of Loreto, specifically from the latter's pocket, another 10 sachets of *shabu*. PO1 Bantog straightforwardly narrated the circumstances leading to the consummation of the sale of illegal drugs, the possession of ten plastic sachets and the arrest of Loreto:

PROS. Bautista:

Q: Where were you at around 7:30 p.m. on August 18, 2003?

A: I was at the office, sir.

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[22] *People v. Dumlao*, G.R. No. 181599, 20 August 2008, 562 SCRA 762, 770.

[23] *Id.*; *People v. Padasin*, 445 Phil. 448, 461 (2003).

Q: What happened while you were inside the office?

A: A civilian informant came informing us that there is a rampant selling of *shabu* along Bolante, sir.

Q: What was the information relayed to you by the informant other than the rampant selling?

A: Allegedly the supplier is one *alias* Tayap, sir.

Q: Was this Tayap particularly described by this informant?

A: Yes, sir.

Q: How was he described?

A: He has a big built, tall person, has fair complexion.

x x x x x x x x x

Q: After receiving the information, what happened?

A: P/Insp. Hoover Pascual conducted a briefing.

Q: How many of you were present at that time?

A: Nine operatives, sir.

Q: And who are these operatives? Will you name them?

A: SPO1 Bernardo, PO1 Jocelyn Samson, PO1 Martinez, PO1 Genove, PO1 Orig, PO1 Damasco, PO1 Ramos.

Q: Was there a briefing conducted by your chief?

A: Yes, sir.

Q: What was the briefing all about?

A: To locate the suspect, to verify if he's really selling *shabu* in that place, to make a surveillance at the place, to monitor the place.

Q: What else? Who acted as a poseur-buyer here?

A: I, sir.

Q: And as poseur-buyer, what were you supposed to do?

A: I was given ₱500 peso bill, sir.

Q: What did you do with that ₱500 peso bill?

A: I put secret markings, sir.

Q: What markings?

A: My initials, sir?

Q: What initials?

A: VSB, sir.

Q: What does VSB stands for?

A: Victor S. Bantog, sir.[24]

PO1 Bantog testified futher:

Q: What was your specific instruction at that time?

A: I will act as poseur buyer, sir.

Q: What else?

A: At 9:30, we arrived at the area, sir.

x x x x x x x x x

Q: When you reached the target area, what happened?

A: Insp. Pascual told the confidential informant to locate Tayap.

x x x x x x x x x

Q: Were you able to locate this Tayap?

A: Yes, sir.

Q: Who was able to locate this Tayap?

A: At first, the confidential informant, sir.

Q: Not you?

A: Not me, sir.

Q: So what happened after that, after this confidential informant was able to locate Tayap?

A: He went back to us and told us that Tayap is there, sir.

Q: And what did you do after that?

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[24] TSN, 18 August 2004, pp. 3-4.

A: I went along with the confidential informant.

Q: Only two of you proceeded to the area?

A: Montefalcon acted as my back-up, sir.

x x x x x x x x x

Q: What happened when you reached the place where Tayap was located?

A: I was introduced by the confidential informant to Tayap, sir.

Q: How were you introduced?

A: That I will get *shabu*, sir.

Q: What was the reply of Tayap, of the accused?

A: I asked him if he has *shabu*, sir.

Q: And what was his answer?

A: He answered, "yes."

Q: Will you narrate to us how this transaction took place?

A: When I gave him the ₱500, he handed me the *shabu*, sir.

Q: How many?

A: One piece, sir.

Q: And how much is that *shabu* worth?

A: ₱500.00, sir.

x x x x x x x x x

Q: So when you handed this ₱500.00 bill, the accused gave to you the one sachet?

A: Yes, sir.

Q: And after the accused gave to you this sachet, what did you do?

A: I introduced myself to him, sir.

Q: You introduced yourself as police?

A: Yes, sir.

Q: And after introducing yourself as police officers, what did you do?

A: I held him, sir.

Q: And then, what happened?

A: PO1 Bedo Montefalcon arrived, sir.

Q: What did Montefalcon do?

A: We both held the accused, sir.

Q: And then, what happened?

A: I was able to recover the marked money from the accused, sir.

Q: You yourself recovered the money?

A: Yes, sir.

Q: Where did you get this marked money?

A: From his hand, sir.

Q: After that, what did you do?

A: I also recovered ten (10) pieces of small plastic sachets aside from the one I bought, sir.

Q: Where did you see it?

A: From his maong pants, sir.

x x x x x x x x x

Q: How did you get that?

A: After frisking him, sir.

x x x x x x x x x

Q: And when you frisked this accused, you were able to get how many pieces of *shabu* or plastic sachet?

A: Ten (10) pieces and the one I bought from him, a total of eleven (11), sir.

Q: After that, what did you do?

A: I put markings on the plastic sachet,sir.

x x x x x x x x x

Q: And from these things you confiscated from the accused, how do you know the thing subject of a buy-bust operation and the things subject of possession?

A: The one I bought contains more, sir.

Q: And what did you mark on the one you bought?

A: I marked "A" the *shabu* I bought from him, sir.

x x x x x x x x x

Q: And then what did you do, what happened next?

A: We brought him to the office, but before that, I informed him of his constitutional rights, sir.

x x x x x x x x x

Q: If shown to you these sachets of *shabu* confiscated from the accused, can you identify the same?

A: Yes, sir.

Interpreter: Witness is going over the envelope containing the specimen confiscated from the accused. Witness is going over the plastic sachets.

A: This is the one, sir.[25]

Contrary to what Loreto wants to portray, the chain of custody of the seized prohibited drugs was shown to have not been broken. While still in the crime scene, PO1 Bantog marked the one plastic sachet he bought and the other 10 sachets he seized from Loreto's possession. These plastic sachets containing a white crystalline substance were immediately forwarded to the PNP Crime Laboratory for examination to determine the presence of dangerous drugs. The forensic chemist found that the white crystalline substance inside the 11 confiscated sachets was positive for methylamphetamine hydrochloride (*shabu*), a dangerous drug. Besides, Loreto did not question the custody and disposition of the drugs that were taken from him in the proceedings before

[25] TSN, 25 October 2004, pp. 3-8.

the RTC. In fact, he stipulated the existence of the specimens, the existence of the arresting officer's request for laboratory examination, and the fact that the same were examined by Forensic Chemist Annalee Forro. The examination yielded a positive result for methamphetamine hydrochloride, commonly known as *shabu*.[26] There can be no doubt that the drug bought and seized from Loreto was the same one examined in the crime laboratory. Plainly, the prosecution established the crucial link in the chain of custody of the sold and seized sachets of *shabu*, from the time they were first bought and seized from Loreto, until they were brought for examination. We, thus, find the integrity and the evidentiary value of the drugs coming from Loreto to have not been compromised.

Loreto also insists that his defense of having been framed up is supported by clear and convincing evidence, since the involved police officers had a sufficient motive to get back at him for filing a case against said officers. Furthermore, he questions the credibility of the lone testimony of the witness for the prosecution, since said witness could not remember from which pocket of the accused he got the ten plastic sachets, and what quantity of *shabu* the witness bought from the accused.

Simply, Loreto wants this Court to evaluate the credibility of the prosecution witnesses *vis-a-vis* the defense witness. It has often been said, however, that the credibility of witnesses is a matter best examined by, and left to, the trial courts.[27] The time-tested doctrine is that the matter of assigning values to declarations on the witness stand is best and most competently performed by the trial judge who, unlike appellate magistrates, can weigh such testimony in light of the declarant's demeanor, conduct and position to discriminate between truth and falsehood.[28] Thus, appellate courts will not disturb the credence, or lack of it, accorded by the trial court to the testimonies of witnesses.[29]

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[26] Records, p. 39.

[27] *People v. Matito*, 468 Phil. 14, 24 (2004).

[28] *Id*.

[29] *People v. Piedad*, 441 Phil. 818, 839 (2002).

This is especially true when the trial court's findings have been affirmed by the appellate court, because said findings are generally conclusive and binding upon this Court, unless it be manifestly shown that the trial court had overlooked or disregarded arbitrarily the facts and circumstances of significance in the case.[30]

However, in view of the fact that at stake here is no less than the liberty of accused-appellant, this Court thoroughly examined the entire records of this case, scrutinized the testimonies and the pieces of documentary evidence tendered by both parties, and observed them at close range. Regrettably for Loreto, this Court failed to identify any error committed by the RTC or the Court of Appeals, both in their respective appreciations of the evidence presented before them and in the conclusion they arrived at.

There was no reason why the police officers involved would exact retribution from Loreto. It must be noted that one of his wives filed a complaint against Inspector Pascual, PO1 Ramos, PO1 Orig and PO3 Bernardo for illegal arrest, planting of evidence and robbery in relation to Loreto's first arrest on 22 July 2003, but, said complaint was already dismissed on 18 May 2004. Not only were the police officers cleared, they were also vindicated when Loreto was convicted in a drug case in relation to his first arrest on 22 July 2003. In addition, he cannot ascribe any ill motive on the part of PO1 Bantog, the lone prosecution witness. What further militates against Loreto's proposition is that it vascillates on whether to stick to the defense that he is a subject of the police officer's revenge or that he is a victim of extortion, both of which remained unsubstantiated. The supposed corroborative testimony mustered by the defense came from Loreto's sister-in-law, a testimony that the court viewed with disfavor since it could easily be fabricated.[31]

Although PO1 Bantog failed to recall from which pants pocket he seized the ten sachets and the exact quantity of drugs he bought from Loreto, said omission cannot affect the cause of

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[30] *People v. Castillo*, G.R. No. 118912, 28 May 2004, 430 SCRA 40, 50.

[31] *People v. Bello*, 383 Phil. 743, 751 (2000).

the prosecution. This only shows an honest lack of recollection of the minor and inconsequential aspect of what transpired during the entrapment operation. It would be a tall order, indeed, to require the witness to recall every minute detail of an incident, *i.e.*, from which pocket PO1 got the ten sachets and the quantity of the *shabu* sold. If the event had transpired in rapid succession amid the flurry and excitement of the moment, it would be hard for the arresting officer to absorb all the nitty gritty of what went on during the incident in question.

Comparing the defense version with that of the arresting/entrapping police officer as to what really happened at about 9:30 p.m. of 18 August 2003 or on 16 August 2003 (defense's version), this Court finds, as did the RTC and the Court of Appeals, the account of the prosecution witness more credible. Aside from the presumption that they — PO1 Bantog and his companions — regularly performed their duties, this Court notes that the prosecution witness gave a consistent and straightforward narration of what transpired on the day in question. The version depicted by the prosecution, through the testimony of the entrapping officer, could have only been described by a person who actually witnessed the event that took place on 18 August 2003. Only a trustworthy witness could have narrated with such clarity and realism what really happened on the date referred to.

Once again, this Court stresses that a buy-bust operation is a legally effective and proven procedure, sanctioned by law, for apprehending drug peddlers and distributors.[32] It is often utilized by law enforcers for the purpose of trapping and capturing lawbreakers in the execution of their nefarious activities.[33] This Court, of course, is not unaware that in some instances, law enforcers resort to the practice of planting evidence to extract information or even to harass civilians. But the defense of frame-up in drug cases requires strong and convincing evidence because of the presumption that the law enforcement agencies acted in the regular performance of their official duties. Moreover, the

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[32] *People v. Chua Uy*, 384 Phil. 70, 85 (2000).

[33] *Id.*

defense of denial or frame-up, like alibi, has been viewed by the court with disfavor, for it can just as easily be concocted and is a common and standard defense ploy in most prosecutions for violations of the drugs law.

In sum, in Criminal Case No. 12832-D, the Court, just like the RTC and the Court of Appeals, is convinced that the prosecution's evidence proved beyond reasonable doubt the charge of violation of Section 5, Article II, Republic Act No. 9165 (illegal sale of *shabu*). Also proven by the same quantum of evidence was the charge for violation of Section 11, Article II, Republic Act No. 9165 (illegal possession of *shabu*) in Criminal Case No. 12833-D, Loreto having knowingly carried with him the ten plastic sachets of *shabu* without legal authority at the time he was apprehended during the buy-bust operation.

In the illegal sale, in Criminal Case No. 12832-D, the RTC imposed upon Loreto the penalty of life imprisonment and a fine of ₱500,000.00; while in the illegal possession, in Criminal Case No. 12833-D, he was sentenced to the indeterminate penalty of imprisonment ranging from 12 years and 1 day to 14 years and to pay the fine of ₱300,000.00.

Under Section 5, Article II of Republic Act No. 9165, the unauthorized sale of *shabu*, regardless of its quantity and purity, carries with it the penalty of life imprisonment to death and a fine ranging from Five Hundred Thousand Pesos (₱500,000.00) to Ten Million Pesos (₱10,000,000.00). Pursuant, however, to the enactment of Republic Act No. 9346 entitled, "An Act Prohibiting the Imposition of Death Penalty in the Philippines," only life imprisonment and fine shall be imposed. Thus, the RTC properly imposed the penalty of life imprisonment and fine of ₱500,000.00 on Loreto for the illegal sale of *shabu*.

The possession of dangerous drugs is punished under Section 11, Article II of Republic Act No. 9165. Paragraph 2, No. 3 thereof, reads:

> Sec. 11. *Possession of Dangerous Drugs*. — x x x.
>
> x x x x x x x x x

3) Imprisonment of twelve (12) years and one (1) day to twenty (20) years and a fine ranging from Three hundred thousand pesos (₱300,000.00) to Four hundred thousand pesos (₱400,000.00), if the quantities of dangerous drugs are less than five (5) grams of x x x methamphetamine hydrochloride x x x.

In the instant case, Loreto was caught in possession of one gram and 11 decigrams (1.11 grams) of *shabu*. The penalty imposed by the RTC is proper.

WHEREFORE, the instant appeal is *DENIED*. The Decision of the Court of Appeals in CA-G.R. CR H.C. No. 02544 which affirmed *in toto* the Decision of the Regional Trial Court of Pasig City, Branch 267 convicting Loreto C. Daria, Jr. "*alias*" Tayap of violation of Section 5, Article II of Republic Act No. 9165, sentencing him to suffer the penalty of life imprisonment, and imposing upon him a fine of ₱500,000.00, and, for violation of Section 11, Article II, Republic Act No. 9165, imposing upon him the indeterminate penalty of imprisonment ranging from 12 years and 1 day to 14 years and a fine of ₱300,000.00, is *AFFIRMED in toto*.

SO ORDERED.

Ynares-Santiago (Chairperson), Velasco, Jr., Nachura, and *Peralta, JJ.,* concur.

THIRD DIVISION

[G.R. No. 187503. September 11, 2009]

PEOPLE OF THE PHILIPPINES, *plaintiff-appellee, vs.* **TECSON LIM *Y* CHUA and MAXIMO FLORES *Y* VITERBO,** *accused-appellants.*

SYLLABUS

1. REMEDIAL LAW; EVIDENCE; CREDIBILITY OF WITNESSES; "OBJECTIVE" TEST IN BUY-BUST OPERATIONS TO DETERMINE THE CREDIBILITY OF THE TESTIMONIES OF THE POLICE OFFICERS INVOLVED IN THE OPERATION DISCUSSED AND APPLIED. — [A] buy-bust operation is a form of entrapment whereby ways and means are resorted to for the purpose of trapping and capturing lawbreakers in the execution of their criminal plan. Unless there is clear and convincing evidence that the members of the buy-bust team were inspired by any improper motive or were not properly performing their duty, their testimonies on the operation deserve full faith and credit. When the police officers involved in the buy-bust operation have no motive to falsely testify against the accused, the courts shall uphold the presumption that they have performed their duties regularly. The courts, nonetheless, are advised to take caution in applying the presumption of regularity. It should not by itself prevail over the presumption of innocence and the constitutionally protected rights of the individual. Thus, this Court discussed in *People v. Doria* the "objective" test in buy-bust operations to determine the credibility of the testimonies of the police officers involved in the operation: We therefore stress that the "objective" test in buy-bust operations demands that the details of the purported transaction must be clearly and adequately shown. This must start from the initial contact between the poseur-buyer and the pusher, the offer to purchase, the promise or payment of the consideration until the consummation of the sale by the delivery of the illegal drug subject of the sale. The manner by which the initial contact was made, whether or not through an informant, the offer to purchase the drug, the payment of the "buy-bust" money, and the delivery of the illegal drug, whether to the informant alone or the police officer, must be the subject of strict scrutiny by courts to insure that law-abiding citizens are not unlawfully induced to commit an offense. Criminals must be caught but not at all cost. At the same time, however, examining the conduct of the police should not disable courts into ignoring the accused's predisposition to commit the crime. If there is overwhelming evidence of habitual delinquency, recidivism or plain criminal proclivity, then this must also be considered. Courts should

look at all factors to determine the predisposition of an accused to commit an offense in so far as they are relevant to determine the validity of the defense of inducement. In this case, the trial court correctly upheld the testimonies of the prosecution witnesses, *i.e.*, PO1 Amerol and P/Sr. Insp. Mata, the police officers who conducted the buy-bust operation. It did not err in applying the presumption of regularity in the performance of duty by law enforcement agents. As observed by both lower courts, the testimonies of PO1 Amerol, the poseur-buyer in the buy-bust operation, and P/Sr. Insp. Mata, the team leader thereof, were straightforward, categorical, consistent, unwavering, clear and credible. They also positively identified appellants as the offenders. The records even revealed that the testimony of PO1 Amerol, as corroborated by the testimony of P/Sr. Insp. Mata, had satisfactorily proven the elements for the prosecution of the illegal sale of regulated or prohibited drugs, to wit: **(1)** the identity of the buyer and the seller, the object, and the consideration; and **(2)** the delivery of the thing sold and the payment therefor. x x x [T]his Court is strongly convinced that the testimony of PO1 Amerol as the poseur-buyer was, indeed, clear and credible. He recounted in full detail how the deal was set by the informant, their meeting with appellants at McDonald's, Sucat, Parañaque City, their agreement to purchase one kilo of *shabu* for ₱700,000.00, the actual exchange of the black bag with a tape-sealed transparent plastic bag containing the substance and the boodle money, and the apprehension of appellants.

2. ID.; ID.; ID.; MINOR DISCREPANCIES AND INCONSISTENCIES IN THE TESTIMONIES OF WITNESSES DO NOT IMPAIR THEIR CREDIBILITY. — This Court has repeatedly held that a few discrepancies and inconsistencies in the testimonies of witnesses referring to minor details and not actually touching upon the central fact of the crime do not impair their credibility. Instead of weakening their testimonies, such inconsistencies tend to strengthen their credibility, because they discount the possibility of such testimonies being rehearsed. Moreover, PO1 Amerol satisfactorily explained the inconsistencies in his testimony. He stated that he was not able to understand the question, as he thought that it referred to the markings on the *shabu*. He then clarified that the markings on the buy-bust money were made at their office in Camp Crame, Quezon City. What

was marked at the scene of the crime was the *shabu* and not the buy-bust money.

3. ID.; ID.; DEFENSE; DENIAL IS A WEAK DEFENSE IN VIEW OF THE POSITIVE IDENTIFICATION OF THE ACCUSED. — The defense of both appellants consists mainly of mere denials. Denial, like alibi, is a weak defense, which becomes even weaker in the face of the positive identification of the accused by prosecution witnesses. Appellants' denial constituted self-serving negative evidence, which can hardly be considered as overcoming a straightforward and credit-worthy eyewitness account. As between the categorical, convincing and credible testimonies of the prosecution witnesses, as well as their positive identification of appellants as the offenders in the crime charged, and the defense of denial profferred by the latter, the former's testimonies are generally held to prevail, especially given the facts obtaining in this case.

4. ID.; ID.; CONSPIRACY; REVEALED BY THE ACTUATIONS OF THE ACCUSED. — [T]his Court affirms the findings of both lower courts that there was conspiracy between appellants Lim and Flores to commit the crime charged, and that the same was apparent from their actuations in selling the prohibited drug to PO1 Amerol. Direct proof is not essential to prove conspiracy; it may be established by acts of the accused before, during and after the commission of the crime charged, from which may be logically inferred the existence of a common purpose to commit the same. As the Court of Appeals stated in its Decision, both appellants arrived together at the place of the buy-bust operation on board a Daihatsu car. Appellant Lim alighted from the car and spoke to the informant and to PO1 Amerol, the poseur-buyer. After the negotiation, appellant Lim went back to the car and returned with appellant Flores, who was then carrying a black bag containing a tape-sealed transparent plastic bag with *shabu*. Appellant Flores gave the black bag with a tape-sealed transparent plastic bag containing *shabu* to PO1 Amerol, and the latter handed to appellant Lim the boodle money in payment thereof. The actuations of both appellants clearly revealed that there was conspiracy between them to commit the illegal transaction of selling *shabu*, a regulated or prohibited drug.

APPEARANCES OF COUNSEL

The Solicitor General for plaintiff-appellee.
Public Attorney's Office for accused-appellants.

D E C I S I O N

CHICO-NAZARIO, *J.*:

For review is the Decision[1] dated 18 November 2008 of the Court of Appeals in CA-G.R. CR HC No. 01871, which affirmed *in toto* the Decision[2] dated 12 February 2003 of the Regional Trial Court (RTC) of Parañaque City, Branch 258, in Criminal Case No. 00-0100, finding herein appellants Tecson Lim *y* Chua (Lim) and Maximo Flores *y* Viterbo (Flores) guilty beyond reasonable doubt of violation of Section 15,[3] Article III of Republic Act No. 6425,[4] as amended by Republic Act No. 7659,[5] sentencing each of them to suffer the penalty of *reclusion perpetua* and ordering each to pay a fine of ₱2,000,000.00.

Appellants Lim and Flores were charged with violation of Section 15, Article III in relation to Section 21(b),[6] Article IV

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[1] Penned by Associate Justice Isaias Dicdican with Associate Justices Juan Q. Enriquez, Jr. and Marlene Gonzales-Sison, concurring; *rollo*, pp. 4-24.

[2] Penned by Judge Raul E. de Leon, CA *rollo*, pp. 26-34.

[3] Sec. 15. *Sale, Administration, Dispensation, Delivery, Transportation and Distribution of Regulated Drugs*. — The penalty of *reclusion perpetua* to death and a fine ranging from five hundred thousand pesos to ten million pesos shall be imposed upon any person who, unless authorized by law, shall sell, dispense, deliver, transport or distribute any regulated drug.

[4] Also known as "The Dangerous Drugs Act of 1972."

[5] An Act to Impose the Death Penalty on Certain Heinous Crimes, Amending for That Purpose the Revised Penal Code, as amended, other Special Penal Laws and for Other Purposes.

[6] **Section 21**. *Attempt and Conspiracy*. The same penalty prescribed by this Act for the commission of the offense shall be imposed in case of any attempt or conspiracy to commit the same in the following cases:

x x x x x x x x x

of Republic Act No. 6425, as amended, in an Information[7] which reads:

> That on or about [3 December 1999], in Parañaque City, Philippines, and within the jurisdiction of the Honorable Court, the above-named [appellants], conspiring and confederating together and mutually aiding and abetting one another, did then and there willfully, unlawfully, and feloniously deliver and/or sell to a poseur-buyer methamphetamine hydrochloride, a regulated drug which is commonly known as *shabu* and with an approximate weight of nine hundred seventy five point four (975.4) grams, without any authority whatsoever.[8]

During arraignment, the appellants, assisted by their counsel *de parte*, refused to enter a plea after the Information was read to them; thus, the court *a quo* ordered that a plea of NOT GUILTY be entered into the records for both appellants. Thereafter, trial on the merits ensued.

The prosecution presented the testimony of the following witnesses: Police Officer (PO) 1 Mangontawar Amerol (PO1 Amerol), member of the Philippine National Police (PNP) Narcotics Group, Camp Crame, Quezon City, who acted as the poseur-buyer in the buy-bust operation on 3 December 1999; Annalee R. Forro, Forensic Chemical Officer of the PNP Crime Laboratory, Camp Crame, Quezon City; and Police Senior Inspector Eleazar Mata (P/Sr. Insp. Mata), member of the PNP Narcotics Group, Camp Crame, Quezon City, who conducted a briefing of his team members on the conduct of their buy-bust operation on 3 December 1999.

The prosecution's version of the facts of this case based on the testimony of the aforesaid witnesses is as follows:

In the early afternoon of 3 December 1999, the PNP Narcotics Group, Camp Crame, Quezon City, received information from their reliable informant that appellant Lim is engaged in illegal

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b) Sale, administration, delivery, distribution and transportation of dangerous drugs. x x x.

[7] CA *rollo*, pp. 10-12.

[8] *Id.* at 11.

drug activities. Immediately, a buy-bust operation team, composed of PO1 Amerol, Senior Police Officer 1 Salvador M. Sorreda (SPO1 Sorreda), PO1 Fabo, PO1 Musni, PO1 Fabian, P/Sr. Insp. Mata, as the team leader, and others was organized to conduct a buy-bust operation at the designated place, which was at McDonald's along Dr. A. Santos Avenue, Sucat, Parañaque City. P/Sr. Insp. Mata, as the team leader, called for a briefing of his team regarding the conduct of their buy-bust operation and designated PO1 Amerol as the poseur-buyer.[9] During the said briefing, the team was apprised that the methamphetamine hydrochloride (*shabu*) involved in their buy-bust operation weighed almost one kilo and was valued at ₱700,000.00.[10] In preparation therefor, the team prepared seven bundles of boodle money[11] and two genuine ₱1,000.00 bills bearing Serial No. AG 150525 and No. AR 252979 with the markings "SMS," written by PO1 Amerol, as marked money.[12] The said two genuine ₱1,000.00 bills were placed on top of the two bundles of boodle money.[13]

At around 2:00 p.m., the buy-bust team proceeded to the designated place on board three vehicles. PO1 Amerol and their informant rode together in a white Toyota Corolla car. At around 3:30 p.m., PO1 Amerol and their informant arrived at the parking lot of McDonald's along Dr. A. Santos Avenue, Sucat, Parañaque City, while the rest of the buy-bust team positioned themselves strategically within its premises. Then, PO1 Amerol and their informant waited for appellant Lim to arrive. At around 4:30 p.m., appellant Lim, together with appellant Flores, arrived on board a red Daihatsu Charade car with Plate No. TEN 576. Subsequently, appellant Lim went out of the car and talked to their informant.[14] During the time that the two were talking to each other, PO1

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[9] PO1 Amerol, TSN, 31 August 2000, pp. 7-10.

[10] *Id.* at 26-27.

[11] *Id.* at 9.

[12] Records, Vol. 1, p. 32.

[13] PO1 Amerol, TSN, 31 August 2000, pp. 16, 19-20 and 22; P/Sr. Insp. Mata, TSN, 16 November 2000, pp. 5-11.

[14] PO1 Amerol, TSN, 31 August 2000, pp. 11-14.

Amerol was about nine meters away from them, while P/Sr. Insp. Mata, who was standing beside the road as if waiting for a ride, was about 10 meters away from appellant Lim and their informant.[15]

After a while, appellant Lim and their informant approached him, and the latter introduced him to appellant Lim as Mike Amerol, a Muslim who wanted to buy *shabu*. Appellant Lim asked PO1 Amerol if he had with him the money. Upon being shown the marked money placed inside a brown envelope, together with the seven bundles of boodle money, appellant Lim went back to the car. Thereafter, appellant Flores alighted from the car carrying a black bag. Both appellants approached PO1 Amerol. Appellant Flores opened the black bag and showed him its contents. PO1 Amerol saw therein a tape-sealed transparent plastic bag containing *shabu* weighing about one kilo. Appellant Lim then asked for the agreed amount of ₱700,000.00 in payment thereof.[16] PO1 Amerol handed the money to appellant Lim, and appellant Flores gave him the black bag with a tape-sealed transparent plastic bag containing *shabu*.[17]

After the sale was consummated, PO1 Amerol executed their pre-arranged signal by lighting his cigarette.[18] P/Sr. Insp. Mata and SPO1 Sorreda immediately responded and arrested both appellants. The buy-bust money was recovered from appellant Lim. PO1 Amerol then placed the markings "12/3/99" and "SMS," which stood for Salam Mangontawar Saud, on both sides of the surface of a tape-sealed transparent plastic bag containing *shabu*. Afterwards, both appellants were brought to the office of the PNP Narcotics Group, Camp Crame, Quezon City, where they were booked, and where the joint affidavit of their arrest and the arrest reports were prepared.[19]

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[15] PO1 Amerol, TSN, 12 October 2000, pp. 16-17 and 21-22; P/Sr. Insp. Mata, TSN, 16 November 2000, pp. 9, 11-12 and 24-27.

[16] PO1 Amerol, TSN, 31 August 2000, pp. 14-27.

[17] PO1 Amerol, TSN, 12 October 2000, pp. 8 and 18.

[18] PO1 Amerol, TSN, 31 August 2000, p. 28.

[19] PO1 Amerol, TSN, 26 September 2000, pp. 4-16; P/Sr. Insp. Mata, TSN, 16 November 2000, pp. 17-20.

Requests for the examination of the specimen[20] and for the physical and medical examination of the appellants[21] both dated 3 December 1999 were likewise made. The specimen was submitted to the PNP Crime Laboratory for examination. Forensic Chemist Forro of the PNP Crime Laboratory examined the specimen, which is a white crystalline substance placed in a tape-sealed transparent bag, by first weighing it. She stated that the substance weighed 975.4 grams. She then proceeded with the chemical examination of the said specimen, and the same yielded a positive result for methamphetamine hydrochloride. Her examination was reduced into writing,[22] as evidenced by Physical Sciences Report No. D-5933-99[23] dated 4 December 1999. The physical and medical examination of appellants, on the other hand, yielded negative results, meaning, there was no showing that they were physically harmed.[24]

For its part, the defense presented the testimonies of the following witnesses: appellant Lim, a Chinese national; appellant Flores; Bienvenido Olan (Olan); and SPO1 Sorreda, as adverse witness.

Appellant Lim testified that he is engaged in buy-and-sell business in Baclaran and Divisoria. On 3 December 1999, he was in Baclaran to collect money from some of his customers therein. Between 10:00 a.m. and 10:30 a.m., he met Bienvenido Olan,[25] a dealer of pants and garments,[26] whom he called Ben Olan. Olan then invited him to visit the former's *kumpare*, who lived in Quezon City near SM North Edsa, as the latter would be returning to Olan some goods that appellant Lim might be interested in selling to his customers. Then, appellant Lim and

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[20] Records, Vol. I, p. 28.

[21] *Id.* at 30.

[22] Forensic Chemist Forro, TSN, 7 November 2000, pp. 13-15.

[23] Records, Vol. II, p. 399.

[24] Records, Vol. I, p. 29.

[25] TSN, 6 March 2001, pp. 8-10.

[26] TSN, 20 March 2001, p. 6.

Olan went to the house of the latter's *kumpare*, who turned out to be appellant Flores, on board a taxi. They arrived therein at around 11:30 a.m. or 12:00 noon.[27]

Thereafter, appellants Lim and Flores and Olan proceeded to the house of Olan's customer in Parañaque on board appellant Flores' Daihatsu car, because the goods that would be shown to appellant Lim were actually in Parañaque. They arrived at the house of Olan's customer in Parañaque between 2:00 p.m. and 2:30 p.m. Suddenly, while they were inside the house, some men barged in and immediately handcuffed and boarded them to a car, where appellant Lim was blindfolded and beaten up on the way to the PNP Narcotics Group's office in Quezon City. He was also asked to identify something, which he failed to do because he could not see it, as he has a blindfold. When they arrived at the PNP Narcotics Group Office in Quezon City, the handcuffs were removed, but his hands were tied to the chair he was sitting on. The police authorities who arrested him never gave him any chance to talk because, whenever he would try to do so, they would hit him on his mouth. Then, his blindfold was removed and his hand was placed on something while his picture was taken. He was also made to undergo some fingerprinting.[28]

Appellant Lim further testified that he wanted to call up his family or relatives, but he was not able to do so, as he was confined in a cell the whole night. The next day or on 4 December 1999, he was brought to the Department of Justice (DOJ); and when he was brought back to the PNP Narcotics Group Office in Quezon City, he was charged with possession of one kilogram of *shabu*.[29]

Appellant Flores, on the other hand, testified that on the morning of 3 December 1999, while he was at home in Pag-asa, Quezon City, Olan, his *kumpare*, called him up and insisted on borrowing his car. He then asked Olan to come to his house to talk about the matter. While appellant Flores was having

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[27] TSN, 6 March 2001, p. 10; TSN, 20 March 2001, pp. 8-9.

[28] *Id.* at 11-15; *id.* at 10-13.

[29] *Id.* at 15-17.

lunch with his family, Olan, together with his companion, arrived at his house. Olan reiterated to appellant Flores the former's intention of borrowing the latter's car. Since his car was not available, appellant Flores borrowed the car of his daughter. As he would not be doing anything else that day, he went with Olan and the latter's companion to Mon-el Subdivision in Parañaque to meet a certain Boyet Samoy (Samoy), Olan's other *kumpare*, whose house was near McDonald's, Sucat, Parañaque City. When they arrived at the house of Samoy between 2:00 p.m. and 2:30 p.m., the latter was not there. It was only an old man who entertained them and even asked them to go inside the house. Suddenly, around 10 armed men barged in while shouting, "*Nasaan, nasaan*?" Then, he and appellant Lim were handcuffed, and they were dragged into a vehicle. While inside the vehicle, they were blindfolded until they reached Camp Crame, where they were interrogated.[30] Appellant Flores later found out that Olan was not apprehended.[31]

Appellant Flores stated that during the interrogation, he was tortured with a plastic bag put on his head to make him admit to the crime. Also, he was never informed of his rights. After the interrogation, he and appellant Lim were transferred to the room of a certain Major Suan. Major Suan then took out from his drawer a plastic bag containing crystalline, substance which was handed to both appellants while their pictures were taken. Thereafter, they were brought back to their detention cell, where appellant Flores was asked to sign an arrest booking sheet even in the absence of a lawyer.[32]

The defense's next witness was Olan, who stated that on 3 December 1999, he was in Baclaran to look for some ready-to-wear (RTW) merchandise when he met appellant Lim. He then invited appellant Lim to go with him to the house of his *kumpare*, appellant Flores, in Quezon City, to which appellant Lim agreed. When they arrived at the house of appellant Flores, they ate

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[30] TSN, 24 April 2001, pp. 6-12, 18.

[31] TSN, 10 July 2001, p. 14.

[32] TSN, 24 April 2001, pp. 12-14.

lunch and thereafter, Olan, appellants Lim and Flores proceeded to Parañaque City on board the car of appellant Flores' daughter. Their reason for going to Parañaque City was for appellant Lim to see the pants that he might want to buy. Upon reaching Parañaque City, they went to Samoy's house but it was a certain *Mang* Jr. whom they saw there. *Mang* Jr. told them to just go to his house in Mon-el Subdivision, Parañaque City, because the pair of pants they wanted to see was already at his house. They arrived at Mon-el Subdivision, which was near McDonald's, Sucat, Parañaque City, at around 1:30 p.m. to 2:00 p.m., and proceeded to *Mang* Jr.'s house to get the pants. While inside the house of *Mang* Jr., the police authorities arrived. They were then arrested, and boarded in separate cars, and brought to Camp Crame where Olan was asked to keep silent. Appellants Lim and Flores were separated from him. At night, Major Suan arrived and ordered his release.[33]

The defense also presented SPO1 Sorreda as an adverse witness, who stated before the court *a quo* that the initials "SMS" appearing on the plastic bag containing *shabu* is also his initials. However, he stated that PO1 Amerol used the same initials "SMS," and that it was the latter who made an inscription of these initials on a tape-sealed transparent plastic bag containing *shabu*, which was marked as Exhibit "F".[34]

After trial, a Decision was rendered by the court *a quo* on 12 February 2003, finding both appellants guilty beyond reasonable doubt of the crime charged. The dispositive portion reads:

> WHEREFORE, premises considered, judgment is hereby rendered, finding [appellants], TECSON LIM *y* CHUA and MAXIMO FLORES *y* VITERBO, GUILTY beyond reasonable doubt of the offense of violation of Section 15, Article III of R.A. [No.] 6425, as amended by R.A. [No.] 7659 in relation to Number 3,[35] Section 20 thereof,

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[33] TSN, 20 September 2001, pp. 4-9; TSN 25 September 2001, pp. 16-19.

[34] TSN, 11 April 2002, pp. 7-11.

[35] **Sec. 20**. *Application of Penalties, Confiscation and Forfeiture of the Proceeds or Instruments of the Crime*. — The penalties for offenses under Sections 3, 4, 7, 8 and 9 of Article II and Sections 14, 14-A, 15 and 16

and [appellants] TECSON LIM *y* CHUA and MAXIMO FLORES *y* VITERBO are hereby sentenced to each suffer the penalty [of] *RECLUSION PERPETUA* and for both [appellants] to pay a fine of TWO MILLION PESOS (₱2,000,000.00) each.

The methamphetamine hydrochloride or *shabu* confiscated from both the [appellants] is hereby ordered confiscated in favor of the government and the Sheriff of this Court is directed to immediately turn over the same to the Dangerous Drugs Board and for the said office to acknowledge receipt thereof.

No pronouncement as to costs.[36]

The records of this case were originally transmitted to this Court on appeal. Pursuant to *People v. Mateo*,[37] the records were transferred to the Court of Appeals for appropriate action and disposition.

In their brief, the appellants' lone assignment of error was: *the court a quo gravely erred in finding the [appellants] guilty beyond reasonable doubt of the crime charged*.[38]

On 18 November 2008, the Court of Appeals rendered a Decision affirming *in toto* the 12 February 2003 Decision of the trial court.

Appellants appealed to this Court, contending that the trial court erred in relying heavily on the testimonies of PO1 Amerol and P/Sr. Insp. Mata. Appellants claimed that PO1 Amerol was silent on the instructions given during the briefing as to what the rest of the buy-bust team would do upon arrival at the target area, while he was transacting with appellants. They insisted that if there was really a briefing, the buy-bust team should

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of Article III of this Act shall be applied if the dangerous drugs involved is in any of the following quantities:

x x x x x x x x x

3. 200 grams or more of *shabu* or methylamphetamine hydrochloride;

[36] CA *rollo*, pp. 33-34.

[37] G.R. Nos. 147678-87, 7 July 2004, 433 SCRA 640.

[38] CA *rollo*, p. 212.

have discussed and identified the areas where they would conceal themselves to boost the confidence of PO1 Amerol as the poseur-buyer. In the absence of such briefing, it cannot be presumed that the other members of the buy-bust team concealed themselves.

Moreover, P/Sr. Insp. Mata, the officer-in-charge in the buy-bust operation, failed to perform his regular duty to conduct a test-buy before the buy-bust operation. For failure of P/Sr. Insp. Mata to do this, the trial court should not have given much weight and reference to the said buy-bust operation.

The appellants also faulted the trial court for convicting them despite the fact that PO1 Amerol had already prepared the crime laboratory result of the white crystalline substance even prior to its submission for laboratory examination.

Finally, appellants asserted that the trial court erred in considering the testimony of PO1 Amerol despite the inconsistencies therein, particularly his testimony referring to two different places where he put markings on the buy-bust money, to wit: (1) at the scene of the crime; and (2) at their office in Camp Crame, Quezon City. The said inconsistencies, if ignored, would cause injustice to appellants.

Appellants' contentions are bereft of merit.

Primarily, a buy-bust operation is a form of entrapment whereby ways and means are resorted to for the purpose of trapping and capturing lawbreakers in the execution of their criminal plan. Unless there is clear and convincing evidence that the members of the buy-bust team were inspired by any improper motive or were not properly performing their duty, their testimonies on the operation deserve full faith and credit. When the police officers involved in the buy-bust operation have no motive to falsely testify against the accused, the courts shall uphold the presumption that they have performed their duties regularly.[39] The courts, nonetheless, are advised to take caution in applying the presumption of regularity. It should not by itself prevail

[39] *People v. Valencia*, 439 Phil. 561, 567 (2002).

over the presumption of innocence and the constitutionally protected rights of the individual.[40] Thus, this Court discussed in *People v. Doria*[41] the "objective" test in buy-bust operations to determine the credibility of the testimonies of the police officers involved in the operation:

> We therefore stress that the "objective" test in buy-bust operations demands that the details of the purported transaction must be clearly and adequately shown. This must start from the initial contact between the poseur-buyer and the pusher, the offer to purchase, the promise or payment of the consideration until the consummation of the sale by the delivery of the illegal drug subject of the sale. The manner by which the initial contact was made, whether or not through an informant, the offer to purchase the drug, the payment of the "buy-bust" money, and the delivery of the illegal drug, whether to the informant alone or the police officer, must be the subject of strict scrutiny by courts to insure that law-abiding citizens are not unlawfully induced to commit an offense. Criminals must be caught but not at all cost. At the same time, however, examining the conduct of the police should not disable courts into ignoring the accused's predisposition to commit the crime. If there is overwhelming evidence of habitual delinquency, recidivism or plain criminal proclivity, then this must also be considered. Courts should look at all factors to determine the predisposition of an accused to commit an offense in so far as they are relevant to determine the validity of the defense of inducement.

In this case, the trial court correctly upheld the testimonies of the prosecution witnesses, *i.e.*, PO1 Amerol and P/Sr. Insp. Mata, the police officers who conducted the buy-bust operation. It did not err in applying the presumption of regularity in the performance of duty by law enforcement agents.

As observed by both lower courts, the testimonies of PO1 Amerol, the poseur-buyer in the buy-bust operation, and P/Sr. Insp. Mata, the team leader thereof, were straightforward, categorical, consistent, unwavering, clear and credible. They

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[40] *People v. De Guzman*, G.R. No. 151205, 9 June 2004, 431 SCRA 516, 522-523.

[41] 361 Phil. 595, 621 (1999).

also positively identified appellants as the offenders. The records even revealed that the testimony of PO1 Amerol, as corroborated by the testimony of P/Sr. Insp. Mata, had satisfactorily proven the elements for the prosecution of the illegal sale of regulated or prohibited drugs, to wit: **(1)** the identity of the buyer and the seller, the object, and the consideration; and **(2)** the delivery of the thing sold and the payment therefor.[42] Here we quote the testimony of PO1 Amerol:

Q: At about what time did you arrive at the Mc[D]onalds parking lot?

A: About 3:30 o'clock in the afternoon, sir.

Q: At about 3:30 o'clock in the afternoon, what did you do there upon arrival, Mr. Witness?

A: We waited there and the subject arrived at 4:30 o'clock in the afternoon, sir.

Q: And when you say the subject, Mr. Witness, who is that subject?

A: Tecson Lim, sir.

Q: Was he alone when he arrived?

A: Two (2) of them, Maximo Flores, sir.

x x x x x x x x x

Q: Now, Mr. Witness, when you said these two (2) [appellants] arrived at that place about 4:30 o'clock, what transpired next?

A: When they arrived our reliable informant saw them and then Tecson Lim went out of the vehicle and they talk to each other, sir.

Q: After these reliable informant and Tecson Lim talked to each other, what happened next?

A: They approached me and then our reliable informant introduced Tecson Lim to me, sir.

x x x x x x x x x

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[42] *People v. Tiu*, 469 Phil. 163, 173 (2004).

Q: Mr. Witness, you said that you were introduced to Tecson Lim by your informant, Mr. Witness, did any conversation take place at that time?

A: Our reliable informant introduced me to Tecson Lim that, this is Mike Amerol, a [M]usli[m] and wanted to buy *shabu*, sir.

Q: After that, Mr. Witness, you were introduced as one who was interested to buy *shabu*, what other conversation took place at that time?

A: Tecson Lim asked me if I brought money, sir.

Q: What was your reply, Mr. Witness?

A: I said "yes" and I showed to him the buy-bust money, sir.

x x x x x x x x x

Q: Now, Mr. Witness, we go back to that particular location now at the Mc[D]onalds parking lot wherein the two (2) [appellants] together with your confidential informant approach you and then you have some conversations and you were introduced to each other and then you showed to Tecson Lim this Manila brown envelope containing the seven (7) bundles of paper cut out including these two (2) genuine ₱1,000.00 bills. So after you have shown this (sic) bundles now, to Mr. Tecson Lim, what transpired next?

Atty: Bringas: Objection, your honor, no basis yet.

Court: Overruled.

A: He excused himself and go back to his car, sir.

Q: When you say Tecson Lim excused himself and went back to his car, Mr. Witness, how about your confidential informant, what did he do also?

A: He was standing in front of the vehicle, sir.

Q: When Tecson Lim went back to their car, Mr. Witness, did he go inside or he just remain (sic) outside of the car?

A: After a while both of them alighted, sir.

Q: When you say alighted, his other companion then was Maximo Flores?

A: Yes, sir.

x x x x x x x x x

Q: So, when they alighted, Mr. Witness, both of the [appellants] alighted from their Daihatsu Car, where did they proceed?

A: They came to me and Maximo Flores was carrying a black bag, sir.

Q: And how about Tecson Lim, Mr. Witness, where was he at that time when Maximo Flores came near you?

A: Both of them approach me, sir.

x x x x x x x x x

Q: When they approach you, what transpired then?

A: Maximo Flores open (sic) that bag and showed to me its contents, sir.

x x x x x x x x x

Q: When he opened the black bag, Mr. Witness, what did you see inside that black bag?

A: I saw one tape sealed on a transparent plastic bag containing the methamphetamine hydrochloride, sir.

Q: By the way, Mr. Witness, during the briefing or during the negotiation of this drug deal what was the weight agreed upon in the negotiations of this drug deal that is going to take place?

A: One (1) kilo, sir.

Q: How much was the price of that one (1) kilo that was agreed upon?

A: ₱700,000.00, sir.

Q: Mr. Witness, after Mr. Maximo Flores [open] that black bag and showed to you the contents, what transpired next?

A: Tecson Lim asked the money in payment of the item, sir.

Q: How about that black bag, Mr. Witness, where was it, who was holding that black bag?

A: Maximo Flores, sir.

Q: Mr. Witness, after Maximo Flores held on to that bag, what did he do with that black bag containing the item, Mr. Witness?

A: He just showed it to me, sir, and we exchange, I got the black bag and he got the money, sir.

Q: And after that exchange took place, what did you do next?

A: I execute my pre-arrange signal, sir.

Q: What was your pre-arrange signal, Mr. Witness?

A: To light my cigarette, sir.[43]

From the foregoing, this Court is strongly convinced that the testimony of PO1 Amerol as the poseur-buyer was, indeed, clear and credible. He recounted in full detail how the deal was set by the informant, their meeting with appellants at McDonald's, Sucat, Parañaque City, their agreement to purchase one kilo of *shabu* for ₱700,000.00, the actual exchange of the black bag with a tape-sealed transparent plastic bag containing the substance and the boodle money, and the apprehension of appellants. Further, the prosecution presented before the court *a quo* the *shabu* subject of the buy-bust operation and the boodle money, which were marked as Exhibit "B" and Exhibits "F" to "F-8".

Appellants allege that (1) the buy-bust team should have discussed and identified the areas where they would conceal themselves to boost the confidence of PO1 Amerol as the poseur-buyer because, in absence thereof, it cannot be presumed that the other members of the buy-bust team concealed themselves; and (2) P/Sr. Insp. Mata, the team leader of the buy-bust operation, failed to perform his regular duty to conduct a test-buy before the buy-bust operation. We do not agree.

In *People v. Beriarmente*[44] citing *People v. Tranca*,[45] this Court has held that there is no rigid or textbook method of conducting buy-bust operations. It is of judicial notice that drug

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[43] TSN, 31 August 2000, pp. 12-28.

[44] 418 Phil. 229, 237-238 (2001).

[45] G.R. No. 110357, 17 August 1994, 235 SCRA 455, 463.

pushers sell their wares to any prospective customer, stranger or not, in both public and private places, with no regard for time. They have become increasingly daring and blatantly defiant of the law. Thus, the police must be flexible in their operations to keep up with the drug pushers. Practice buy-bust operations will not only hinder police efforts to apprehend drug pushers, but would even render them inutile, as these would only forewarn the drug pushers.[46]

Further, the choice of effective ways to apprehend drug dealers is within the ambit of police authority. Police officers have the expertise to determine which specific approaches are necessary to enforce their entrapment operations.[47] Thus, there was no irregularity in the performance of duty on the part of the members of the buy-bust team, even though they did not anymore conduct a test or trial buy-bust operation.

Contrary to appellants' claim that PO1 Amerol had already prepared the crime laboratory result of the white crystalline substance even prior to the submission of the specimen for laboratory examination, the records revealed otherwise. Records showed that after appellants were apprehended, a request was made for the laboratory examination of the white crystalline substance confiscated by the buy-bust team from appellants. The white crystalline substance was subsequently submitted to the PNP Crime Laboratory for examination by its forensic chemist, Annallee R. Forro. The examination yielded a positive result for methamphetamine hydrochloride. Forensic chemist Forro reduced the result of the examination into writing, as evidenced by Physical Sciences Report No. D-5933-99 dated 4 December 1999. Clearly, the crime laboratory result of the examination of the *shabu* confiscated from appellants was not prepared prior to the submission of the specimen for laboratory examination, as appellants would want this Court to believe.

Appellants' assertion that the trial court erred in considering the testimony of PO1 Amerol despite the inconsistencies therein,

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[46] *People v. Beriarmente, supra* note 44.

[47] *People v. Hajili*, 447 Phil. 283, 305 (2003).

which, if ignored, would cause injustice to the appellants, is likewise specious.

This Court has repeatedly held that a few discrepancies and inconsistencies in the testimonies of witnesses referring to minor details and not actually touching upon the central fact of the crime do not impair their credibility. Instead of weakening their testimonies, such inconsistencies tend to strengthen their credibility, because they discount the possibility of such testimonies being rehearsed.[48] Moreover, PO1 Amerol satisfactorily explained the inconsistencies in his testimony. He stated that he was not able to understand the question, as he thought that it referred to the markings on the *shabu*. He then clarified that the markings on the buy-bust money were made at their office in Camp Crame, Quezon City. What was marked at the scene of the crime was the *shabu* and not the buy-bust money.

The defense of both appellants consists mainly of mere denials. Denial, like alibi, is a weak defense, which becomes even weaker in the face of the positive identification of the accused by prosecution witnesses. Appellants' denial constituted self-serving negative evidence, which can hardly be considered as overcoming a straightforward and credit-worthy eyewitness account. As between the categorical, convincing and credible testimonies of the prosecution witnesses, as well as their positive identification of appellants as the offenders in the crime charged, and the defense of denial profferred by the latter, the former's testimonies are generally held to prevail, especially given the facts obtaining in this case.[49]

Finally, this Court affirms the findings of both lower courts that there was conspiracy between appellants Lim and Flores to commit the crime charged, and that the same was apparent from their actuations in selling the prohibited drug to PO1 Amerol.

Direct proof is not essential to prove conspiracy; it may be established by acts of the accused before, during and after the

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[48] *People v. Bagaua*, 442 Phil. 245, 255 (2002).

[49] *People v. Garcia*, 346 Phil. 475, 497 (1997).

commission of the crime charged, from which may be logically inferred the existence of a common purpose to commit the same.[50]

As the Court of Appeals stated in its Decision, both appellants arrived together at the place of the buy-bust operation on board a Daihatsu car. Appellant Lim alighted from the car and spoke to the informant and to PO1 Amerol, the poseur-buyer. After the negotiation, appellant Lim went back to the car and returned with appellant Flores, who was then carrying a black bag containing a tape-sealed transparent plastic bag with *shabu*. Appellant Flores gave the black bag with a tape-sealed transparent plastic bag containing *shabu* to PO1 Amerol, and the latter handed to appellant Lim the boodle money in payment thereof. The actuations of both appellants clearly revealed that there was conspiracy between them to commit the illegal transaction of selling *shabu*, a regulated or prohibited drug.

With the foregoing, it is beyond any cavil of doubt that the appellants were, indeed, guilty of violation of Section 15, Article III of Republic Act No. 6425, as amended.

As to the penalties. Section 15, Article III, in relation to Section 20(3) of Republic Act No. 6425, as amended, provides:

Sec. 15. *Sale, Administration, Dispensation, Delivery, Transportation and Distribution of Regulated Drugs*. — The **penalty of *reclusion perpetua* to death and a fine ranging from five hundred thousand pesos to ten million pesos** shall be imposed upon any person who, unless authorized by law, shall sell, dispense, deliver, transport or distribute any regulated drug.

Sec. 20. *Application of Penalties, Confiscation and Forfeiture of the Proceeds or Instruments of the Crime*. — The penalties for offenses under Sections 3, 4, 7, 8 and 9 of Article II and Sections 14, 14-A, 15 and 16 of Article III of this Act shall be applied if the dangerous drugs involved is in any of the following quantities:

1. 40 grams or more of opium;

2. 40 grams or more of morphine;

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[50] *People v. Bulan*, G.R. No. 143404, 8 June 2005, 459 SCRA 550, 575.

3. **200 grams or more of *shabu* or methylamphetamine hydrochloride**;
4. 40 grams or more of heroin;
5. 750 grams or more of Indian hemp or marijuana;
6. 50 grams or more of marijuana resin or marijuana resin oil;
7. 40 grams or more of cocaine or cocaine hydrocholoride; or
8. In the case of other dangerous drugs, the quantity of which is far beyond therapeutic requirements, as determined and promulgated by the Dangerous Drugs Board, after public consultations/hearings conducted for the purpose. (Emphases supplied.)

On the basis of the aforesaid provisions of law, the penalty imposed by the lower courts upon appellants, which is *reclusion perpetua*, is proper, considering that the *shabu* confiscated in this case as a result of the buy-bust operation weighs more than 200 grams, *i.e.*, 975.4 grams.

In the same vein, the fine of ₱2,000,000.00 imposed by the lower courts on each appellant is also in order as the same is still within the range of fines imposable on any person who sells prohibited drugs without any authority as clearly provided in Section 15, Article III of Republic Act No. 6425, as amended.

WHEREFORE, premises considered, the Decision dated 18 November 2008 of the Court of Appeals in CA-G.R. CR HC No. 01871, is hereby *AFFIRMED in toto*. No costs.

SO ORDERED.

Ynares-Santiago (Chairperson), Velasco, Jr., Leonardo-de Castro,[*] and *Peralta, JJ.,* concur.

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[*] Associate Justice Teresita J. Leonardo-De Castro was designated to sit as additional member replacing Associate Justice Antonio Eduardo B. Nachura per Raffle dated 27 May 2009.

THIRD DIVISION

[G.R. No. 162104. September 15, 2009]

R TRANSPORT CORPORATION, represented by its owner/President RIZALINA LAMZON, *petitioner, vs.* **EDUARDO PANTE,** *respondent.*

SYLLABUS

1. CIVIL LAW; COMMON CARRIERS; LIABILITY FOR NEGLIGENCE OF ITS EMPLOYEE. — Under the Civil Code, common carriers, like petitioner bus company, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence for the safety of the passengers transported by them, according to all the circumstances of each case. They are bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with due regard for all the circumstances. Article 1756 of the Civil Code states that "[i]n case of death of or injuries to passengers, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as prescribed by Articles 1733 and 1755." Further, Article 1759 of the Civil Code provides that **"[c]ommon carriers are liable for the death or injury to passengers through the negligence or willful acts of the former's employees,** although such employees may have acted beyond the scope of their authority or in violation of the orders of the common carriers. **This liability of the common carriers does not cease upon proof that they exercised all the diligence of a good father of a family in the selection and supervision of their employees."** In this case, the testimonial evidence of respondent showed that petitioner, through its bus driver, failed to observe extraordinary diligence, and was, therefore, negligent in transporting the passengers of the bus safely to Gapan, Nueva Ecija on January 27, 1995, since the bus bumped a tree and a house, and caused physical injuries to respondent. Article 1759 of the Civil Code explicitly states that the common carrier is liable for the death or injury to passengers through the negligence or willful acts of its

employees, and that such liability does not cease upon proof that the common carrier exercised all the diligence of a good father of a family in the selection and supervision of its employees. Hence, even if petitioner was able to prove that it exercised the diligence of a good father of the family in the selection and supervision of its bus driver, it is still liable to respondent for the physical injuries he sustained due to the vehicular accident.

2. ID.; DAMAGES; AWARD OF ACTUAL DAMAGES IS PROPER WHEN IT IS BASED ON THE STATEMENT OF ACCOUNT ISSUED BY A HOSPITAL. — [P]etitioner contends that the Court of Appeals erred in affirming the decision of the trial court, which awarded actual damages in the amount of ₱22,870.00 based on the statement of account issued by the Baliuag District Hospital and not based on an official receipt. Petitioner argues that the statement of account is not the best evidence. The contention is without merit. As cited by the Court of Appeals in its Decision, *Jarco Marketing Corporation v. Court of Appeals* awarded actual damages for hospitalization expenses that was evidenced by a statement of account issued by the Makati Medical Center. Hence, the statement of account is admissible evidence of hospital expenses incurred by respondent.

3. ID.; ID.; MORAL DAMAGES AWARDED DUE TO PHYSICAL PAIN AND MENTAL ANGUISH AS A RESULT OF A VEHICULAR ACCIDENT. — The Court of Appeals correctly sustained the award of moral damages, citing *Spouses Ong v. Court of Appeals*, which awarded moral damages to paying passengers, who suffered physical injuries on board a bus that figured in an accident. *Spouses Ong* held that a person is entitled to the integrity of his body and if that integrity is violated, damages are due and assessable. Thus, the usual practice is to award moral damages for physical injuries sustained. In *Spouses Ong*, the Court awarded moral damages in the amount of ₱50,000.00 to a passenger who was deemed to have suffered mental anguish and anxiety because her right arm could not function in a normal manner. Another passenger, who suffered injuries on his left chest, right knee, right arm and left eye, was awarded moral damages in the amount of ₱30,000.00 for the mental anxiety and anguish he suffered from the accident. In this case, respondent sustained a "laceration frontal area,

with fracture of the right humerus" due to the vehicular accident. He underwent an operation for the fracture of the bone extending from the shoulder to the elbow of his right arm. After a few years of rest, he had to undergo a second operation. Respondent, therefore, suffered physical pain, mental anguish and anxiety as a result of the vehicular accident. Hence, the award of moral damages in the amount of ₱50,000.00 is proper.

4. ID.; ID.; EXEMPLARY DAMAGE AWARDED IN VIEW OF THE DRIVER'S RECKLESS, NEGLIGENT AND IMPRUDENT DRIVING. — Article 2232 of the Civil Code states that [i]n contracts and quasi-contracts, the court may award exemplary damages if the defendant acted in a wanton, fraudulent, reckless, oppressive or malevolent manner. In this case, respondent's testimonial evidence showed that the bus driver, Johnny Merdiquia, was driving the bus very fast in a reckless, negligent and imprudent manner; hence, the bus hit a tree and a house along the highway in Baliuag, Bulacan. The award of exemplary damages is, therefore, proper. The award of exemplary damages is justified to serve as an example or as a correction for the public good.

5. ID.; ID.; ATTORNEY'S FEES, AWARD OF. — [T]he Court affirms the award of attorney's fees to respondent's counsel. The Court notes that respondent filed his Complaint for damages on March 14, 1995 as pauper-litigant. The award of legal fees by the trial court to respondent's counsel was a contingent fee of 25 percent of the total amount of damages, which shall constitute a lien on the total amount awarded. The said award was affirmed by the Court of Appeals. Twenty-five percent of the total damages is equivalent to ₱34,778.15. The award of legal fees is commensurate to the effort of respondent's counsel, who attended to the case in the trial court for seven years, and who finally helped secure redress for the injury sustained by respondent after 14 years.

APPEARANCES OF COUNSEL

Gaspar V. Tagalo for petitioner.
Public Attorney's Office for respondent.

D E C I S I O N

PERALTA, *J.*:

This is a petition for review on *certiorari*[1] of the Decision dated October 7, 2003 of the Court of Appeals in CA-G.R. CV No. 76170, and its Resolution dated February 5, 2004, denying petitioner's motion for reconsideration. The Court of Appeals affirmed the Decision of the Regional Trial Court (RTC) of Gapan City, Branch 35, dated January 26, 2002, holding petitioner liable to respondent for damages for physical injuries sustained by respondent due to a vehicular accident.

The facts[2] are as follows:

Petitioner R Transport Corporation, represented by its owner and president, Rizalina Lamzon,[3] is a common carrier engaged in operating a bus line transporting passengers to Gapan, Nueva Ecija from Cubao, Quezon City and back.

At about 3:00 a.m. of January 27, 1995, respondent Eduardo Pante rode petitioner's R. L. Bus Liner with Plate Number CVW-635 and Body Number 94810 in Cubao, Quezon City bound for Gapan, Nueva Ecija. Respondent paid the sum of ₱48.00 for his fare, and he was issued bus ticket number 555401.[4]

While traveling along the Doña Remedios Trinidad Highway in Baliuag, Bulacan, the bus hit a tree and a house due to the fast and reckless driving of the bus driver, Johnny Merdiquia. Respondent sustained physical injuries as a result of the vehicular accident. He was brought by an unidentified employee of petitioner to the Baliuag District Hospital, where respondent was diagnosed to have sustained a "laceration frontal area, with fracture of

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[1] Under Rule 45 of the Rules of Court.

[2] As culled from the Decision of the Court of Appeals, the transcript of stenographic notes and the records of the case.

[3] Also referred to as Rosalina Lamson in the RTC Decision and as Rosalina Lanson in the CA Decision.

[4] Exhibit "A", records, p. 37.

the right humerus,"[5] or the bone that extends from the shoulder to the elbow of the right arm. Respondent underwent an operation for the fracture of the right humerus per Certification dated February 17, 1995 issued by Dr. Virginia C. Cabling of the Baliuag District Hospital.[6]

The hospital's Statement of Account showed that respondent's operation and confinement cost ₱22,870.00.[7] Respondent also spent ₱8,072.60 for his medication. He was informed that he had to undergo a second operation after two years of rest.[8] He was unemployed for almost a year after his first operation because Goldilocks, where he worked as a production crew, refused to accept him with his disability as he could not perform his usual job.[9]

By way of initial assistance, petitioner gave respondent's wife, Analiza P. Pante, the sum of ₱7,000.00, which was spent for the stainless steel instrument used in his fractured arm.[10]

After the first operation, respondent demanded from petitioner, through its manager, Michael Cando, the full payment or reimbursement of his medical and hospitalization expenses, but petitioner refused payment.[11]

Four years later, respondent underwent a second operation. He spent ₱15,170.00 for medical and hospitalization expenses.[12]

On March 14, 1995, respondent filed a Complaint[13] for damages against petitioner with the RTC of Gapan City, Branch 35 (trial

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[5] Exhibit "B", records, p. 114.

[6] *Id.*

[7] Exhibit "E", records, p. 119.

[8] TSN, October 4, 1990, p. 7.

[9] *Id.* at 7; TSN, October 24, 1995, pp. 6-7.

[10] Exhibit "D", records, p. 118; TSN, October 4, 1995, pp. 11-12.

[11] TSN, October 4, 1995, pp. 7-8.

[12] Exhibits "F-1"to "F-5", records, pp. 241-243.

[13] Docketed as Civil Case No. 1460.

court) for the injuries he sustained as a result of the vehicular accident.

In its Answer,[14] petitioner put up the defense that it had always exercised the diligence of a good father of a family in the selection and supervision of its employees, and that the accident was a *force majeure* for which it should not be held liable.

At the pre-trial on October 4, 1995, petitioner was declared in default,[15] which was reconsidered by the trial court on December 12, 1995[16] upon finding that petitioner had earlier filed a Motion to Transfer Date of Hearing. Trial was first set on February 26, 1996, and from then on trial was postponed several times on motion of petitioner.

Six years later, on October 24, 2001, respondent's direct examination was concluded. His cross-examination was reset to December 5, 2001 due to the absence of petitioner and its counsel.[17] It was again reset to January 23, 2002[18] upon petitioner's motion. On January 23, 2002, petitioner, through its new counsel, asked for another postponement on the ground that he was not ready. Hence, the cross-examination of respondent was reset to March 13, 2002.[19]

On March 13, 2002, petitioner was declared to have waived its right to cross-examine respondent due to the absence of petitioner and its counsel, and respondent was allowed to offer his exhibits within five days.[20] Petitioner's motion for reconsideration dated April 4, 2002[21] was denied on May 7, 2002.[22]

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[14] Records, pp. 53-57.

[15] *Id.* at 73.

[16] *Id.* at 96.

[17] *Id.* at 245.

[18] *Id.* at 249.

[19] *Id.* at 250.

[20] *Id.* at 255.

[21] *Id.* at 260.

[22] *Id.* at 268.

In the hearing of June 19, 2002, petitioner was declared to have waived its right to present evidence on motion of respondent's counsel in view of the unexplained absence of petitioner and its counsel despite prior notice. The case was declared submitted for decision.[23]

On June 26, 2002, the trial court rendered a Decision, the dispositive portion of which reads:

> WHEREFORE, premises considered, judgment is hereby rendered finding the plaintiffs to be entitled to damages and ordering defendants to [pay]:
>
> 1.) ₱39,112.60 as actual damages;
> 2.) ₱50,000.00 as moral damages;
> 3.) ₱50,000.00 as exemplary damages;
> 4.) Twenty-five percent (25%) of the total of which shall constitute a lien as contingent fee of plaintiff's counsel.[24]
>
> So ordered.

The trial court held that the provisions of the Civil Code on common carriers govern this case. Article 1756 of the Civil Code states that "[i]n case of death of or injuries to passengers, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as prescribed by Articles 1733 and 1755." The trial court ruled that since petitioner failed to dispute said presumption despite the many opportunities given to it, such presumption of negligence stands.

Petitioner appealed the decision of the trial court to the Court of Appeals.

In its Decision dated October 7, 2003, the Court of Appeals affirmed the decision of the trial court, the dispositive portion of which reads:

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[23] CA *rollo*, p. 284.

[24] *Rollo*, p. 90.

WHEREFORE, for lack of merit, the appeal is DENIED and the Decision appealed from is AFFIRMED *in toto*. With double costs against the appellant.[25]

Petitioner's motion for reconsideration was denied for lack of merit in the Resolution of the Court of Appeals dated February 5, 2004.[26]

Hence, petitioner filed this petition raising the following issues:

I

THE HONORABLE COURT OF APPEALS, TENTH DIVISION GRAVELY ERRED IN NOT GIVING DUE COURSE TO THE DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION OF THE DECISION PROMULGATED ON OCTOBER 7, 2003, THEREBY DEPRIVING PETITIONER'S FUNDAMENTAL RIGHT TO DUE PROCESS.

II

THE HONORABLE COURT OF APPEALS, TENTH DIVISION FURTHER GRAVELY ERRED IN AFFIRMING *IN TOTO* THE DECISION OF THE REGIONAL TRIAL COURT OF GAPAN CITY, BRANCH 35, PARTICULARLY IN AWARDING DAMAGES TO THE RESPONDENT WITHOUT PRESENTING ANY SUBSTANTIAL EVIDENCE.

III

THE HONORABLE COURT OF APPEALS, TENTH DIVISION, IN AFFIRMING *IN TOTO* THE DECISION OF THE REGIONAL TRIAL COURT OF GAPAN CITY, BRANCH 35, HAS COMMITTED GRAVE AND REVERSIBLE ERROR IN ITS FINDING OF FACTS AND APPLICATION OF [THE] LAW.[27]

The main issue is whether or not petitioner is liable to respondent for damages.

The Court affirms the decision of the Court of Appeals that petitioner is liable for damages.

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[25] *Id.* at 47.

[26] *Id.* at 26.

[27] *Id.* at 5.

Under the Civil Code, common carriers, like petitioner bus company, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence for the safety of the passengers transported by them, according to all the circumstances of each case.[28] They are bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with due regard for all the circumstances.[29]

Article 1756 of the Civil Code states that "[i]n case of death of or injuries to passengers, common carriers are presumed to have been at fault or to have acted negligently, unless they prove that they observed extraordinary diligence as prescribed by Articles 1733 and 1755."

Further, Article 1759 of the Civil Code provides that **"[c]ommon carriers are liable for the death or injury to passengers through the negligence or willful acts of the former's employees**, although such employees may have acted beyond the scope of their authority or in violation of the orders of the common carriers. **This liability of the common carriers does not cease upon proof that they exercised all the diligence of a good father of a family in the selection and supervision of their employees**."[30]

In this case, the testimonial evidence of respondent showed that petitioner, through its bus driver, failed to observe extraordinary diligence, and was, therefore, negligent in transporting the passengers of the bus safely to Gapan, Nueva Ecija on January 27, 1995, since the bus bumped a tree and a house, and caused physical injuries to respondent. Article 1759

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[28] Civil Code, Art. 1733. Common carriers, from the nature of their business and for reasons of public policy, are bound to observe extraordinary diligence in the vigilance over the goods and for the safety of the passengers transported by them, according to all the circumstances of each case.

[29] Civil Code, Art. 1755. A common carrier is bound to carry the passengers safely as far as human care and foresight can provide, using the utmost diligence of very cautious persons, with due regard for all the circumstances.

[30] Emphasis supplied.

of the Civil Code explicitly states that the common carrier is liable for the death or injury to passengers through the negligence or willful acts of its employees, and that such liability does not cease upon proof that the common carrier exercised all the diligence of a good father of a family in the selection and supervision of its employees. Hence, even if petitioner was able to prove that it exercised the diligence of a good father of the family in the selection and supervision of its bus driver, it is still liable to respondent for the physical injuries he sustained due to the vehicular accident.[31]

Petitioner cannot complain that it was denied due process when the trial court waived its right to present evidence, because it only had itself to blame for its failure to attend the hearing scheduled for reception of its evidence on June 19, 2002. The trial court stated, thus:

> It is noteworthy to state that during the course of the proceeding of this case, defendant (petitioner) and its counsel hardly appeared in court and only made innumerable motions to reset the hearings to the point that this case x x x dragged [on] for seven years from its filing up to the time that it has been submitted for decision. And for the unexplained absence of counsel for defendant in the hearing set last June 19, 2002 despite repeated resetting, upon motion of the counsel for plaintiff (respondent), Atty. Ireneo Romano, its right to present its evidence was considered waived.[32]

In *Silverio, Sr. v. Court of Appeals*,[33] the Court held that petitioner therein was not denied due process when the records of the case showed that he was amply given the opportunity to present his evidence, which he, however, waived. There is no denial of due process where a party was given an opportunity to be heard.[34]

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[31] See *Mallari, Sr. v. Court of Appeals*, 381 Phil. 153 (2000); *Baliwag Transit, Inc. v. Court of Appeals*, 326 Phil. 762 (1996).

[32] Records, p. 89.

[33] G.R. No. 109979, March 11, 1999, 304 SCRA 541.

[34] *Id.*, citing *Gutierrez v. Commission on Elections*, G.R. No. 126298, March 25, 1997, 270 SCRA 413.

Next, petitioner contends that the Court of Appeals erred in denying its motion for reconsideration of the appellate court's Decision dated October 7, 2003.

The contention is unmeritorious.

The Court of Appeals has the discretion to deny petitioner's motion for reconsideration since it found that there was no cogent reason to warrant reconsideration of its Decision dated October 7, 2003. According to the appellate court, it had already considered, if not squarely ruled upon, the arguments raised in petitioner's motion for reconsideration.[35]

Moreover, petitioner contends that the Court of Appeals erred in affirming the decision of the trial court, which awarded actual damages in the amount of ₱22,870.00 based on the statement of account issued by the Baliuag District Hospital and not based on an official receipt. Petitioner argues that the statement of account is not the best evidence.

The contention is without merit.

As cited by the Court of Appeals in its Decision, *Jarco Marketing Corporation v. Court of Appeals*[36] awarded actual damages for hospitalization expenses that was evidenced by a statement of account issued by the Makati Medical Center. Hence, the statement of account is admissible evidence of hospital expenses incurred by respondent.

Petitioner also contends that the award of moral damages is not proper, because it is not recoverable in actions for damages predicated on breach of the contract of transportation under Articles 2219 and 2220 of the Civil Code.[37]

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[35] *Rollo*, p. 26.

[36] 378 Phil. 991 (1999).

[37] Art. 2219. Moral damages may be recovered in the following and analogous cases:

(1) A criminal offense resulting in physical injuries;

(2) Quasi-delicts causing physical injuries;

(3) Seduction, abduction, rape or other lascivious acts;

The Court is not persuaded.

The Court of Appeals correctly sustained the award of moral damages, citing *Spouses Ong v. Court of Appeals*,[38] which awarded moral damages to paying passengers, who suffered physical injuries on board a bus that figured in an accident. *Spouses Ong* held that a person is entitled to the integrity of his body and if that integrity is violated, damages are due and assessable. Thus, the usual practice is to award moral damages for physical injuries sustained. In *Spouses Ong*, the Court awarded moral damages in the amount of ₱50,000.00 to a passenger who was deemed to have suffered mental anguish and anxiety because her right arm could not function in a normal manner. Another passenger, who suffered injuries on his left chest, right knee, right arm and left eye, was awarded moral damages in the amount of ₱30,000.00 for the mental anxiety and anguish he suffered from the accident.

In this case, respondent sustained a "laceration frontal area, with fracture of the right humerus" due to the vehicular accident. He underwent an operation for the fracture of the bone extending from the shoulder to the elbow of his right arm. After a few years of rest, he had to undergo a second operation. Respondent, therefore, suffered physical pain, mental anguish and anxiety as a result of the vehicular accident. Hence, the award of moral damages in the amount of ₱50,000.00 is proper.

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(4) Adultery or concubinage;

(5) Illegal or arbitrary detention or arrest;

(6) Illegal search;

(7) Libel, slander or any other form of defamation;

(8) Malicious prosecution;

(9) Acts mentioned in article 309;

(10) Acts of actions referred to in Articles 21, 26, 27, 28, 29, 30, 32, 34, and 35.

Art. 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.

[38] 361 Phil. 338 (1999).

Petitioner likewise contends that the award of exemplary damages is improper, because it did not act in a wanton, fraudulent, reckless, oppressive or malevolent manner.

The contention is without merit.

Article 2232 of the Civil Code states that [i]n contracts and quasi-contracts, the court may award exemplary damages if the defendant acted in a wanton, fraudulent, reckless, oppressive or malevolent manner. In this case, respondent's testimonial evidence showed that the bus driver, Johnny Merdiquia, was driving the bus very fast in a reckless, negligent and imprudent manner; hence, the bus hit a tree and a house along the highway in Baliuag, Bulacan. The award of exemplary damages is, therefore, proper. The award of exemplary damages is justified to serve as an example or as a correction for the public good.[39]

Further, the Court affirms the award of attorney's fees to respondent's counsel. The Court notes that respondent filed his Complaint for damages on March 14, 1995 as pauper-litigant. The award of legal fees by the trial court to respondent's counsel was a contingent fee of 25 percent of the total amount of damages, which shall constitute a lien on the total amount awarded. The said award was affirmed by the Court of Appeals. Twenty-five percent of the total damages is equivalent to ₱34,778.15. The award of legal fees is commensurate to the effort of respondent's counsel, who attended to the case in the trial court for seven years, and who finally helped secure redress for the injury sustained by respondent after 14 years.

Lastly, petitioner contends that the medical certificate presented in evidence is without probative value since respondent failed to present as witness Dr. Virginia Cabling to affirm the content of said medical certificate.

The contention lacks merit. The Court of Appeals correctly held that the medical certificate is admissible since petitioner failed to object to the presentation of the evidence.[40]

[39] *Prudencio v. Alliance Transport System*, G.R. No. L-33836, March 16, 1987, 148 SCRA 440.

[40] *SCC Chemicals Corporation v. Court of Appeals*, 405 Phil. 514 (2001).

WHEREFORE, the petition is *DENIED.* The Decision of the Court of Appeals in CA-G.R. CV No. 76170, dated October 7, 2003, and its Resolution dated February 5, 2004, are hereby *AFFIRMED*. Petitioner R Transport Corporation is ordered to pay respondent Eduardo Pante ₱39,112.60 as actual damages; ₱50,000.00 as moral damages; and ₱50,000.00 as exemplary damages. Twenty-five percent (25%) of the total amount shall constitute a lien as contingent fee of respondent's counsel.

Costs against petitioner.

SO ORDERED.

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

EN BANC

[G.R. No. 184268. September 15, 2009]

ERNESTO BATALLA, *petitioner, vs.* **COMMISSION ON ELECTIONS and TEODORO BATALLER,** *respondents.*

SYLLABUS

1. POLITICAL LAW; ELECTION LAWS; COMELEC RULES OF PROCEDURE; PAYMENT OF TWO APPEAL FEES PERFECTS THE APPEAL IN ELECTORAL CASES; DISCUSSION AND APPLICATION. — The issue of the correct appeal fee to be paid for the perfection of an appeal from the decision of the trial court in electoral cases was clarified in very recent cases — *Aguilar v. Commission on Elections* and *Divinagracia v. Commission on Elections*. x x x [I]n holding that *Aguilar* had not diluted the force of Comelec Resolution No. 8486, the Court in *Divinagracia* categorically ruled that for an appeal to be perfected in an election case

from the trial court, the appellant must: (1) file his Notice of Appeal and pay the PhP 1,000 appeal fee within the five-day reglementary period to the trial court that rendered the assailed decision, pursuant to A.M. No. 07-4-15-SC; and (2) pay to the Comelec Cash Division the additional PhP 3,200 appeal fee within 15 days from the time of the filing of the Notice of Appeal with the lower court pursuant to Comelec Resolution No. 8486. Thus, any error in the matter of nonpayment or incomplete payment of the two appeal fees in election cases is no longer excusable and is a cause for the outright dismissal of the appeal. We, however, note that under the present Comelec Rules of Procedure, Sec. 3, Rule 40 provides for the payment of the additional PhP 3,200 appeal fee to the Comelec Cash Division. The period in which to pay such additional appeal fee is provided under Sec. 4, Rule 40, thus: Sec. 4. Where and When to Pay. — The fees prescribed in Sections 1, 2 and 3 hereof shall be paid to, and deposited with, the Cash Division of the Commission **within a period to file the notice of appeal**. And the period to file the notice of appeal is provided under Sec. 3 of Rule 22, thus: Sec. 3. Notice of Appeal. — **Within five (5) days after promulgation of the decision of the court,** the aggrieved party may file with said court a notice of appeal, and serve a copy thereof upon the attorney of record of the adverse party. The promulgation of the decision is understood to mean the receipt by a party of a copy of the decision. Thus, to recapitulate, under Sec. 4, Rule 40 in relation to Sec. 3, Rule 22 of the Comelec Rules of Procedure, an appellant from a decision of a trial court in an election protest case is given a reglementary period of five days from the receipt of a copy of the decision within which to pay the PhP 3,200 additional appeal fee to the Comelec Cash Division. Considering that the Comelec *En Banc* issued on July 15, 2008 Comelec Resolution No. 8486, which allowed the payment of the additional appeal fee of PhP 3,200 to the Comelec Cash Division **within 15 days from the filing of the notice of appeal,** said Resolution, however, has effectively amended Sec. 4, Rule 40 of the Comelec Rules of Procedure. Thus, the Comelec is advised to reflect such amendment in their rules for the proper guidance of the Bench, the Bar, and litigants. In the instant case, it is undisputed that Batalla had already perfected his appeal by paying the required appeal fees. **He paid the PhP 1,000 appeal fee to the trial court on February 22, 2008 within the five-**

day period from receipt of the decision and the additional PhP 3,200 appeal fee to the Comelec Cash Division on March 5, 2008 or within 15 days from the filing of his notice of appeal. It is, thus, clear that Batalla had perfected his appeal by complying with the appeal requirements.

2. ID.; ID.; OMNIBUS ELECTION CODE (OEC); APPRECIATION OF BALLOTS; INTENT RULE, APPLIED. — Exhibit "A" ballot clearly shows the first name "Teodoro," while the surname written is a bit confusing; still, it certainly cannot be read as "Batalla" since the way it is written clearly indicates eight characters. The first six characters clearly make out "Batall," and the last two characters are the ones that are quite illegible. The name "Batalla" consists of only seven characters, while "Bataller" consists of eight characters. Thus, with the eight characters of the surname and the first name properly made out as "Teodoro," the benefit of the doubt tilts in favor of Bataller. More so, if the first name alone of a candidate (where no other candidate has a similar name)—in this case, for example, Teodoro or Ernesto—is sufficient to appreciate the vote for that candidate, with more reason should the first name of Teodoro and the surname making out "Bataller" be appreciated in his favor. Evidently, the voter wanted to cast his ballot in favor of Bataller as *Punong Barangay*. The intent rule is well settled in this jurisdiction that in the appreciation of the ballot, the objective should be to ascertain and carry into effect the intention of the voter, if it could be determined with reasonable certainty. Hence, the intention of the voter to vote for Bataller is unequivocal from the face of the Exhibit "A" ballot. The ballot in question should be liberally appreciated to effectuate the voter's choice of Bataller.

3. ID.; ID.; ID.; ID.; NEIGHBORHOOD RULE, EXPLAINED AND APPLIED. — The ballot marked as Exhibit "E" above was properly credited in Bataller's name under the neighborhood rule x x x. The neighborhood rule is a settled rule stating that where the name of a candidate is not written in the proper space in the ballot, but is preceded by the name of the office for which he is a candidate, the vote should be counted as valid for said candidate. Such rule is usually applied in consonance with the intent rule which stems from the principle that in the appreciation of the ballot, the object should be to ascertain and carry into effect the intention of the voter, if it could be

determined with reasonable certainty. x x x The House of Representatives Electoral Tribunal (HRET) first laid down the particulars of the above "neighborhood rule" in *Nograles v. Dureza*. *Nograles* and subsequent related rulings were later codified in its "Rules and Rulings on Appreciation of Ballots" (HRET Rules). We note that the HRET Rules provided for the "neighborhood rule" and the "intent rule," and that the Senate Electoral Tribunal's Rules on Appreciation of Ballots has adopted the HRET's "neighborhood rule." Thus, the MCTC is correct in appreciating name of Teodoro Bataller in the Exhibit "E" ballot as a vote for Bataller although written on the space for *Kagawad* pursuant to the neighborhood and intent doctrines.

4. ID.; ID.; ID.; ID.; WHEN NEITHER THE NEIGHBORHOOD RULE NOR THE DOCTRINE OF *IDEM SONAMS* APPLY. — The Exhibit "B" ballot above is a stray ballot and cannot be credited to Bataller. We agree with Batalla that neither the neighborhood rule nor the doctrine of *idem sonans* apply to this instance. *First*, the neighborhood rule applies when the name for *Punong Barangay* is left vacant, while the name of a candidate for *Punong Barangay* is clearly legible or discernable. This particular ballot does not clearly show the name of the candidate written on the first space for *kagawad*. *Second*, the word "tododer" written on the first line for *kagawad* does not necessarily refer to Teodoro Bataller. The word "tododer" does not sound like Teodoro under the *idem sonans* (having the same sound) rule. Said rule of law states that the occurrence in a document of a spelling of a material word that is wrong but has the sound of the word intended does not vitiate the instrument. Neither was it shown that Bataller is known by that name in Barangay Mapulang Daga in Bacacay, Albay. *Third*, while it is paramount to give full expression to the voter's will under the intent rule as indicated in the ballots — thus, the liberality in ballot appreciation — it is necessary that the voter's intention be at least discernable with certainty. It has not been satisfactorily shown that "tododer" is used as a name of a person or the nickname of a candidate. Absent any indication of such discernable intent, we cannot appreciate this particular ballot in favor of Bataller. Thus, the MCTC erroneously credited this ballot to Bataller.

APPEARANCES OF COUNSEL

Betito Peña & Associates Law Offices for petitioner.
The Solicitor General for public respondent.

D E C I S I O N

VELASCO, JR., *J.*:

The Case

In a Petition for *Certiorari* under Rules 65 in Relation to Rule 64 of the Rules of Court, petitioner assails the Order[1] of the Commission on Elections (Comelec) First Division dated April 3, 2008 dismissing his appeal from the February 12, 2008 Decision[2] of the Municipal Circuit Trial Court (MCTC), Bacacay, Albay, in Election Case No. B-2007-2, and the Order[3] of the Comelec *En Banc* dated August 5, 2008 denying his motion for reconsideration.

The Facts

Petitioner Ernesto Batalla (Batalla), who was a former *Punong Barangay*, and private respondent Teodoro Bataller (Bataller), then incumbent *Punong Barangay*, were candidates for the position of *Punong Barangay* or Barangay Chairperson in Barangay Mapulang Daga, Bacacay, Albay during the October 29, 2007 *barangay* elections. During the count, Batalla garnered 113 votes while Bataller garnered 108 votes. Consequently, Batalla was proclaimed the *Punong Barangay* winner in Barangay Mapulang Daga, Bacacay, Albay.

On November 7, 2007, Bataller filed an election protest,[4] docketed as Election Case No. B-2007-2, before the MCTC in

[1] *Rollo*, p. 29. Per Presiding Commissioner Romeo A. Brawner and Commissioner Moslemen T. Macarambon, Sr.

[2] *Id.* at 22-27, per Presiding Judge Marietta Lea B. Rosana.

[3] *Id.* at 38 and 40, per Chairperson Jose A.R. Melo and Commissioners Rene V. Sarmiento, Nicodemo T. Ferrer, Moslemen T. Macarambon, Sr., Leonardo L. Leonida and Lucenito N. Tagle.

[4] *Id.* at 16-18, Petition dated October 31, 2007.

Bacacay, Albay against Batalla and six members of the Board of Election Tellers in Precincts 107-A and 108-A for Barangay Mapulang Daga. Bataller claimed misappreciation of seven ballots. During the revision on December 7, 2007, Batalla did not protest any ballots.

The Ruling of the MCTC

On February 12, 2008, the trial court rendered its Decision finding that Batalla and Bataller had garnered an equal number of votes. The *fallo* reads:

> WHEREFORE, premises considered, judgment is hereby rendered:
>
> 1. Declaring that the protestant [Bataller] and the protestee [Batalla] have received equal number of votes for the position of Punong Barangay of Mapulang Daga, Bacacay, Albay, in the October 29, 2007 *barangay* election, and the winning candidate between the two shall be proclaimed as elected in accordance with Section 240, Article XIX of the Omnibus Election Code.
>
> SO ORDERED.[5]

Section 240[6] of *Batas Pambansa Bilang* 881, as amended, otherwise known as the Omnibus Election Code, provides for the drawing of lots in case of a tie of two or more electoral

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[5] *Id.* at 27.

[6] Sec. 240. ***Election resulting in tie***.—Whenever it shall appear from the canvass that two or more candidates have received an equal and highest number of votes, or in cases where two or more candidates are to be elected for the same position and two or more candidates received the same number of votes for the last place in the number to be elected, the board of canvassers, after recording this fact in its minutes, shall by resolution, upon five days notice to all the tied candidates, hold a special public meeting at which the board of canvassers shall proceed to the drawing of lots of the candidates who have tied and shall proclaim as elected the candidates who may be favored by luck, and the candidates so proclaimed shall have the right to assume office in the same manner as if he had been elected by plurality of vote. The board of canvassers shall forthwith make a certificate stating the name of the candidate who had been favored by luck and his proclamation on the basis thereof. Nothing in this section shall be construed as depriving a candidate of his right to contest the election.

candidates garnering the same or equal highest number of votes, with the proclamation as winner of the candidate favored by luck.

Of the seven ballots protested, the trial court appreciated five of them in favor of Bataller by applying the neighborhood and intent rules as enunciated in *Ferrer v. Comelec*[7] and *Velasco v. Commission on Elections*,[8] and the application of the doctrine of *idem sonans*. Consequently, the MCTC found both Batalla and Bataller garnering an equal number of 113 votes each.

Aggrieved, Batalla timely filed his Notice of Appeal[9] of the trial court's decision elevating the election protest before the Comelec, docketed as EAC (BRGY.) No. 89-2008.

The Ruling of the Comelec First Division

On April 3, 2008, the Comelec First Division issued the first assailed Order dismissing Batalla's appeal in this wise:

> Pursuant to Sections 3 and 4, Rule 40 of the COMELEC Rules of Procedure which provide for the payment of appeal fee in the amount of [₱3,000.00] within the period to file the notice of appeal, and Section 9 (a), Rule 22 of the same Rules which provides that failure to pay the correct appeal fee is a ground for the dismissal of the appeal, the Commission (First Division) RESOLVED as it here RESOLVES to DISMISS the instant case for Protestee-Appellant's [Batalla] failure to pay the appeal fee as prescribed by the Comelec Rules of Procedure within the five-(5)-day reglementary period.
>
> SO ORDERED.

Aggrieved further, Batalla elevated before the Comelec *En Banc* the above Order of the Comelec First Division by filing on April 11, 2008 his Motion for Reconsideration[10] followed by a Supplemental Motion for Reconsideration[11] on April 30, 2008.

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[7] G.R. No. 139489, April 10, 2000, 330 SCRA 229.

[8] G.R. No. 166931, February 22, 2007, 516 SCRA 447.

[9] *Rollo*, p. 28, dated February 22, 2008.

[10] *Id.* at 30-33, dated April 11, 2008.

[11] *Id.* at 34-37, dated April 30, 2008.

The Ruling of the Comelec *En Banc*

On August 5, 2008, the Comelec *En Banc* issued the second assailed Order affirming the Comelec First Division's earlier Order dismissing the appeal for Batalla's failure to pay the appeal fee and, moreover, denying his motion for reconsideration for his failure to verify the motion. The second assailed Order, in its entirety, reads:

> Acting on the *Motion for Reconsideration* filed via registered mail on April 11, 2008 by protestee-appellant [Batalla], through counsel, seeking reconsideration of the Order issued by the Commission (First Division) on April 3, 2008 dismissing the herein appeal for protestee-appellant's [Batalla] failure to pay the appeal fee as prescribed by the Comelec Rules of Procedure within the five-day reglementary period and the Manifestation filed via registered mail on April 23, 2008 by protestant-appellee [Bataller], through counsel, stating that the Motion for Reconsideration was not verified and therefore inadmissible on record and must be expunged therefrom, and praying that the Order of April 3, 2008 be declared as final, the Commission *En Banc* resolved to:
>
> 1. DENY the Motion for Reconsideration for movant's [Batalla] failure to VERIFY the same in accordance with Section 3, Rule 19 of the Comelec Rules of Procedure, which states:
>
>   "Rule 19 – Motions for Reconsideration.
>
>   Section 3. Form and Contents of Motion for Reconsideration – The motion shall be verified x x x"
>
> 2. Declare the Order of April 3, 2008 to have become final and executory as of April 25, 2008, there being no motion for reconsideration to speak of, pursuant to Section 13 (c), Rule 18 of the Comelec Rules of Procedure, to wit:
>
>   "Section 13. Finality of Decisions or Resolutions.
>
> x x x x x x x x x
>
>   (c) Unless a motion is seasonably filed, a decision or resolution of a Division shall become final and executory after the lapse of five (5) days in Special Actions and

> Special Cases and after fifteen (15) days in all other actions or proceedings following its promulgation."

ACCORDINGLY, the Clerk of the Commission, Electoral Contests Adjudication Department, is hereby directed to immediately issue an Entry of Judgment and the Chief, Judicial Records Division of the same department, to remand the records of the case to the lower court for its proper disposition.

Let copies of this Order and the Order of April 3, 2008 be furnished to Her Excellency, President Gloria Macapagal-Arroyo, the Secretary, Department of the Interior and Local Government, the Chairman, Commission on Audit and the Secretary, Sangguniang Barangay of Barangay Mapulang Daga, Bacacay, Albay, pursuant to Section 11 (b), Rule 18 of the Comelec Rules of Procedure.

SO ORDERED.

Consequently, on August 11, 2008, the Comelec Electoral Contests Adjudication Department issued an Entry of Judgment[12] in EAC No. 89-2008.

The Issues

Thus the instant petition, with Batalla raising the following issues for our consideration:

A. WHETHER OR NOT THE RESPONDENT COMELEC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR IN EXCESS OF JURISDICTION WHEN IT ISSUED THE ASSAILED RESOLUTION DISMISSING THE APPEAL ON TWO GROUNDS OF TECHNICALITIES: A) FOR FAILURE ON THE PART OF THE PETITIONER TO PAY THE APPEAL FEE ON TIME; AND B) FAILURE TO VERIFY THE MOTION FOR RECONSIDERATION.

B. WHETHER OR NOT THE FIVE CONTESTED VOTES BE DECLARED VOID AND THE HEREIN PETITIONER BE DECLARED AS THE WINNER IN THE *BARANGAY* ELECTION LAST OCTOBER 29, 2007.[13]

The foregoing issues can be summarized into two: *first*, the procedural issue of whether Batalla's appeal ought to be given

[12] *Id.* at 39.

[13] *Id.* at 7.

due course despite the procedural infirmities of belated payment of the appeal fee and the non-verification of his motion for reconsideration; and *second*, the corollary substantive issue—if the appeal is given due course—of whether the appeal is meritorious.

The Court's Ruling

The petition is meritorious.

Procedural Issue: Appeal Already Perfected

Respondent Comelec grievously erred and gravely abused its discretion when it dismissed and denied petitioner's appeal.

The records show that Batalla received the February 12, 2008 MCTC Decision on February 20, 2008. He timely filed his Notice of Appeal on February 22, 2008 with the MCTC and paid the PhP 1,000 appeal fee pursuant to A.M. No. 07-4-15-SC.[14] He admits paying to the Comelec the additional appeal docket fee of PhP 3,200[15] only on March 5, 2008 or 11 days after he received a copy of the MCTC Decision on February 20, 2008, way beyond the five-day reglementary period to file the appeal under Secs. 3 and 4, Rule 40 of the Comelec Rules of Procedure. Batalla, however, postulates that the delay in the payment of the appeal fee in the Comelec was caused by his difficulty in getting to Manila from Barangay Mapulang Daga which is located in an island off the *poblacion* of Bacacay, Albay due to the massive floods that inundated the Bicol area in the months of February and March 2008, aside from the difficulty in getting a bus ride from Bacacay, Albay to Manila.

While Batalla concedes that his motion for reconsideration of the April 3, 2008 Order of the Comelec First Division was not verified, he submits that he cured the omission by attaching to the instant petition his Verification[16] as compliance for his

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[14] Rules of Procedure in Election Cases before the Courts involving Elective Municipal and *Barangay* Officials, dated May 15, 2007.

[15] *Rollo*, p. 47, Official Receipt No. 0513533.

[16] *Id.* at 45.

motion. He begs our indulgence in light of the Court's ruling in *Buenaflor v. Court of Appeals*,[17] which reiterated the liberal application of the rules in the perfection of an appeal upon substantial justice and equity considerations.

Be it noted that while the Office of the Solicitor General (OSG) on behalf of public respondent Comelec filed its Comment[18] on the instant petition, respondent Bataller, despite notice,[19] failed to register his comment. Thereafter, Bataller was sent notice[20] requiring him to show cause and to comply with the earlier notice to file his comment. To date, Bataller has neither filed his comment nor complied with the show-cause order. Thus, his opportunity to submit his comment is dispensed with.

The OSG argues that the instant petition is bereft of merit, since the Comelec did not gravely abuse its discretion in dismissing Batalla's appeal. The Comelec cannot be faulted for issuing the assailed orders, applying the clear provisions of the Comelec Rules of Procedure, specifically Sec. 9(a) of Rule 22. Moreover, the OSG reasons out that Batalla's late payment of the additional appeal fee to the Comelec is fatal, since his appeal was never perfected. The mere filing of a notice of appeal is not enough, for the timely payment of the full appeal fee is an essential requirement for the perfection of an appeal, based on *Rodillas v. Comelec*.[21] And finally, the OSG cites *Loyola v. Commission on Elections*[22] and other cases,[23] which consistently emphasized

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[17] G.R. No. 142021, November 29, 2000, 346 SCRA 563.

[18] *Rollo*, pp. 62-69, dated January 22, 2009.

[19] *Id.* at 48, Resolution dated September 30, 2008.

[20] *Id.* at 82, Resolution dated April 28, 2009.

[21] G.R. No. 119055, July 10, 1995, 245 SCRA 702; citing *Galang v. Court of Appeals*, G.R. No. 76221, July 29, 1991, 199 SCRA 683.

[22] G.R. No. 124137, March 25, 1997, 270 SCRA 404.

[23] *Soller v. Comelec*, G.R. No. 139853, September 5, 2000, 339 SCRA 685, 693; *Miranda v. Castillo*; G.R. No. 126361, June 19, 1997, 274 SCRA 503; *Gatchalian v. Court of Appeals*, G.R. No. 107979, June 19, 1995, 245 SCRA 208; *Pahilan v. Tabalba*, G.R. No. 110170, February 21, 1994, 230 SCRA 205.

that non-payment of filing fees in election cases is no longer excusable.

The general rule is that payment of appellate docket fees within the prescribed reglementary period for filing an appeal is mandatory for the perfection of an appeal. Secs. 3[24] and 4[25] of Rule 40 of the Comelec Rules of Procedure provide for the payment of an additional appeal fee in the amount of PhP 3,200 within the period to file the notice of appeal, *i.e.*, within five days from receipt of the assailed decision of the trial court.[26] And an appellant's failure to pay the said appeal fee is a ground for the dismissal of the appeal by the Comelec under the succeeding Sec. 9(a) of Rule 22.[27]

Payment of the two appeal fees perfects the appeal

In the instant case, however, we find that Batalla already perfected his appeal by filing his Notice of Appeal and by paying the PhP 1,000 appeal fee, pursuant to A.M. No. 07-4-15-SC, within the five-day reglementary period, to the MCTC; and by paying the additional appeal fee of PhP 3,200 to the Comelec Cash Division on March 5, 2008. Consequently, the Comelec First Division committed grave abuse of discretion in dismissing

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[24] Sec. 3. Appeal Fees. — The appellant in election cases shall pay an appeal fee as follows:

a. Election cases appealed from Regional Trial Courts ₱1,000.00.

b. Election cases appealed from courts of limited jurisdiction …. ₱500.00.

In every case, a legal research fee of ₱20.00 shall be paid by the appellant in accordance with Sec. 4, Republic Act No. 3870, as amended. (Comelec's Resolution No. 02-0130, issued on September 18, 2002, prescribes ₱3,000 as appeal fee plus ₱50 for legal research and ₱150 for bailiff's fee.)

[25] Sec. 4. Where and When to Pay. — The fees prescribed in Sections 1, 2 and 3 hereof shall be paid to, and deposited with, the Cash Division of the Commission within a period to file the notice of appeal.

[26] COMELEC RULES OF PROCEDURE, Rule 22, Sec. 3.

[27] Sec. 9. Grounds for Dismissal of Appeal.—The appeal may be dismissed upon motion of either party or at the instance of the Commission on any of the following grounds:

(a) Failure of the appellant to pay the correct appeal fee.

Batalla's appeal and, likewise, so did the Comelec *En Banc* in not correcting this error by denying Batalla's motion for reconsideration.

The issue of the correct appeal fee to be paid for the perfection of an appeal from the decision of the trial court in electoral cases was clarified in very recent cases—*Aguilar v. Commission on Elections*[28] and *Divinagracia v. Commission on Elections*.[29] In both cases, the Court clarified that the appellant in an electoral protest case decided by the trial court must file his notice of appeal and pay the PhP 1,000 appeal fee to the trial court that rendered the decision, **and** must pay to the Comelec Cash Division the required additional PhP 3,200 appeal fee.

In *Aguilar*, the earlier case decided on June 30, 2009, the Court ruled that the issuance of A.M. No. 07-4-15-SC on April 24, 2007, which became effective on May 15, 2007, had superseded Secs. 3 and 4, Rule 40 of the Comelec Rules of Procedure (which provided for the payment of the additional PhP 3,200 appeal fee to the Comelec Cash Division within the same five-day reglementary period for filing the notice of appeal) in that the payment of the PhP 1,000 appeal fee to the trial court already perfected the appeal of appellant. The Court added that the nonpayment or the insufficient payment of said additional appeal fee to the Comelec Cash Division does not affect the perfection of the appeal or result in the outright or *ipso facto* dismissal of the appeal; and that the Comelec is merely given the discretion to dismiss the appeal or not, following Sec. 9 (a), Rule 22 of the Comelec Rules, or the Comelec may refuse to take action thereon until the appeal fees are paid pursuant to Sec. 18, Rule 40 of the Comelec Rules. This ruling, however, has been abandoned in *Divinagracia*.

In *Divinagracia*, decided on July 27, 2009, the Court took a second look at the issue of an appellant's compliance with the payment of the required appeal fees (both to the trial court and to the Comelec) in the backdrop of Comelec Resolution

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[28] G.R. No. 185140, June 30, 2009.

[29] G.R. Nos. 186007 & 186016, July 27, 2009.

No. 8486 in relation to A.M. No. 07-4-15-SC. The Court ruled, thus:

> Considering that a year has elapsed after the issuance on July 15, 2008 of Comelec Resolution No. 8486, and to further affirm the discretion granted to the Comelec which it precisely articulated through the specific guidelines contained in said Resolution, the Court **NOW DECLARES**, for the guidance of the Bench and Bar, that **for notice of appeal filed *after* the promulgation of this decision, errors in the matter of non-payment or incomplete payment of the two appeal fees in election cases are *no longer excusable***.

Comelec Resolution No. 8486,[30] issued on July 15, 2008, clarified the procedural rules on the payment of appeal fees. In said resolution, the Comelec clarified that: **(a) if the appellant had paid the PhP 1,000 appeal fee to the trial court within the five-day reglementary period pursuant to A.M. No. 07-4-15-SC and his appeal was given due course by the trial court, said appellant was required to pay the additional appeal fee of ₱3,200.00 to the Commission's Cash Division within a period of fifteen (15) days from the time of the filing of the Notice of Appeal with the lower court, or else the appeal would be dismissible under Sec. 9 (a) of Rule 22; and (b) if the appellant had failed to pay the PhP 1,000 appeal fee to the trial court within the five (5) day period as required under A.M. No. 07-4-15-SC, but the case was nonetheless elevated to the Comelec, no appeal was perfected and it should be dismissed outright pursuant to Sec. 9 (a) of Rule 22**.

Thus, in holding that *Aguilar* had not diluted the force of Comelec Resolution No. 8486, the Court in *Divinagracia* categorically ruled that for an appeal to be perfected in an election case from the trial court, the appellant must: (1) file his Notice of Appeal and pay the PhP 1,000 appeal fee within the five-day reglementary period to the trial court that rendered the

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[30] Entitled "In the Matter of Clarifying the Implementation of COMELEC Rules Re: Payment of Filing Fees for Appealed Cases Involving *Barangay* and Municipal Elective Positions From the Municipal Trial Courts, Municipal Circuit Trial Courts, Metropolitan Trial Courts and Regional Trial Courts."

assailed decision, pursuant to A.M. No. 07-4-15-SC; and (2) pay to the Comelec Cash Division the additional PhP 3,200 appeal fee within 15 days from the time of the filing of the Notice of Appeal with the lower court pursuant to Comelec Resolution No. 8486. Thus, any error in the matter of nonpayment or incomplete payment of the two appeal fees in election cases is no longer excusable and is a cause for the outright dismissal of the appeal.

We, however, note that under the present Comelec Rules of Procedure, Sec. 3, Rule 40 provides for the payment of the additional PhP 3,200 appeal fee to the Comelec Cash Division. The period in which to pay such additional appeal fee is provided under Sec. 4, Rule 40, thus:

> Sec. 4. Where and When to Pay. — The fees prescribed in Sections 1, 2 and 3 hereof shall be paid to, and deposited with, the Cash Division of the Commission **within a period to file the notice of appeal**.

And the period to file the notice of appeal is provided under Sec. 3 of Rule 22, thus:

> Sec. 3. Notice of Appeal. — **Within five (5) days after promulgation of the decision of the court**, the aggrieved party may file with said court a notice of appeal, and serve a copy thereof upon the attorney of record of the adverse party.

The promulgation of the decision is understood to mean the receipt by a party of a copy of the decision. Thus, to recapitulate, under Sec. 4, Rule 40 in relation to Sec. 3, Rule 22 of the Comelec Rules of Procedure, an appellant from a decision of a trial court in an election protest case is given a reglementary period of five days from the receipt of a copy of the decision within which to pay the PhP 3,200 additional appeal fee to the Comelec Cash Division.

Considering that the Comelec *En Banc* issued on July 15, 2008 Comelec Resolution No. 8486, which allowed the payment of the additional appeal fee of PhP 3,200 to the Comelec Cash Division **within 15 days from the filing of the notice of appeal**, said Resolution, however, has effectively amended Sec. 4, Rule 40 of the Comelec Rules of Procedure. Thus, the Comelec is

advised to reflect such amendment in their rules for the proper guidance of the Bench, the Bar, and litigants.

In the instant case, it is undisputed that Batalla had already perfected his appeal by paying the required appeal fees. **He paid the PhP 1,000 appeal fee to the trial court on February 22, 2008 within the five-day period from receipt of the decision and the additional PhP 3,200 appeal fee to the Comelec Cash Division on March 5, 2008 or within 15 days from the filing of his notice of appeal**. It is, thus, clear that Batalla had perfected his appeal by complying with the appeal requirements.

It must be noted that the required payment of separate and distinct appeal fees to the trial court under A.M. No. 07-4-15-SC and to the Comelec under its Rules of Procedure has caused much confusion to litigants. In fact, it became necessary for the Comelec to clarify the procedural rules on the payment of these appeal fees, and for this purpose issued Comelec Resolution No. 8486 on July 15, 2008.

While it seems that the Comelec First Division may not be faulted for following the then prevailing Comelec Rules of Procedure, still, it cannot close its eyes to the fact of the confusion in the payment of distinct appeal fees, which many litigants—like petitioner Batalla—went through. It must be noted that Batalla complied in good faith with the required payment of the additional appeal fee as soon as he was able.

But what was worse was the Comelec *En Banc*'s denial of Batalla's motion for reconsideration on mere procedural grounds, through the second assailed Order of August 5, 2008, after it had already issued clarificatory Resolution No. 8486 on July 15, 2008. Having issued said clarificatory resolution a scant 16 days before it issued the second assailed Order, the Comelec *En Banc* was duty-bound to recognize the timeliness and the compliance of Batalla's appeal. Procedural rules are applied retroactively when no vested rights are prejudiced. Such was the case with Batalla's appeal. He had paid the PhP 1,000 appeal fee to the MCTC within the five-day reglementary period under Sec. 4 of Rule 40 of the Comelec Rules of Procedure. And he paid the additional PhP 3,200 appeal fee to the Comelec Cash

Division within the 15-day period granted under Resolution No. 8486. Clearly, he had complied with the procedural appeal requirements of the Comelec.

Fairness and prudence dictate that the Comelec *En Banc* should have recognized Batalla's compliance with clarificatory Resolution No. 8486 when it resolved his motion for reconsideration and should not have merely denied it on the procedural ground of non-verification. It is true that the verification requirement was not complied with, but such procedural lapse pales in the face of the manifest error in the dismissal of Batalla's appeal by the Comelec First Division when the Comelec *En Banc* had already issued Resolution No. 8486, granting an appellant — in this case, Batalla — 15 days within which to pay the additional fee of PhP 3,200, with which he had already complied.

Perforce, then, the assailed Orders must be reversed and set aside for having been issued with grave abuse of discretion. Accordingly, the appeal of Batalla must be given due course.

Substantive Issue: Petitioner Won in the Protested Election

In the interest of expeditious dispensation of justice, the Court will no longer remand Batalla's appeal to the Comelec and instead rule on the merits of the appeal in this petition. The core issue is whether the five protested ballots were correctly appreciated by the MCTC as votes for Bataller, resulting into a tie between the contenders.

Batalla's arguments

Batalla vehemently disagrees with the findings of the trial court in appreciating the five protested ballots in favor of Bataller, specifically arguing that:

(a) Ballot 1: Exhibit "A"[31] shows, contrary to the finding of the MCTC, the contested name written on the line for *Punong Barangay*, but the surname is not discernable as it was written in a way susceptible to different interpretations, *i.e.*, it can be read either as Batalla or Bataller. Batalla thus contends that

[31] *Rollo*, p. 41.

this is a case of writing the first name of a candidate and the surname of the opposing candidate, in which case the ballot ought to be considered a stray ballot under Sec. 211(6)[32] of the Omnibus Election Code.

(b) Ballot 2: Exhibit "B"[33] shows that while the space for *Punong Barangay* is left blank, the first of the names for *kagawad* is unreadable and does not sufficiently identify Bataller, since the name written seems to be "tododer" and as such cannot be equated to Teodoro (Bataller), much less, credited to him pursuant to Sec. 211(14)[34] of the Omnibus Election Code, for there is no way of determining the intention of the voter as held in *Bautista v. Comelec*.[35] Moreover, Batalla maintains that "tododer" cannot also be appreciated under the doctrine of *idem sonans* in favor of his opponent, as the MCTC erroneously held, for Bataller did not indicate or apply for "tododer" to be recognized as one of the names for which he can be voted, and neither has it been shown that Bataller is known in the *barangay* as such.

(c) Ballot 3: Exhibit "C",[36] similar to Exhibit "B", should be deemed a stray ballot, for the real intention of the voter cannot be determined.

(d) Ballot 4: Exhibit "E"[37] shows the name of Teodoro Bataller written on the space for the candidates for *kagawad*, with that for *Punong Barangay* left blank, and should be considered a stray vote pursuant to Sec. 211(8)[38] of the Omnibus Election Code.

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[32] 6. When two words are written on the ballot, one of which is the first name of the candidate and the other is the surname of his opponent, the vote shall not be counted for either.

[33] *Rollo*, p. 42.

[34] 14. Any vote containing initials only or which is illegible or which does not sufficiently identify the candidate for whom it is intended shall be considered as a stray vote but shall not invalidate the whole ballot.

[35] G.R. No. 133840, November 3, 1998, 298 SCRA 480.

[36] *Rollo*, p. 43.

[37] *Id.* at 44.

[38] 8. When a name of a candidate appears in a space of the ballot for an office for which he is a candidate and in another space for which he is not a

(e) Ballot 5: Exhibit "G"[39] is not legible and does not sufficiently identify the candidate, and to consider it a vote for Bataller is highly speculative and conjectural.

Only three ballots to be credited to Bataller

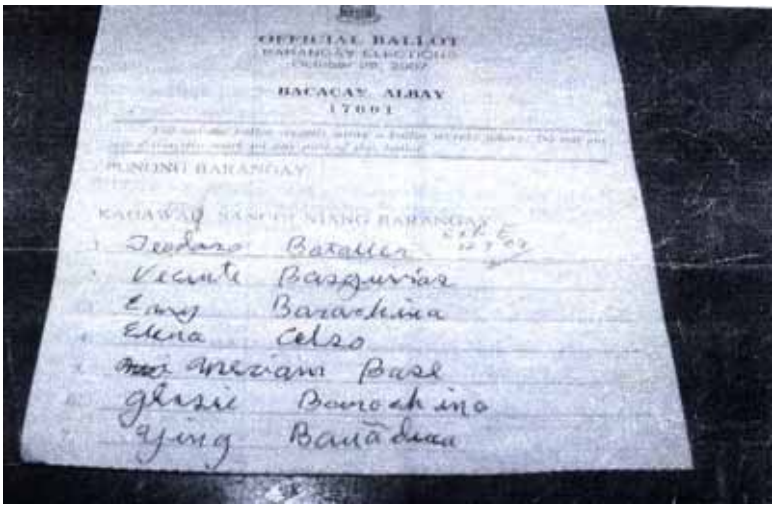
After a scrutiny of the five (5) contested ballots subject of Batalla's instant position, we rule that three (3) ballots marked as Exhibits "A", "E", and "G" were properly appreciated and credited in favor of Bataller under the neighborhood rule and intent rule. On the other hand, the ballots marked as Exhibits "B" and "C" are stray ballots.

We explain our ruling this way:

candidate, it shall be counted in his favor for the office for which he is a candidate and the vote for the office for which he is not a candidate shall be considered as stray, except when it is used as a means to identify the voter, in which case, the whole ballot shall be void.

[39] *Rollo*, p. 46.

(1) The above Exhibit "A" ballot clearly shows the first name "Teodoro," while the surname written is a bit confusing; still, it certainly cannot be read as "Batalla" since the way it is written clearly indicates eight characters. The first six characters clearly make out "Batall," and the last two characters are the ones that are quite illegible. The name "Batalla" consists of only seven characters, while "Bataller" consists of eight characters. Thus, with the eight characters of the surname and the first name properly made out as "Teodoro," the benefit of the doubt tilts in favor of Bataller. More so, if the first name alone of a candidate (where no other candidate has a similar name)—in this case, for example, Teodoro or Ernesto—is sufficient to appreciate the vote for that candidate, with more reason should the first name of Teodoro and the surname making out "Bataller" be appreciated in his favor. Evidently, the voter wanted to cast his ballot in favor of Bataller as *Punong Barangay*. The intent rule is well settled in this jurisdiction that in the appreciation of the ballot, the objective should be to ascertain and carry into effect the intention of the voter, if it could be determined with reasonable certainty. Hence, the intention of the voter to vote for Bataller is unequivocal from the face of the Exhibit "A" ballot. The ballot in question should be liberally appreciated to effectuate the voter's choice of Bataller.



(2) The ballot marked as Exhibit "E" above was properly credited in Bataller's name under the neighborhood rule as applied in *Ferrer*[40] and, more recently, in *Abad v. Co*[41] where the Court applied the same rule and credited to the candidates for *Punong Barangay* the votes written on the first line for *kagawad* with the spaces for *Punong Barangay* left vacant.

The neighborhood rule is a settled rule stating that where the name of a candidate is not written in the proper space in the ballot, but is preceded by the name of the office for which he is a candidate, the vote should be counted as valid for said candidate.[42] Such rule is usually applied in consonance with the intent rule which stems from the principle that in the appreciation of the ballot, the object should be to ascertain and carry into effect the intention of the voter, if it could be determined with reasonable certainty.

In *Velasco*, the Court explained the neighborhood rule and its application in this wise:

> The votes contested in this appeal are all **misplaced votes**, *i.e.*, votes cast for a candidate for the wrong or, in this case, inexistent office. In appreciating such votes, the COMELEC applied the "neighborhood rule." As used by the Court, this nomenclature, loosely based on a rule of the same name devised by the House of Representatives Electoral Tribunal (HRET), refers to an exception to the rule on appreciation of misplaced votes under Section 211(19) of Batas Pambansa Blg. 881 (Omnibus Election Code) which provides:
>
> > **Any vote** in favor of a person who has not filed a certificate of candidacy or **in favor of a candidate for an office for which he did not present himself shall be considered as a stray vote** but it shall not invalidate the whole ballot. (Emphasis supplied.)
>
> Section 211(19) is meant to avoid confusion in the minds of the election officials as to the candidates actually voted for and to stave off any scheming design to identify the vote of the elector, thus

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[40] *Supra* note 7.

[41] G.R. No. 167438, July 25, 2006, 496 SCRA 505.

[42] See *Farin v. Gonzales*, No. L-36893, September 28, 1973, 53 SCRA 237.

defeating the secrecy of the ballot which is a cardinal feature of our election laws. Section 211(19) also enforces Section 195 of the Omnibus Election Code which provides that in preparing the ballot, each voter must "fill his ballot by writing in the proper place for each office the name of the individual candidate for whom he desires to vote."

Excepted from Section 211(19) are ballots with (1) a general misplacement of an entire series of names intended to be voted for the successive offices appearing in the ballot; (2) a single or double misplacement of names where such names were preceded or followed by the title of the contested office or where the voter wrote after the candidate's name a directional symbol indicating the correct office for which the misplaced name was intended; and (3) a single misplacement of a name written (a) off-center from the designated space, (b) slightly underneath the line for the contested office, (c) immediately above the title for the contested office, or (d) in the space for an office immediately following that for which the candidate presented himself. In these instances, the misplaced votes are nevertheless credited to the candidates for the office for which they presented themselves because the voters' intention to so vote is clear from the face of the ballots. This is in consonance with the settled doctrine that ballots should be appreciated with liberality to give effect to the voters' will.[43]

The House of Representatives Electoral Tribunal (HRET) first laid down the particulars of the above "neighborhood rule" in *Nograles v. Dureza*.[44] *Nograles* and subsequent related rulings were later codified in its "Rules and Rulings on Appreciation of Ballots" (HRET Rules). We note that the HRET Rules[45] provided

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[43] *Supra* note 8, at 455-459.

[44] HRET Case No. 34, June 16, 1989, 1 HRET Reports 138.

[45] Under the HRET Rules, the "neighborhood rule" provides:

A vote shall be counted in favor of a claimant where his name is found:

a) On any of the lines for Governor, Vice-Governor, Members of Sangguniang Panlalawigan, Provincial Board Member, Mayor, Vice-Mayor and Members of Sangguniang Panlungsod/City Council provided that:
   i. the line for Representative is blank;
   ii. no other name of a congressional candidate was written on the ballot;
   iii. the misplaced vote was not intended as an identifying mark; and

iv. there were no intervening votes between the line for Representative and the line on which the claimant's name could be found, except when the vote was written on the line for Governor, in which case, this requisite is no longer necessary.

b) On the line for President, provided that:

i. the line for Representative is blank;
ii. no other name of a congressional candidate was written on the ballot;
iii. the misplaced vote was not intended as an identifying mark; and
iv. the lines for Vice-President, Senators and Party-List are also blank.

c) On the line for Vice-President, provided that:

i. the line for Representative is blank;
ii. no other name of a congressional candidate was written on the ballot;
iii. the misplaced vote was not intended as an identifying mark; and
iv. the lines for Senators and Party-List are also blank.

d) On lines 1 and 2 for Senators, provided that:

i. the line for Representative is blank;
ii. no other name of a congressional candidate was written on other lines for Senators in the same ballot; and
iii. the misplaced vote was not intended as an identifying mark.

The HRET also adopted the "Intent Rule," comprising two parts (the "Evident Intent Rule" and "Correct Sequence Rule"), which provides:

A) Evident Intent Rule

Claimed ballots shall be admitted where the name of the party-claimant appeared on any line other than that for Representative, and is preceded by the descriptive title "Congressman" or "Representative," or the word "Congressman" or "Representative" was written on a space immediately followed by the name of a claimant, or with an arrow pointing to the space for Representative subject to the following conditions:

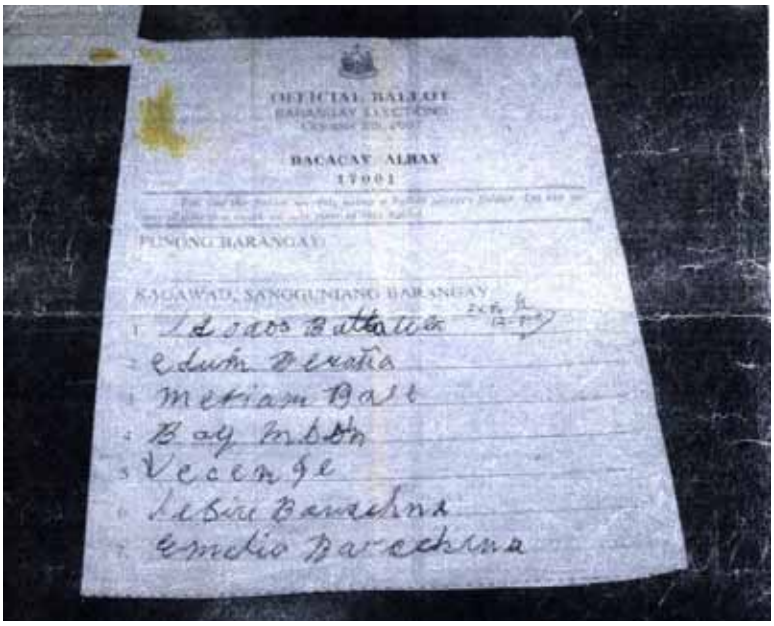
1) the line for Representative is blank, or has an entry which is not a congressional candidate but with an arrow pointing to the appropriate space where the vote should be;
2) no other name of a congressional candidate is written on the ballot; and
3) the misplaced vote was not intended as an identifying mark.

B) Correct Sequence Rule

1) A misplaced name of a congressional candidate may be admitted provided it can be discerned from the sequence of votes or entries that the voter intended to vote for the congressional candidate named therein, provided that:
   a) the line for Representative is blank or need not be blank if the voter was not so lettered;
   b) no other name of a congressional candidate was written on the ballot; and
   c) the misplaced vote was not intended as an identifying mark.

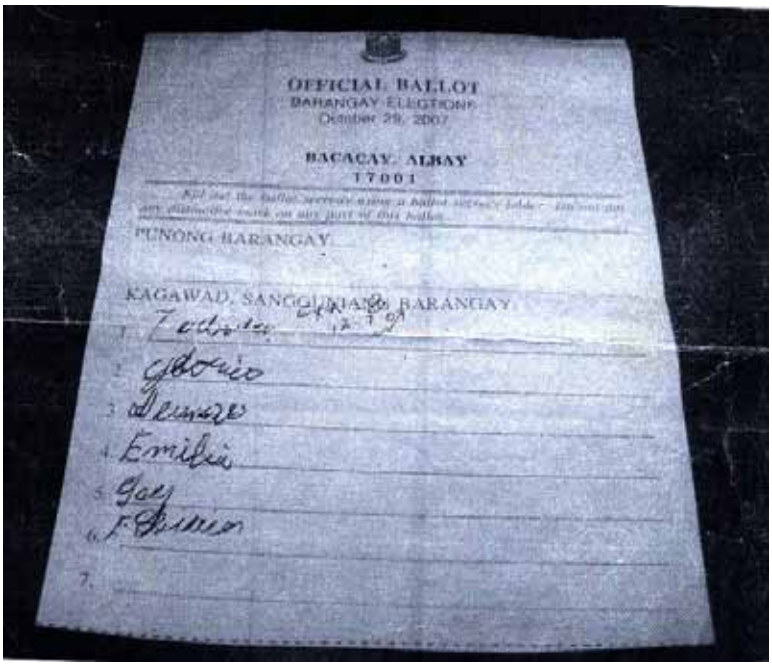
for the "neighborhood rule" and the "intent rule," and that the Senate Electoral Tribunal's Rules on Appreciation of Ballots has adopted the HRET's "neighborhood rule."

Thus, the MCTC is correct in appreciating name of Teodoro Bataller in the Exhibit "E" ballot as a vote for Bataller although written on the space for *Kagawad* pursuant to the neighborhood and intent doctrines.



2) Where the name of the party claimant appears below the line or space for Representative/Congressman and is followed by the name of a gubernatorial candidate or the names of the gubernatorial and vice-gubernatorial candidates, respectively, subject to the following conditions:
   a) the line for Representative is blank;
   b) no other name of a congressional candidate was written on the ballot;
   c) the misplaced vote was not intended as an identifying mark; and
   d) in case of misplaced names followed by a name of a gubernatorial candidate or by names of a gubernatorial and a Vice-gubernatorial candidates, respectively, the lines for Governor and Vice-Governor are also blank.

(3) The ballot marked as Exhibit "G" above was likewise properly credited in Bataller's name under the neighborhood rule and the intent rule, being similarly situated as the ballot marked as Exhibit "E". Moreover, contrary to Batalla's contention, the name of Bataller, written in this ballot on the first line for *kagawad*, is quite distinct and legible.



(4) The Exhibit "B" ballot above is a stray ballot and cannot be credited to Bataller. We agree with Batalla that neither the neighborhood rule nor the doctrine of *idem sonans* apply to this

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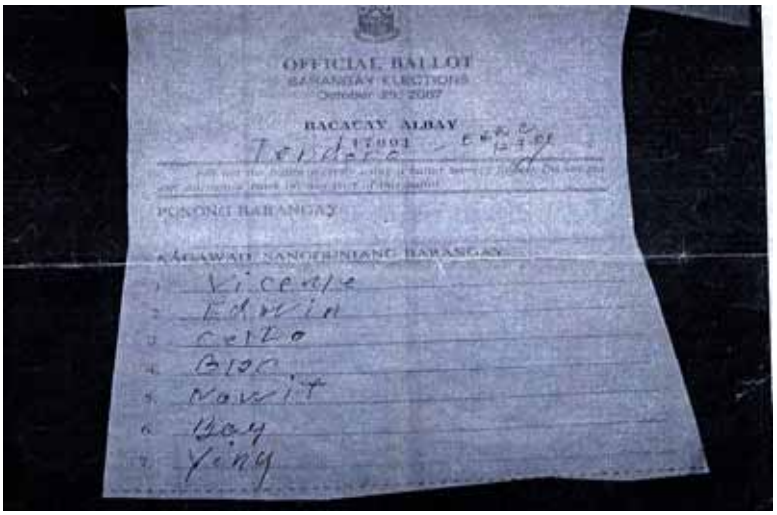
3) Where the name of the party claimant appears on other lines, but
   a) was preceded by the name of a candidate for Party-List and followed by the name of a candidate for Governor; or
   b) was followed by the name of a candidate for Governor and a candidate for Vice-Governor provided that:
      i. the line for Representative is blank;
      ii. no other name of a congressional candidate was written on the ballot; and
      iii. the misplaced vote was not intended as an identifying mark.

instance. *First*, the neighborhood rule applies when the name for *Punong Barangay* is left vacant, while the name of a candidate for *Punong Barangay* is clearly legible or discernable. This particular ballot does not clearly show the name of the candidate written on the first space for *kagawad*. *Second*, the word "tododer" written on the first line for *kagawad* does not necessarily refer to Teodoro Bataller. The word "tododer" does not sound like Teodoro under the *idem sonans* (having the same sound) rule. Said rule of law states that the occurrence in a document of a spelling of a material word that is wrong but has the sound of the word intended does not vitiate the instrument.[46] Neither was it shown that Bataller is known by that name in Barangay Mapulang Daga in Bacacay, Albay. *Third*, while it is paramount to give full expression to the voter's will under the intent rule as indicated in the ballots—thus, the liberality in ballot appreciation—it is necessary that the voter's intention be at least discernable with certainty. It has not been satisfactorily shown that "tododer" is used as a name of a person or the nickname of a candidate. Absent any indication of such discernable intent, we cannot appreciate this particular ballot in favor of Bataller. Thus, the MCTC erroneously credited this ballot to Bataller.



[46] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1122 (1993).

(5) Exhibit "C" ballot above is also a stray vote, for Bataller's name is not found on or near any of the lines corresponding to the offices of *Punong Barangay* and *kagawad*s, and, thus, does not relate to any office. The name of Bataller was written in the upper portion of the ballot, above the instructions to the voter, but below the words "Bacacay, Albay," while the lines provided for the *kagawad*s were properly filled up.

In *Velasco*,[47] a similar factual situation transpired in two protested ballots during the 2002 *barangay* elections. A particular ballot marked as Exhibit "13" showed that the lines for *kagawad* were properly filled up, but the line for *Punong Barangay* was left vacant and therein private respondent's name written above the instructions to the voter and below the words "San Pablo City." On the other hand, the ballot marked as Exhibit "9" similarly had the lines for *kagawad* properly filled up, but therein private respondent's name was written in the left uppermost part of the ballot. The Court ruled that the votes in the ballots marked as Exhibits "9" and "13" for therein private respondent were stray votes, for they did not relate to any office, and ratiocinated thus:

> x x x Section 211(19), which treats misplaced votes as stray, speaks of a vote for a candidate "for an **office** for which he did not present himself." Thus, there is more reason to apply this rule here as the votes in Exhibits "9" and "13" do not even relate to any office.
>
> Nor do the votes in question fall under any of the exceptions to Section 211(19) enumerated above. x x x Exhibits "9" and "13" present an unusual case of extremes—while respondent's name was written way off its proper place, the names of persons who were presumably candidates for *Sangguniang Barangay Kagawad* were properly placed, without the slightest deviation, in the first of the seven lines for that office.
>
> This gives only two possible impressions. *First*, that the voters in these two ballots knew in fact where to write the candidates' names, in which case the votes for respondent written way off its proper place become stray votes. *Second*, the voters' manner of voting was a devise to identify the ballots, which renders the ballots invalid.

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[47] *Supra* note 8.

We adopt the more liberal view—that the misplaced votes in Exhibits "9" and "13" are stray votes under Section 211(19), thus, leaving the ballots valid.

Considering that the vote for Teodoro in Exhibit "C" ballot does not even relate to any office, then said misplaced vote is treated as stray.

Thus, to recapitulate, of the five protested ballots, three are properly credited in favor of Bataller while the other two ballots are declared stray votes for *Punong Barangay*. Consequently, Batalla having garnered a total of 113 votes prevailed by two votes over Bataller, who only garnered an adjusted total of 111 votes (less the two ballots with stray votes, *i.e.*, ballots marked as Exhibits "B" and "C").

WHEREFORE, the petition for *certiorari* is hereby *GRANTED*. The assailed Orders of the Comelec First Division and Comelec *En Banc*, dated April 3, 2008 and August 5, 2008, respectively, are *REVERSED* and *SET ASIDE*. The appeal of Ernesto Batalla is given *DUE COURSE* and the Decision of the MCTC in Bacacay, Albay dated February 12, 2008 is accordingly *REVERSED* and *SET ASIDE*. Ernesto Batalla is hereby *DECLARED* the *WINNER* for the position of *Punong Barangay* or Barangay Chairperson of Mapulang Daga, Municipality of Bacacay, Albay during the *Barangay* Elections held on October 29, 2007.

No pronouncement as to costs.

SO ORDERED.

Puno, C.J., Quisumbing, Carpio, Corona, Carpio Morales, Chico-Nazario, Nachura, Leonardo-de Castro, Brion, Peralta, Bersamin, Del Castillo, and *Abad, JJ.,* concur.

Ynares-Santiago, J., on official leave.

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article mentions. (Roque, Jr. *vs.* COMELEC, G.R. No. 188456, Sept. 10, 2009; *Puno, C.J., dissenting opinion*) p. 149

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— Autonomous Region in Muslim Mindanao (ARMM) elections in 2008 did not meet the parameters of a limited initial use of the Automated Election System in R.A. No. 8436, as amended. *(Id.)*

— By surrendering to Smartmatic-Tim control over the automated systems' "technical aspects," the COMELEC closed the door on manual fraud but opened wide the window to its automated counterpart. *(Id.)*

— Categorically requires that the Automated Election System (AES) to be installed shall be under the COMELEC's exclusive supervision and control. *(Id.)*

— Directive of the law is clear that the nationwide implementation of the Automated Election System commences in the 2010 elections. *(Id.)*

— Legislative intent behind Section 5 thereof, as amended is an automated election system limited to partial automation covering at least two highly urbanized cities and two provinces each in Luzon, Visayas and Mindanao. *(Id.)*

— Operative word "use" in Section 26 thereof is "exclusive" which means that the automation responsibility given to COMELEC cannot be shared with any other entity. *(Id.)*

— "Pilot Testing" of the Precinct-Count Optic Scan (PCOS) technology is not a mandatory requirement for the choice of system in, or a prerequisite for, the full automation of the May 2010 elections. *(Id.)*

— Procurement Standards under Section 12 thereof, as amended, meant to assure efficiency of system and proof of system provider's capability, supplementing minimum standards provided under Section 6 and not to be

(People *vs*. Daria, Jr., G.R. No. 186138, Sept. 11, 2009) p. 744

— Testimony of rape victims who are young and immature deserve full credence; it is impossible for a girl of complainant's age to fabricate a charge so humiliating to herself and her family had she not been subjected to the painful experience of sexual abuse. (People *vs*. Sarcia, G.R. No. 169641, Sept. 10, 2009) p. 97

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